

The London School of Economics and Political Science

**The Evolution of European Union Criminal Law
(1957-2012)**

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A thesis submitted to the European Institute of the London School of Economics
for the degree of Doctor of Philosophy, London, June 2012

Declaration

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Abstract

This thesis addresses the nature of European Union criminal law (ECL). It claims that ECL has evolved along two main expanding dynamics, both with a significant punitive emphasis. The first dynamic of ECL focuses on the fight against a particular type of criminality that the European Union perceives as threatening to its goals - 'Euro-crime' - a criminality with particular features (complex in structure and which attempts primarily against public goods) that reflects the nature of contemporary societies. This focus was brought about by rationales such as the fight against organised crime, the protection of EU interests and policies, and recently, the protection of the victim. In turn, the second dynamic of ECL reinforces the State's capacity to investigate, prosecute and punish beyond its own national borders. It does so, not only in relation to Euro-crime, but also in relation to a broader range of criminality.

This thesis will further argue that these two dynamics have contributed to a more severe penalty across the European Union by increasing levels of formal criminalisation; by facilitating criminal investigation, prosecution and punishment; and by placing more pressure on more lenient States. Furthermore, it will claim that this punitive emphasis of ECL has, more recently, begun to be nuanced. This has taken place at the national level as some Member States have shown reluctance to fully accepting the enhanced punitive tone of ECL instruments. It has also taken place at EU level as the punitive emphasis of EU legal instruments was modulated and the protection of fundamental rights has taken a more central place in the 'post Lisbon' framework. Thus, at this later stage of ECL a dialectic between punitiveness and moderation began to surface.

Acknowledgments

A good friend, who knows me well, advised me not to be too emotive in the tone of this section. Yet, I am afraid that I am bound to fail at such a task from the outset. Writing this PhD has been a long and often solitary process and I am certain that getting here would not have been possible without the support of key people in my life.

I feel both honoured and humbled for having had an exceptional PhD supervision. I have an immeasurable debt of gratitude to Professor Damian Chalmers without whose commitment and support this PhD would not have been possible. His enthusiasm, rigour, perseverance and work ethics go far beyond any expectations in PhD supervision. Professor Nicola Lacey has been a precious source of support and encouragement throughout this journey. In particular, her inspirational personality, work and sharp feedback every time have given me the decisive energy and motivation to complete this journey. I will be forever grateful to them.

This thesis received the generous financial support of the ‘Fundação para a Ciência e Tecnologia’ (‘Ministério da Educação e Ciência’) and the occasional but important help of LSE. I thank both institutions for that. I would also like to thank Professor Miguel Poiars Maduro for showing me different ways to think about the Law, for the determinant incentive to continue my studies and for directing me to the LSE. Tony Bunyon was very generous for letting me have access to the Statewatch archives. I thank him and Statewatch for that.

At LSE many colleagues and friends have made this journey enjoyable. Ronan McCrea’s supportive friendship and company throughout this project was absolutely invaluable. Besides Ronan, many others have enriched my journey. I thank Juliana Cardinale for the laughter and support. Bryon Fong, Tine van Criekeing and Nadine El-Enany for the companionship, Niclas for the entertaining and fine irony, Alison for the good mood, Sofia for her immense generosity and help, Thanasis for the seldom but lovely breaks, Roch and Valentina for the positivity and company. I also would like to thank Katjana, Costanza, Lior, Max, Raya, Emelyne, Matthias, Banu, Sotiris, Margarita, Eva and all the other inhabitants of J14 for their company and good spirits. I owe a special thank you to Bryan Mahan and Loukia Vassiliou for all their friendly help with any difficulties and bureaucracies throughout the PhD process.

However, the journey of writing this dissertation was as much a professional experience as it was a personal one and the support I received beyond LSE was fundamental. One of my greatest debts of gratitude is to Sara Brown. Without her nurturing support, this journey would have been much harder, if even possible at all. I will be forever grateful to her. I owe a very special thank you to Dr. Manuel Fialho Bento without whose care and unconditional support the final stages of this thesis would not have been feasible. I am also deeply grateful to Christy Campbell. She has been a wonderful friend, a terrific companion and a valuable reader of this work. Her friendship has made my life and this work much richer. Meghan Horvath has been a pillar of my life in London and of the PhD journey. So have Ana Sofia Silva and Sérgio Alves, whose long lasting friendship keeps me grounded. Isha Weerasinghe, Ricardo Camões and Isaac Iglesias have been the best friends one could ask for. Luis, Leon, Luce, Michele, Claire, Thomas, Kate, Tom, Liz and many others have made these past years happy ones.

Simon Haddock's companionship, love and unconditional support have changed my life in many ways and have made this journey smoother. Furthermore, his art and our long dinner conversations about Europe and so many other topics have enriched my way of thinking about our changing world and made the process of writing this thesis more interesting. I thank him for all that and more. I also thank Ale and Julia for the laughter and joy.

Last but certainly not least, I thank my parents, Maria Laura Cima and Hilário Chaves. It is impossible to find words that could do them, and the support they have given me, any justice. Their kindness, generosity, respect and acceptance of others, resilience, intellect and so many other traits have been a source of inspiration and an example to me both at a personal and professional level. Moreover, throughout my entire life they have encouraged me to find my inner voice, to read, to write and to follow my dreams. They have always stood by me and continuously given me more support than I could ever have asked for or even imagined to be possible. This dissertation is wholeheartedly dedicated to them.

London, June 2012

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Abbreviations

| | |
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| CISA | Convention Implementing the Schengen Agreement |
| CFSP | Common Foreign and Security Policy |
| CFR | Charter of Fundamental Rights of the European Union |
| CJEU | Court of Justice of the European Union |
| EAW | European Arrest Warrant |
| ECL | European Union Criminal Law |
| ECHR | European Convention of Human Rights |
| EcHR | European Court of Human Rights |
| ECR | European Court Reports |
| ECT | Treaty establishing the European Economic Community |
| ECT(M) | Treaty on the European Communities, Maastricht version |
| ECT(A) | Treaty on the European Communities, Amsterdam version |
| EEC | European Economic Community |
| EEW | European Evidence Warrant |
| ESCC | European Coal and Steel Community |
| EP | European Parliament |
| EPC | European Political Cooperation |
| ESO | European Supervision Order |
| EURATOM | European Atomic Energy Community |
| JHA | Justice and Home Affairs |
| OJ | Official Journal of the European Union |
| SEA | Single European Act |
| TEU(M) | Treaty on the European Union, Maastricht version |
| TEU(A) | Treaty on the European Union, Amsterdam version |
| TEU(L) | Treaty on the European Union, Lisbon version |
| TFEU | Treaty on the Functioning of the European Union |
| UN | United Nations |
| QMV | Qualified majority voting |

Introduction: The nature of European Union criminal law

As a central and sensitive element of national sovereignty and the relationship between the State and its citizen-subjects,¹ criminal law was not initially envisaged as an area of competence of the European Communities (EC). In fact, although cooperation in criminal matters between Member States began in the 1970s and European Community law was already indirectly influencing national criminal law,² it was not until 1993, with the entry into force of the Treaty of Maastricht (TEU(M)), that criminal matters were given a place in the Treaties.³ Nonetheless, at this stage, these provisions were kept in a separate institutional framework (the so-called ‘third pillar’). The third pillar was enacted by a different Treaty—the Treaty on the European Union (TEU(M))—and encompassed more intergovernmental methods of decision-making (with unanimous voting), allowing for very limited involvement by some EU institutions such as the European Parliament (EP) and the Court of Justice of the European Union (CJEU), maintaining the Council and hence Member States at the core of the decision making process.⁴ Subsequently, the framework of the ECL was brought forward in 1999 with the entry into force of the Treaty of Amsterdam (TEU(A)).⁵ Amsterdam brought significant ambition to the field by creating an ‘area of freedom, security and justice’, with the goal of providing EU citizens with a ‘high level of safety’.⁶ Nonetheless, regardless of an increase in the scope of cooperation and improved roles of some EU institutions, criminal matters were maintained in the autonomous institutional framework of the third pillar and thus continued to be removed from core EC competences.⁷

It was not until the entry into force of the Treaty of Lisbon in December 2009 (TEU(L) and TFEU)⁸ that ECL became a domain of fully shared competence between the EU and Member States.⁹ Criminal law is now, to some extent, like many other fields of EU

¹ D. Garland, “The Limits of the Sovereign State, Strategies of Crime Control in Contemporary Society” (1996) 36 *The British Journal of Criminology* 445, 448-449.

² E. Baker and C. Harding, “From Past Imperfect to Future Perfect? A longitudinal Study of the Third Pillar” (2009) 34 *European Law Review* 25, 27-30; M. Delmas-Marty, “The European Union and Penal Law” (1998) 4 *European Law Journal* 87.

³ Treaty on European Union (Maastricht version), OJ C 191/1 [1992].

⁴ *Idem*. The ‘first pillar’ was in turn based on a separated Treaty – Treaty on the European Communities (TEC) and included matters of economic, social and environmental integration.

⁵ Treaty on European Union (Amsterdam version), OJ C 340/1 [1997].

⁶ Article 29, *ibid.*.

⁷ Title VI, *ibid.*.

⁸ Treaty on European Union (TEU(L)) and Treaty on the Functioning of the European Union (TFEU), OJ C 83/1 [2010].

⁹ Article 4 (2) TFEU.

integration.¹⁰ This implies that decision making is now operated by qualified majority voting (QMV) and not unanimity; EU institutions such as the EP and the CJEU, which previously had limited roles in the field, will now have full rights of participation in criminal matters; whilst legal acts adopted by the EU will also have a stronger legal value than previous measures. This new institutional framework represents one of the most significant shifts in the history of ECL as it brings criminal matters fully into the supranational framework of the European Union (EU).

Nevertheless, criminal law remains an area of particular legal, cultural and political sensitivity.¹¹ This is reflected in the Treaty itself, which notes that national security remains the responsibility of Member States. Article 4(2) of the TEU (L) holds,

“The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.”¹²

This Treaty provision is symbolic of a main tension at the heart of ECL’s development—the tension between States as established, sovereign and legitimate penal actors and the evolution of the EU from a merely economic sphere of action into an emerging penal sphere. This tension became more visible following the institutional shifts brought about by the Treaty of Lisbon given the degree of supranationalisation of ECL that the Treaty provided. However, it has always lain at the heart of the developments in the field. This tension has had an impact in the shaping and understating of ECL, whose nature has been—and remains to some extent—fragmented,¹³ contested¹⁴ and in transition.¹⁵

¹⁰ Article 4 (2) TFEU identifies as areas of shared competence between the EU and Member States the internal market, social policy (for aspects specifically defined), economic and social cohesion, agriculture and fisheries, environment, consumer protection, transport, trans-European networks, energy, area of freedom, security and justice and common safety concerns in public health matters.

¹¹ See, for instance, opinion of Advocate General J. Mazak, Case C-440/05 *Commission v Council* ECR I-9100 [2007] para 67-68.

¹² Article 4 (2) TEU (L), OJ C 115 [2008].

¹³ European Parliament, *Report on an EU approach on criminal law* (2010/2310(INI)), Committee on Civil Liberties, Justice and Home Affairs, 24 April 2012, para 11, 16; E. Baker, “The Emerging Role of the EU as a Penal Actor” in T. Daems, S. Snacken and D. van Zyl Smit (eds) *European Penology?* (Oxford: Hart Publications, forthcoming – 2013).

¹⁴ V. Mitsilegas, *EU Criminal Law* (Oxford and Portland: Hart Publishing, 2009) 5.

¹⁵ A. Klip, *European Criminal Law* (Antwerp-Oxford-Portland: Intersentia, 2009) 1.

This dissertation seeks to advance our understanding of these issues by asking precisely what the nature of European Union criminal law is. In doing so it will provide an overall analysis of the field and look at the context and content of ECL, exploring its patterns, rationales, focus and qualities.

Preliminary remarks: the scope, approach and context of the dissertation

Before engaging with the argument of this thesis, it is necessary to address some preliminary points regarding the scope of this study. The first being: what is European Union criminal law? At present, regardless of the fact that criminal matters were introduced in the EU's agenda almost three decades ago, there are still several approaches to its study and no clear or official definition of ECL exists yet.¹⁶ The definition and delimitation of the 'criminal law' has been discussed at the European level without any definite conclusions being reached. Advocate General Mazák noted in *Commission v Council*¹⁷ that there is no uniform concept of 'criminal law' and Member States may have very different ideas regarding the details, purposes and effects that 'criminal law' should have. He suggested that a way to define what should be included in the concept of 'criminal law' could be the case law of the European Court of Human Rights (EcHR), which has identified the possible application of a 'criminal sanction' as the defining element of 'criminal law'. In particular, in 1984 the EcHR held in the case *Öztürk*, that the criminal nature of the penalty can be deducted from the general character of the rule, the nature of the offence and the purpose and severity of the penalty that could be applied, regardless of the formal classification that could have been given to a norm.¹⁸ In the case in question, the EcHR applied this reasoning to the situation in which road traffic offences had been classified as mere 'regulatory offences' and not as 'criminal offences' in Germany. Consequently, the offender was not entitled to a free interpreter during the so-called 'administrative procedure'. In particular, the EcHR held that

"there is in fact nothing to suggest that the criminal offences referred to in the Convention necessarily imply a certain degree of seriousness" and that it would be "contrary to the object and purpose of Article 6 (...), which guarantees to "everyone charged with a criminal offence" the right to a court and to a fair trial, if the States

¹⁶ G.J.M. Corstens and J. Pradel, *European Criminal Law* (The Hague: Kluwer Law International, 2002) 2; E. Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (Oxford-Portland: Hart Publishing, 2012) 1.

¹⁷ Opinion of Advocate General Jan Mazák, Case C-440/05, *supra* note 11, para 69.

¹⁸ Judgement of the EcHR of 21 February 1984, *Öztürk v. Germany*, A 73, at paras. 47-49.

were allowed to remove from the scope of this Article (...) a whole category of offences merely on the ground of regarding them as petty."¹⁹

Klip uses precisely the criteria of the nature of the sanction to delineate the scope of 'European criminal law'—which he considers to be a multilevel field of law in which the European Union either has normative influence on substantive criminal law and criminal procedure or on the co-operation between the Member States. Observing that this denotes more the European character of the definition than its criminal nature, he then considers that the criteria of the 'criminal nature of a charge', as defined in Article 6 of the European Convention of Human Rights (ECHR)²⁰ and as defined by the EcHR in the landmark case *Öztürk*, has been commonly accepted as the definition that separates 'criminal law' from other fields of law and uses it as a delineating concept for ECL. The use of this criterion leads Klip to include 'competition law' in his book on European criminal law.²¹ This is uncommon in ECL textbooks thus far given that the nature of the sanctions applicable in EU competition law (whether they are 'administrative' or 'criminal') is still open to debate.²² Indeed, the author systematises his analysis of ECL in a relatively similar fashion to that followed by many manuals on national criminal law rather than EU law or ECL (different chapters include, amongst others, the constitutional principles of Union law, European substantive law, European criminal procedure, European sentencing and penitentiary law, bilateral cooperation in criminal matters, multilateral cooperation and direct enforcement).²³

This criterion of the nature of the sanction overlooks the institutional framework of criminal matters in the EU and comes closer to the structure of the criminal law at the national level rather than at the EU level. However, the institutional framework of the development of criminal law within the EU context has been of central importance to the development of ECL. As mentioned, the framework for the EU's action in criminal matters has, for a long time, been placed in the separate institutional framework of the third pillar and an analysis of the 'nature' of ECL necessitates taking that context into

¹⁹ *Ibid.* paras 47-49, 53 and 70-71. The criteria of what is to be considered a 'criminal charge' was further developed in Judgement of the ECtHR of 8 June 1976, *Engel and others v. the Netherlands*, A 22.

²⁰ Right to a fair trial.

²¹ A. Klip, *European Criminal Law*, supra note 15, 1-2.

²² E. Herlin-Karnell, *The Constitutional Dimension of European Criminal Law*, supra note 16, 14. There are increasingly strong arguments to consider these sanctions as 'criminal sanctions', see, *inter alia*, D. Slater, S. Thomas, D. Waelbroek, "Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?" *The Global Competition Law Centre Working Papers Series*, Working Paper 04/08, Bruges, Belgium. Note that 'administrative sanctions' is not a term used in the UK jurisdictions, where they are referred to as non-criminal penalties, C. Harding, "Exploring the Intersection of European Law and National Criminal Law" (2000) 25 *European Law Review* 374.

²³ A. Klip, *European Criminal Law*, supra note 15, 1-2.

account as a reference. Indeed, several authors have preferred an approach that takes the particular institutional framework under which criminal matters in the EU were placed, as a starting point. Mitsilegas, for example, includes five main areas of development of EU action in criminal matters in his 'EU Criminal Law' textbook: 'harmonisation and competence', 'mutual recognition', 'bodies, offices and agencies', 'databases' and the 'external dimension of EU criminal law'.²⁴ Similarly, Fletcher, Lööf and Gilmore assemble the domains of 'police cooperation in criminal matters', 'judicial cooperation in criminal matters', 'substantive criminal law' (which corresponds to harmonisation of national criminal law) and the 'external dimension of EU action in criminal matters' under the title of 'EU Criminal Law and Justice'.²⁵ These headings correspond largely (but not only) to the three main dimensions that criminal matters might assume within the EU legal order. The first dimension—that of harmonisation of national criminal law (also referred to, on occasion, as 'substantive criminal law')—concerns the EU legal measures adopted with the purpose of approximating national substantive criminal law, in particular the minimum elements constituent of crimes and penalties.²⁶ The second dimension, corresponds to the principle of mutual recognition which has been, since 1999, the cornerstone of judicial cooperation in criminal matters in the EU and aims at ensuring that judicial decisions of one Member State should, as far as possible, be recognised in other Member States.²⁷ Finally, the third dimension—police cooperation in criminal matters—concerns a wide range of norms which vary from measures concerning crime prevention, the collection and exchange of data relating to policing and other forms of cooperation between national law enforcement authorities, as well as the functioning of EU bodies with a role on policing and cross-border police operations.²⁸ The approaches to the study of ECL that follow this institutional dimension, rather than concerning themselves with finding a definition of what ECL is exactly, consider the different 'criminal law dimensions' within EU's legal order.

Facing the difficulty in determining what ECL is and the different approaches to its study and analysis, it is useful to look at national definitions of the 'criminal law' for some guidance. In doing so, one finds that the definition of 'criminal law' at a national level is also complex. Indeed, it will be seen, defining criminal law at national level has proven difficult and has led to the emergence and prevalence of formal definitions. As Sanders and Young suggest, there is no universal definition of 'criminal law' and what

²⁴ V. Mitsilegas, *EU Criminal Law*, *supra* note 14.

²⁵ M. Fletcher, R. Lööf and B. Gilmore, *EU Criminal Law and Justice* (Cheltenham-Northampton: Edward Elgar, 2008).

²⁶ Harmonisation of national criminal law finds its legal base today under Article 83 TFEU and partly under Article 82(2) TFEU. 'Partly' as Article 82(2) TFEU refers to harmonisation of criminal procedure for the purposes of facilitating mutual recognition only.

²⁷ Mutual recognition finds its legal base today under Article 82 TFEU.

²⁸ Police cooperation in criminal matters rest today under Article 87-89 TFEU.

is defined as ‘criminal law’ will vary from society to society and across time.²⁹ As a starting point, Lacey, Wells and Quick note that ‘criminal law’ is one amongst several sets of practices through which a society defines, constructs and responds to ‘deviance’, ‘wrong doing’ or ‘harmful conduct’; equally, it is also a system which sets down standards of conduct, and which enforces, in distinctive ways, those substantive standards or norms. In constructing the notions of ‘deviance’, ‘wrongdoing’ or ‘harmful conduct’, contemporary ‘criminal law’ can be identified by two distinctive features. First, it can be identified as an institutionalised practice, structured by fixed norms and procedures and administered by official personnel. This clearly envisages ‘criminal law’ as a *legal* response distinct from other types of institutional responses. Second, ‘criminal law’ can also be distinguished from other categories of legal responses, such as civil law. The distinction between criminal and civil law often cannot be explained by reason of ‘subject-matter’ since many conducts are covered by both fields. In this sense, ‘criminal law’ can be defined in terms of its distinctive ‘criminal procedure’, such as rules of evidence, burdens and standards of proof, special enforcement mechanisms such as public policing and prosecution and particular tribunals and forms of trial.³⁰

A comparable, distinctive formal feature of ‘criminal law’ in relation to other areas of law and, in particular, in relation to civil law, is identified by Figueiredo Dias, who argues that the ultimate symbol and hence, the ultimate distinctive feature of ‘criminal law’ is – not the following of a criminal procedure *per se* - but the nature of the sanction applied at the end of that procedure. Hence, a norm will be considered to be a criminal norm when its violation potentially entails the application of a ‘criminal sanction’ (in opposition to a civil one). In this sense, the author argues, criminal law is defined as distinctive from other areas of law by a teleological and formal element: the ‘consequence’ of the violation of its norms.³¹

²⁹ A. Sanders and R. Young, *Criminal Justice* (Oxford: Oxford University Press, 2007, Third Edition) 3.

³⁰ As the authors go on to explain, if the distinctive feature is to be the criminal procedure to be followed, in England and Wales, criminal law can be defined as a “*legal response to deviance over which the State has the dominant if not exclusive right of action; in which defendants must be proved by the prosecution to be guilty beyond reasonable doubt; and under which, if which, if charged with an offence of a certain degree of seriousness, they are entitled to trial by a jury. It is equally that are of legal regulation in which certain sorts of evidence are inadmissible, and in which the result of the conviction if typically the imposition is a punitive (as opposed to compensatory) sentence executed by or on behalf of the state. Criminal law, in other words, can be identified in terms of the distinctive features of criminal procedure.(..) And if anyone is sufficiently presumptuous to ask how we can tell whether criminal law procedure should (legally) apply, she can be met by a simple answer – ‘whenever the law identifies itself as criminal’.*”, N. Lacey, C. Wells and O. Quick, *Reconstructing Criminal Law* (Cambridge: Cambridge University Press, 2010, Fourth Edition) 7; For a similar approach in relation to Scotland see, for instance, G.H. Gordon, *The Criminal Law of Scotland* (Edinburgh: W Green, 1978) 15.

³¹ The author identifies German academics, namely Luhmann and Roxin, as the precursors of this approach to criminal law, J. Figueiredo Dias, *Direito Penal* (Coimbra: Coimbra Editora, 2007) 5.

Whilst the distinctive criteria of ‘criminal law’ is increasingly being identified with the nature of the procedure and of the sanction, the ambit of what is identified with ‘criminal law’ also provides some guidance as to what can be understood as ‘criminal law’. Here differences between Anglo-Saxon and Continental European jurisdictions come to the fore. As Lacey and Zedner outline, for Anglo-Saxon jurisdictions, ‘criminal law’ encompasses substantive rules of conduct, rules determining how liability should be attributed and how breaches of criminal norms should be graded. Other aspects related to ‘criminal law’ such as prosecution, trial procedure, sentencing, and punishment, among others, tend to be dealt with by ‘criminal justice studies’. This separation between ‘criminal law’, criminal procedure and sentencing, however, will not be found as such in continental European jurisdictions.³² Indeed, the latter often make a distinction between ‘substantive criminal law’³³—which corresponds largely to the Anglo-Saxon conception of ‘criminal law’—and ‘criminal law in a broad sense’, which also includes the domains of criminal procedure, sentencing and sentence enforcement. In the French system, for instance, ‘criminal law in a broad sense’ concerns itself with the so-called ‘substantive criminal law’ and with ‘criminal procedure in a broad sense’ (i.e. norms which concern the penal procedure, rules on sentencing and punishment and the rules of organisation of judicial institutions and their modes of intervention).³⁴ Similarly, in Portugal, for example, ‘criminal law in a broad sense’ concerns itself with ‘substantive criminal law’ (the rules which determine what is to be understood as a wrongdoing, the rules of liability and the consequences of a crime); with procedural criminal law, which concerns the realisation of the punitive power (namely, investigation and judicial evaluation of the crime); and, finally, with sentencing and sentence enforcement (so-called ‘executive’ penal law).³⁵

Regardless of these differences, some commonalities can be found across domestic legal orders. In fact, the distinction between substantive criminal law, criminal procedure,

³² N. Lacey and L. Zedner, “Legal Constructions of Crime”, in M. Maguire, R. Morgan and R. Reiner (eds) *The Oxford Handbook of Criminology*, 4th Edition (Oxford: OUP, 2012, Fifth edition) 159, 161; see also L. Zedner, *Criminal Justice* (Oxford: Oxford University Press, 2004) 63.

³³ Often identified by ‘general penal law’ (‘droit pénal général’ or ‘parte geral do direito penal’, respectively in French and Portuguese law, for instance).

³⁴ In the concept of general criminal law, Pradel includes substantive criminal law, rules on sentencing and punishment and criminal procedure (droit pénal général; ‘droit pénal spécial’; ‘le droit des infractions et sanctions’; la procedure pénal; le droit de l’exécution des peines), J. Pradel, *Droit Pénal Général* (Paris: Éditions Cujas, 2006) 53-56; Similarly, Carbasse, for instance, refers to ‘criminal law’ as incorporating substantive criminal law (“*droit penal strictu sensu*”) and to the general norms of criminal procedure, including the judicial organisation and the modes of intervention (“*les grandes lignes de la procédure penale (caracteres generaux de l’organisation judiciaire et de ses modalités d’intervention)*”). The author also remarks that these distinctions between substantive criminal law and criminal procedure are relatively recent in the historical development of the discipline and used to be integrated in a single unitary concept. J.M. Carbasse, *Histoire du droit penal et de la justice criminelle* (Paris: Presses Universitaires de France, 2009, 2^e Edition) 23.

³⁵ J. Figueiredo Dias, *Direito Penal*, *supra* note 31, 6-7.

sentencing and sentence enforcement is primarily a formal one as these ‘different branches’ of ‘criminal law’ intrinsically complete each other. As Fletcher argues, substantive criminal law and procedural criminal law are two sides of the same coin:

“Being guilty is one thing; being prosecuted and punished is another. Whether one is ever held liable for a particular offence depends on the rules of procedure. These rules determine how the state enforces the criminal law by proving the occurrence of crime and convicting and punishing those responsible for the crime./ In general terms, we can say that the substantive rules establish ‘guilt in principle.’ The procedural rules determine whether individuals are ‘guilty in fact.’”³⁶

Can national criminal law thus provide some guidance to the delimitation of the scope or the definition of ECL? Certainly, there appears to be no uniform approach to ‘criminal law’ at a national level. Moreover, there seems to be no correspondence between the structure of national criminal law—as given by different jurisdictions—and that of ECL. In fact, many of the studies in ECL find little correspondence to what is traditionally understood as criminal law at the national level. They include, as seen above, for example, police cooperation and EU-wide information sharing tools such as databases as well as other domains of the external dimension of ECL. These topics, as seen, are not included in the ambit of ‘criminal law’ at the national level.

In spite of these contrasts, some commonalities can be found between the European Union criminal law and various national criminal law, as harmonisation of national criminal law and mutual recognition in criminal matters offer EU’s own framework for the enactment of norms which comprise the different branches of what is understood as ‘criminal law in a broad sense’ in continental European jurisdictions (substantive criminal law, criminal procedure, sentencing and sentence execution). Hence, under the framework of harmonisation of national criminal law, matters pertaining to substantive criminal law such as the definition of offences, the rules relating to the establishment of liability and the sanctions applicable have been adopted. The inclusion of harmonisation of national criminal law into the concept of ECL does not present difficulties as it largely corresponds to the ‘core of criminal law’ in continental jurisdictions and to ‘criminal law’ in Anglo-Saxon jurisdictions. Furthermore, under the framework of mutual recognition in criminal matters, issues relating to criminal procedure, sentencing, sentence enforcement and also, indirectly, to substantive criminal law, have been enacted. Examples range from evidence, surrender, recognition and execution of penalties, and the rights of participants in the criminal procedure, amongst others. Thus,

³⁶ G. Fletcher, *Basic Principles of Criminal Law* (New York-Oxford: Oxford University Press, 1998) 7-8.

it makes sense to consider the domains under mutual recognition as part of ECL. First, because the scope of mutual recognition at the EU level finds correspondence in the broad scope of national ‘criminal law’ in Continental European jurisdictions. Second, as mentioned earlier, domains of criminal procedure and substantive criminal law are increasingly seen as two sides of the same coin.³⁷ In a similar line of reasoning, and particular to the context of the ECL, Mitsilegas notes, in relation to the European Arrest Warrant (EAW)—the central measure adopted thus far in the context of mutual recognition in criminal matters—that although an EAW is not a decision determining guilt and punishment, its execution certainly facilitates prosecution. Hence, a narrow definition of the scope of criminal law, such as one which would exclude surrender from its ambit, would overlook the punitive character of that instrument.³⁸ Finally, the exclusion of mutual recognition from the concept of ECL would ill suit the EU’s institutional framework for criminal matters, which has always grouped harmonisation and mutual recognition in criminal matters. These ‘headings’ were previously placed under the institutional framework of the third pillar and, more specifically, under the context of judicial cooperation in criminal matters. After the entry into force of the Lisbon Treaty, the two now lie under chapter 4, Title V, of the Treaty on the Functioning of the European Union (TFEU).

Hence, if one takes into account the institutional framework of ECL and the correspondence between national ‘criminal law in a broad sense’ and ECL, it makes sense to delineate the two headings of harmonisation of national criminal law and mutual recognition as the core of ECL. Therefore, **European Union Criminal Law, for the purposes of this dissertation, consists of the legal measures adopted under the mechanisms of ‘harmonisation of national criminal law’ (also referred to as approximation of minimum elements constituent of crimes and penalties) and ‘mutual recognition in criminal matters’ (or, until 1999—the date of the introduction of the principle in criminal matters—under the general goal of ‘judicial cooperation in criminal matters’).**

The historical-legal approach to the study of ECL

In seeking to delineate the nature of ECL, this thesis will adopt a combined historical-legal approach. The first part of the thesis (chapters 1, 2 and 3) will analyse legal developments through recent history, building a road map of the evolution of ECL. In doing so, this section will shed light on the patterns, assumptions, rationales and focus

³⁷ *Ibid.*

³⁸ V. Mitsilegas, “The Transformation of Criminal Law in the ‘Area of Freedom, Security and Justice’” (2007) 26 *Yearbook of European Law* 26-27.

that gave rise to the field. This first part follows a ‘descriptive-analytical’ approach in order to shed light on the scope and content of ECL by analysing its general features, revealing what has been criminalised and systematising measures adopted into broader themes. This systematisation will shed light on the ‘focus’ of ECL and its ‘rationales’.³⁹

This is relevant for, as Lacey, Wells and Quick note, the ‘substance of criminalisation’, *i.e.* how societies define deviance and determine which deviance is identified as criminal, is of central importance to the understanding of criminal law.⁴⁰ As the authors go on to note, a reflection on the criminal law is—to a great extent—a matter of historical development, understandable in terms of the salience of particular issues at particular moments. In this sense, what is criminalised is contingent and a construct of particular legal and social systems that reflects specific temporal and geographic arrangements, interests and imperatives.⁴¹ The mapping of the field’s evolution also brings to light the patterns, continuities and discontinuities that are often determinant of choices and modes of criminalisation.⁴² The relevance of an historical approach to studies in criminal law is further enhanced by the changing scope of criminal law in the last century. Indeed, at a national level, the definition and understanding of the nature of criminal law has become increasingly difficult given that, historically, the scope of crime has changed significantly. This is true both in relation to the scope of specific crimes and in relation to the scope of criminal law in general. Hence, the scope of particular criminal offences has been modified over time. By way of illustration, Zedner points to examples such as child sexual abuse and homosexuality. She notes how, child sexual abuse, for instance, was barely recognised as a criminal offence until the Second World War and came to be regarded as one of the most heinous crimes after that.⁴³ Furthermore, difficulties in the definition of criminal law have been particularly exacerbated by a significant increase in its scope. This expansion has been experienced both in Anglo-saxon and continental European jurisdictions and has, in fact, led to the rise of formal definitions of criminal law such as those mentioned in the previous section. Accordingly, in both systems, criminal law has moved from the protection of core fundamental values of society, to a more regulatory, less morally charged role. According to Farmer, the prevalence of formal definitions in contemporary criminal law over definitions centred on the content of the criminal law can be understood in England and Wales, precisely in the context of this marked expansion of criminal law since the nineteenth century. The author argues that this expansion was primarily effected by the

³⁹ The terms ‘rationales’, ‘narratives’ and ‘themes’ will be used interchangeably in this dissertation.

⁴⁰ N. Lacey, C. Wells and O. Quick, *Reconstructing Criminal Law*, *supra* note 30, 13.

⁴¹ *Ibid.*, 13.

⁴² D. Garland, *The Culture of Control, Crime and Social Order in Contemporary Society* (Oxford: OUP, 2001) 3.

⁴³ L. Zedner, *Criminal Justice*, *supra* note 32, 40-41; Sexual Offences Act 1967 S.I.

creation of summary offences tried in magistrate courts—a product of the expanding functions of the modern administrative state for which criminal law became an increasingly important tool.⁴⁴ Similarly, in European continental systems, the same increase in the scope of criminal law was felt. This led to the emergence and development of the so-called ‘administrative penal offences’, which are tantamount to ‘regulatory offences’—wrongdoings deemed to violate social or administrative norms of organisation but not the core fundamental moral values of a society.⁴⁵

This expansion of criminal law also brought about a shift in its substantive scope. As Lacey and Zedner observe, the search for rationales in criminal law across criminal justice systems has become less straightforward in recent years. For example, the authors note that,

“In a system in which criminal law is regarded as a regulatory tool of government and in which (in England and Wales) there are very weak constitutional constraints on what kinds of conduct can be criminally proscribed – everything from homicide and serious fraud through dumping litter to licensing infractions and ‘raves’ can be criminalized – it seems impossible to distinguish criminal law by reference to its substance.”

The authors go on to explain that this is a contingent matter and that, historically, things have not always followed this trend. Hence, in legal commentaries of the eighteen and nineteen centuries, a richer and more confident assertion of a rationale for criminal law could be found and the interests and values that criminal law set out to protect and express were clearer. These rationales would vary from the protection of god, religion, and the state, to the protection of the individual or property.⁴⁶

Hence, as Lacey, Wells and Quick note, this tendency to resort to formal approaches when defining criminal law draws from

“a prevailing tension in contemporary criminal law: that between older ideas of crime as public wrongdoing and the modern reality of criminal law as a predominantly administrative system managing enormous numbers of relatively non serious and ‘regulatory offences’: between the older, quasi moral and retributive view of criminal

⁴⁴ The author argues that this expansion was effected primarily by the creation of summary offences tried in magistrates courts which were a product of the expanding functions of the modern administrative state for which criminal law became an increasingly important tool, L. Farmer, “The obsession with Definition” (1996) *Social and Legal Studies* 64-66.

⁴⁵ J. Figueiredo Dias, *Direito Penal*, *supra* note 31, 153-160.

⁴⁶ The authors also note that the existence of stronger rationales is expected in very circumscribed systems of criminal law but less so in the type of systems we have nowadays, in relation to which the scope and functions of criminal law have increased immensely, N. Lacey and L. Zedner, “Legal Constructions of Crime”, *supra* note 32, 164.

*law and the instrumental, regulatory aspect of criminal law which has become increasingly dominant under modern and late modern conditions.*⁴⁷

Furthermore, as Duff et al. remark, the expansion of criminal law also took place, more recently, in relation to wrongdoings such as terrorism, pornography and certain types of sexual exploitation.⁴⁸ Finally, changes in the scope of criminal law have also been taking place due to the increasing intervention of different actors. At the national level, the State began to devolve responsibility in crime control to civil society;⁴⁹ whilst at the supranational level, international organisations and EU involvement in crime related issues also began to take place in recent years.⁵⁰

Hence, in a world where it is increasingly difficult to delimit the boundaries and scope of the criminal law, the appearance and development of European Union criminal law calls for an enquiry into its own nature. Is it possible to find common underlying rationales or themes in ECL? When and how did they appear? Is the EU concerned with particular types of criminality? Is it possible to delimit the boundaries of ECL? What are its patterns of development? What are ECL's own distinctive features?

The political and institutional context of ECL

An analysis of the nature of ECL requires the taking into account of its own context. As Lacey suggests, studies in criminal law need to be contextualised. This means, first and foremost, to escape the implicit reliance of the idea of crime as given and to look at a multiplicity of actors and interpretative and enforcement practices which are relevant to the understanding of criminalisation.⁵¹ This need for context is also suggested by Duff et al., who note that one cannot ask about the proper aims of criminal law independently of, or prior to, any particular political structure. Hence, any enquiry into criminal law needs to take into account the set of political institutions it depends on, if it does not

⁴⁷ N. Lacey, C. Wells and O. Quick, *Reconstructing Criminal Law*, *supra* note 30, 9.

⁴⁸ RA Duff, L. Farmer, SE Marshall, M. Renzo and V. Tadros, "Introduction: The Boundaries of the Criminal Law", in RA Duff et al., *The Boundaries of the Criminal Law* (Oxford: OUP, 2010) 1-2. J. Figueiredo Dias names these new phenomena of criminalisation as 'neo-criminalisation', J. Figueiredo Dias, *Direito Penal, Parte Geral II - As Consequências Jurídicas do Crime* (Lisboa: Æquitas/Nobar, 1993) 66.

⁴⁹ D. Garland, "The Limits of the Sovereign State, Strategies of Crime Control in Contemporary Society", *supra* note 1, 445, 448-449; L. Johnston and C. Shearing, *Governing Security: Explorations in Policing and Justice* (London: Routledge, 2003).

⁵⁰ RA Duff, L. Farmer, SE Marshall, M. Renzo and V. Tadros, "Introduction: The Boundaries of the Criminal Law", *supra* note 48, 13.

⁵¹ N. Lacey, "Contingency and Criminalisation", in I. Loveland (ed) *Frontiers of Criminality* (London: Sweet & Maxwell, 1995) 1, 10-11.

want to be talking about a simple abstract legal entity. This, accordingly, is an enquiry reachable only via an historical review.⁵²

In historicising the evolution of ECL, its broader context has to be taken into account. Indeed, although the norms enacted under the goals of ‘harmonisation of national criminal law’ and ‘mutual recognition in criminal matters’ will be the main focus of this dissertation, they need to be contextualised, for their existence was influenced by other norms, actors, practices and institutions. As it will be shown, the institutional framework of the EC and EU and of the ‘third pillar’ has always strongly influenced the scope and shape of the ECL. In particular, it has strongly limited the areas in which the EU could intervene in criminal matters. Furthermore, within this institutional framework, particular areas of development have influenced ECL. This is the case, *prima facie*, of police cooperation in criminal matters and of the CJEU. As seen earlier, many studies in European Union criminal law have brought developments relating to police cooperation into their scope. Indeed, police cooperation has been a central axis of development of criminal matters in the EU and has significantly influenced the scope of ECL. This was predominantly the case during the first stages of ECL’s development. Another important axis of development has been the case law of the CJEU. The Court has influenced the scope of ECL by strengthening one of its main rationales of intervention and has influenced its shape by providing guidance on the *modus operandi* of ECL as well as on national criminal law. Equally, political developments in EU criminal matters have deeply influenced the scope of ECL. In general, these different domains of interaction with criminal matters provide the general context of the development of ECL and are important to the understanding of the EU’s own criminalisation process. Hence, these and other related developments that have provided context to the development of ECL will be referred to throughout the thesis when they are necessary to fully explain the nature of ECL. Their use will not be comprehensive, but merely accessory to the aim of providing context to ECL.

The historical perspective and the political and institutional context of ECL are used as a means to give context and shape to the present dynamics of ECL. Chapter 4 and 5 will then look at the qualities of ECL, through the analysis of the two main mechanisms: harmonisation and mutual recognition in criminal matters. The approach in these two chapters will be more legal and analytical than the previous chapters. The focus will be on the mode and intensity of ECL as well as on how criminalisation operates within ECL. In relation to harmonisation of national criminal law, which covers matters related to ‘substantive criminal law’, the emphasis of the research enquiry will be on the main

⁵² RA Duff, L. Farmer, SE Marshall, M. Renzo and V. Tadros, “Introduction: The Boundaries of the Criminal Law”, *supra* note 48, 1, 7, 9-10.

elements of the definition of offences, liability and penalties. Chapter 4 will look at how far ECL operates in the definition of offences that national legal orders ought to criminalise; at whether ECL offers narrow or broad offence definition and categorisations; to whom does ECL articulate matters of liability; and how does it articulate the type and level of sanctions to be applied.⁵³ It will also focus on the identification of common features that can be discernable from the legal acts adopted. In relation to mutual recognition in criminal matters—which relates primarily to matters of criminal procedure, prosecution, sentence and sentence enforcement—the focus of analysis will be on how ECL operates with these domains. Chapter 5 will look at the type of legal mechanisms introduced by ECL; how they operate; and what type of values they allocate and how. Similar to the first part of the thesis, ECL will be contextualised. Thus, domestic implementation, use, enforcement or adjudication relating to ECL will be referred to when necessary, to provide context and clarity to the EU norm. Finally, Chapter 6 will look at the most recent developments of ECL, particularly those after the entry into force of the Treaty of Lisbon. It will look at how the most recent legislative and judicial developments in the field framed the themes and mechanisms of ECL.

The analysis will primarily be carried out by investigating the political and legal acts adopted throughout the evolution of the field. The different taxonomies proposed—namely the *dynamics of ECL*, the rationales/themes/narratives of the *fight against organised crime*, *protection of EC/EU interests and policies* and *protection of fundamental rights* as well as the classification of *Euro-crimes*—do not attempt to draw precise, exhaustive or mutually exclusive categories. Rather, these are flexible, often overlapping and continuously evolving spheres and themes that can provide a useful systematisation and understanding of ECL. Moreover, the words *severe*, *harsh* and *lenient* are used with neutrality and express the idea that a certain norm is *harsher* or *more lenient* than those usually found or than those used in comparison.

The argument

This dissertation claims that European Union criminal law has two main dynamics. The two share a significant punitive emphasis and overlap in some features, yet have distinguishable origins, *modus operandi*, rationales and focus. The first dynamic goes back to the origins of the European Union project and engages the EU as a penal actor, focusing on the fight against a particular type of criminality that the EU perceives as threatening to its own values and policy goals - ‘Euro-crime’- crime characteristic of

⁵³ These questions are also relevant to normative studies of criminal law, see *inter alia*, RA Duff, L. Farmer, SE Marshall, M. Renzo and V. Tadros, “Introduction: The Boundaries of the Criminal Law”, *supra* note 48, 1, 14.

contemporary societies that primarily affects public goods and is complex in structure. It will be suggested that this focus on Euro-crime was brought about by rationales such as the fight against organised crime, the protection of EC interests and policies and, later, on the protection of fundamental rights (mainly, victims' rights). In this sphere of ECL, the EU deploys a specific legal apparatus to secure the criminalisation and punishment of these offences. It will be contended that the intensity of the EU's criminalisation of Euro-crime is high and has the potential to bring about harsher criminal law across the European Union. This is so as the EU tends to adopt very broad definitions of criminal offences (which potentially lead domestic legal orders to introduce new crimes or enlarge the scope of pre-existent criminal offences); seeks to extend liability not just to natural persons but also to legal persons (often expanding the type of liable subjects at national level); and seeks to harmonise the minimum levels of maximum penalties (but not maximum levels). This severity in the criminalisation of Euro-crime is further emphasised by the way that criminalisation is envisaged through minimal harmonisation, which places added pressure on more lenient criminal justice systems. This potentially affects the latter more as these are more likely to have to amend their national provisions in order to meet the minimum EU standard. On the contrary, more severe legal orders will more likely already meet such a minimum standard of criminalisation and punishment.

The second dynamic of ECL engages the State as a penal actor and seeks to enhance the national punitive apparatus by creating new tools that are at the disposal of Member States for investigation, prosecution and punishment beyond national borders. This dimension of ECL reinforces the *ius puniendi* of the State. It no longer necessarily follows the thematic narratives of Euro-crime, focusing rather on a broader range of criminality (potentially any criminality) and engages with a variety of domains in national criminal justice systems (from evidence to custodial sentences or financial penalties, among others). This second dimension is more recent in the history of ECL and was enhanced particularly by the introduction of the principle of mutual recognition in criminal matters in 1999.⁵⁴ This principle requires Member States to recognise and enforce each other's judicial decisions in criminal matters. In particular, mutual recognition largely restricts the capacity of the executing State to refuse or set conditions for cooperation, by imposing swift procedures and limiting grounds for refusal to cooperate. In doing so the principle acquires a clear punitive bias, potentially favouring more 'active' States - those who more readily prosecute - as these will more likely make use of these EU tools for enhanced investigation, prosecution and punishment. Certain features of mutual recognition further emphasise this punitive impetus, particularly the

⁵⁴ Presidency Conclusions, Tampere European Council, 15 and 16 October 1999, para 33.

removal of the principle of dual criminality, which required a certain type of behaviour to be considered a crime in both States involved in cooperation. Most legal instruments implementing the principle of mutual recognition no longer allow States to refuse cooperation based on the fact that the acts for which cooperation is being asked are not deemed as criminal in their own legal orders. Consequently, States with more lenient laws are placed under increasing pressure, having to cooperate in the investigation, prosecution or punishment of conducts their penal systems might not deem as criminal.

This thesis will further highlight that, more recently, the punitive emphasis of ECL began to be nuanced. This took place at both an EU and national level, primarily as a reaction to the expanding features of the second dynamic of ECL. First, the punitive impetus of this second dimension led to a counter response at the national level in which certain Member States showed reluctance to accepting the full effects of mutual recognition, at times introducing qualifications to the principle. These qualifications were generally in the sense of resisting the abolition of the principle of dual criminality and introducing or maintaining additional protections for national citizens as well as the fundamental rights of defendants. Second, at the EU level, newer measures on mutual recognition attenuated their punitive impetus either by fully or partially reintroducing the principle of dual criminality or by reconnecting with the figure of the defendant and prisoner. Furthermore, the CJEU contributed to the moderation of the punitive impetus by adjudicating a series of cases on the principle of *ne bis in idem* and adopting a stance largely beneficial for the defendants in such cases. Finally, the rights of the defendant and of the victim have also been acknowledged in the post Lisbon framework which, although it reinforced the punitive apparatus of the two dimensions of ECL, it also added some moderating features by endorsing the individual - both the defendant and victim - to a greater extent than the previous framework of ECL.

The chapters

Chapter 1 of this dissertation will analyse the very early origins of ECL and cover the period from approximately 1957 until 1993, date of the entry into force of the Treaty of Maastricht (TEU (M)). Previous to 1993, the founding Treaties were mostly silent regarding matters of criminal matters and did not attribute any competence to the European Communities to act in this field.⁵⁵ However, regardless of this silence, the EC was not completely estranged from criminal matters matters, particularly those of criminal law. In fact, through CJEU case law and secondary legislation, the EC began to have an influence in national criminal law. This happened at times through the EC's

⁵⁵ Chapter 1, section 1.

influence on Member States to introduce national provisions of a penal nature to seek compliance with EC provisions, and at other times by requiring Member States to remove existing national law or by affecting the level and type of sanctions at national level when these were found to hinder EC objectives.⁵⁶ Furthermore, ever since 1976, that EC Justice and Home Affairs Ministers saw the European Communities as a forum where agreements and cooperation in criminal matters could be facilitated. This cooperation was taking place mostly through the Trevi group, an *ad hoc*, informal and rather secretive forum set in place to mainly discuss terrorist threats from an operational perspective.⁵⁷

In 1985 however, a significant shift took place in the way criminal matters were perceived with the release of the Commission's White Paper on the Single Market⁵⁸ and the signature of the Schengen Agreement—both of which envisaging the removal of internal borders throughout the EC.⁵⁹ These two initiatives arrived at a time when Member States were also concerned with pressures from international criminality and changing patterns in terrorism, drug trafficking and organised crime across the globe and in Europe. Although the link between the removal of internal borders and a possible increase in such criminality was not established, politically, the link between the two was made and initiatives for cooperation amongst Member States began to take place under the auspices of Trevi.⁶⁰ Hence, in the years between 1985 and 1993, cooperation in matters of law and order was streamlined.⁶¹ Through mostly secretive negotiations by the Trevi group (composed of Interior Ministers and police officers), intervention in topics as diverse as terrorism, illegal immigration, drug trafficking or trafficking in human beings began to be discussed, rationalised and organised in preparation for the incorporation of matters of law and order into the Treaty of Maastricht, which came into force in 1993.⁶² Some of these documents began to offer a broad view of organised crime, significantly shaping the importance and definition of organised crime in the years to come.⁶³ In fact, it will be seen how during those years, two main narratives begin to take shape—that of the fight against organised crime and the protection of EC interests and policies via criminal law. These two remain at the core of ECL today.

⁵⁶ Chapter 1, sections 1, 1.1, 1.2 and 2.2.

⁵⁷ Chapter 1, section 1.2.

⁵⁸ European Commission, *Completing the Internal Market, White Paper from the Commission to the European Council*, Milan, 28-29 June 1985, COM (85) 310 final, Brussels, 14 June 1985.

⁵⁹ The Schengen Agreement of 14 June 1985 - The Schengen Agreement was negotiated and signed in 1985, providing for the gradual removal of internal borders between Belgium, France, Luxembourg, Netherlands and Germany. Schengen *acquis* - Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the gradual abolition of checks at their common borders, at OJ L239/19 [2000]. Chapter 1, section 2.

⁶⁰ Chapter 1, section 2.

⁶¹ Chapter 1, section 2.1.

⁶² Chapter 1, section 2.2.

⁶³ Chapter 1, section 2.3.

Chapter 2 will follow up on this ‘silent birth’ of ECL and analyse the developments from 1993 up to 1999. The Maastricht years were years of construction of a new field of cooperation in matters of law and order. The legal framework provided for the TEU(M) was limited in its institutional structures and scope.⁶⁴ Institutionally, criminal matters were placed in the so-called ‘third pillar’ where the intergovernmental method prevailed, transparency was limited and accountability by other EU institutions was largely absent. It is within this setting that priorities for action began to be defined. From a structural perspective, police and judicial cooperation were envisaged in great detail with the establishment of several networks and structures, mostly with the aim of exchanging know-how and information between national authorities.⁶⁵ Furthermore, harmonisation of national criminal law began to take place in areas as varied as fraud against the EC budget, corruption, drug trafficking, racism and xenophobia, sexual exploitation of children, and money laundering among others. This took place regardless of the TEU(M)’s silence in relation to the EU’s competence to harmonise national criminal law.⁶⁶ Whilst this amalgam of initiatives and measures was adopted with no clear policy orientation and based on rather brief and non-explanatory Treaty provisions, the two rationales of fighting organised crime and protecting EC policies and interests clearly establish themselves as embedded themes throughout both policy documents and legislations (at the time, mostly through conventions and joint actions).⁶⁷

Hence, it will be contended that since the 1970s and especially throughout the Maastricht era, ECL has expanded significantly along these two rationales. These two themes surface in political declarations and preambles in a significant amount of legislation aimed at facilitating police cooperation, judicial cooperation and at harmonising national criminal law. These measures focus on a variety of criminality ranging from terrorism, drug trafficking, illegal immigration, money laundering, trafficking in human beings, corruption or fraud. This type of offences stands in contrast with crimes such as rape, murder, assault, robbery or theft, for example. It appears first of all to be a criminality that reflects the nature of late modern societies where all interactions become more volatile and interrelated. People move more than ever between continents and countries; capital is increasingly more mobile between different financial systems as the world becomes financially and economically more interdependent; similarly, information flows without boundaries through the internet.

⁶⁴ Chapter 2, section 1.

⁶⁵ Chapter 2, section 2.

⁶⁶ Chapter 2, section 2.2.

⁶⁷ Chapter 2, section 3, 3.1, 3.1.1 and 3.2.

But what defines these Euro-crimes vis-à-vis other type of criminality? It is suggested that there are two dominant features: first, the nature of the goods protected. The criminalisation of these behaviours tends to protect public goods or goods related to collective institutions or collective interests, such as the stability of the political and financial systems, the security of the State (in this case of the European Communities and the European Union) or the efficacy of its policies. The criminalisation of money laundering, for example, attempts to protect the stability of financial systems; the criminalisation of terrorism protects democratic values as well as the structures and ultimate survival of the State; criminalisation of corruption aims at the protection of a political system and of the principles and institutions that are embedded in it. This stands in contrast with the protection of private property or the integrity of the person, which are protected by crimes such as assault, theft, rape or even murder for example.⁶⁸

A second defining feature is that Euro-crimes also have a distinctive structure. They appear as complex offences in a twofold manner: they often involve the use of some sort of infrastructure in a broad sense such as the use of means of transport (a case in point being human trafficking which usually involves transport to move people), technology or the use of support materials (the commission of terrorism-related offences, for example, usually involves the use of materials or means such as the construction or assembly of chemical or other type of weaponry or the use of sites to assemble and prepare a terrorist attack). Likewise, many of these offences are complex in the sense that they involve a degree of collective action: usually more than one perpetrator is required and a certain degree of coordination between the different participants must take place. Trafficking in human beings, terrorism or even corruption are rarely actions that can be performed by a single individual alone.⁶⁹

It is in this setting that the TEU(A) entered into force. Chapter 3 will look at the new stage of development of ECL that came about through this Treaty. It will remark that the TEU(A) significantly reshaped the institutional and substantive frame of ECL. First, at an institutional level, it brought about significant empowerment and formalisation of the role of the EU in criminal matters as well as broadened the range of tools and the scope of intervention.⁷⁰ The fight against organised crime is solidified,⁷¹ the protection of EC interests and policies expanded⁷² and a new rationale emerges—the protection of fundamental rights and mostly of the rights of the victim.⁷³ A clear dynamic, which

⁶⁸ Chapter 2, section 4.

⁶⁹ Chapter 2, section 4.

⁷⁰ Chapter 3, section 1 and 1.2.

⁷¹ Chapter 3, section 2.11.

⁷² Chapter 3, section 2.1.2.

⁷³ Chapter 3, section 2.1.3.

engages the EU as a penal actor and seeks the protection of values or policies it sees as fundamental to its existence, is further solidified and continued to grow during this period.

However, it will be seen that the idea of ECL as focused on a specific type of criminality with identifiable patterns, focus and rationales is partly relegated to second plan with the emergence of a second distinct dynamic in ECL. This took place in 1999 with the introduction of the principle of mutual recognition as the ‘cornerstone of judicial cooperation in criminal matters.’⁷⁴ The principle was endorsed by the European Council in the Tampere Conclusions⁷⁵ and in fact completely reshaped ECL with the aim of facilitating cooperation and avoiding the political difficulties of harmonisation of national criminal law. The gist of the principle was that national judicial decisions were to be recognised and enforced throughout the territory of the European Union with automaticity. Measures that brought this principle to life no longer relied on the narratives of the fight against organised crime or protection of EC interests nor did they focus on Euro-crimes alone. In fact, the principle’s aim became one of facilitating and securing State investigation, prosecution and punishment in relation to any criminality, regardless of its EU connection.⁷⁶ With the TEU(A) and especially with the introduction of the principle of mutual recognition, ECL became potentially capable of affecting the entire national systems of criminal justice.

This chapter will also look at the changes that came about through the TEU(L) and TFEU. These Treaties brought about substantial supranationalisation of the field and, it will be suggested, further avenues for future expansion, raising questions about the limits of ECL. However, the TFEU also recognised EU’s competence to act in procedural matters, potentially opening the door for a more moderate tone of ECL, particularly in relation to defence rights and due process.⁷⁷

Once the dynamics of ECL are set this thesis will turn to evaluating the qualities that emerged out of the two dynamics of ECL. It will do so by looking at the harmonisation of national criminal law and mutual recognition in criminal matters. It will contend that both principles are contributing to a more severe penalty⁷⁸ across the European Union, in particular by increasing levels of formal criminalisation of Euro-crime, by facilitating criminal investigation and prosecution, and securing punishment in relation to a

⁷⁴ Chapter 3, section 2.2.

⁷⁵ Tampere European Council, *supra* note 54, para 33.

⁷⁶ Chapter 3, section 2.2 (see also chapter 5).

⁷⁷ Chapter 3, section 3 and 3.3.

⁷⁸ ‘Penalty’ refers to the general practices, ideas and discourses about punishment, as defined by M. Cavadino and J. Dignan, *Penal Systems A comparative Approach* (London: Sage, 2006) xiv.

significantly broader range of crimes, and by placing more pressure for change upon more lenient legal orders than upon more severe ones.

Chapter 4 will shed light on the harmonisation of national criminal law. The Treaty of Amsterdam had envisaged harmonisation of the minimum elements constituent of criminal offences and penalties in relation to drug trafficking, terrorism and organised crime.⁷⁹ The chapter will highlight how the Treaty's provisions were interpreted extensively and secondary legislation adopted across a wide range of Euro-crimes. Furthermore, the intensity of the EU's criminalisation of these offences was significant. This will be shown through the example of organised crime, which has been a central rationale for criminalisation by the EU.⁸⁰ This is particularly evident in the Framework Decision on fighting organised crime,⁸¹ which called for the criminalisation of one or both offences of membership in a criminal organisation or the agreement to actively take part in the execution of offences related to the activities of the criminal organisation. This dual option given by the Framework Decision was a result of the political incapacity to agree on one single approach to criminalisation. More significant to this chapter's argument on the intensity of EU's criminalisation, was the wide definition of what a criminal organisation is. It will be shown how the definition agreed upon is very broad definition in comparison with both academic commentaries on the phenomena of organised crime and with examples of legislation at the national and international level which—even in their broadest examples—are more limited in scope than the EU's. The latter's definition is in fact, broad and flexible enough to cover a wide range of criminality, from Mafia-like associations, business related criminal groups, small groups of pick-pocketers, large illegal drug and human trafficking networks, national or transnational, more or less structured, among many others. The EU's definition is able to cover not only traditional organised crime groups but also looser structures and networks of criminals which rather than being organised crime groups can also be groups that commit crimes that are organised or, said differently, groups that can organise themselves to commit certain crimes but which do not amount to what was usually thought to be organised crime in the strictest sense.

In fact, it will further be argued in this chapter that this broad definition of offences was seen in a large number of examples and, in general, definitions of crimes proposed by the EU legislator were very broad. This required some Member States to widen the scope of existing offences or introduce new criminal offences altogether.⁸² Furthermore,

⁷⁹ Chapter 4, section 1.

⁸⁰ Chapter 4, section 2.

⁸¹ Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, OJ L 300/42 [2008].

⁸² Chapter 4, section 2.1.

the EU sought to extend liability to legal persons and focused solely on laying down minimum maximum penalties primarily regarding imprisonment. This, it will be suggested, equally led some Member States to extend the class of subjects who can attract criminal liability at the national level and to secure minimum maximum sentences for harmonised offences, often increasing national levels of punishment.⁸³ These three features of harmonisation of national criminal law led to an increase in formal criminalisation at the national level by requiring States to introduce new crimes or to extend the scope of pre-existing offences and by requiring them to extend liability to legal persons as well as establish minimum maximum punishment. Furthermore, it will also be argued that minimum harmonisation placed more pressure on more lenient States as these are more likely to have to amend their national provisions in order to meet the EU standard.⁸⁴ However, the chapter will also outline how minimum harmonisation and this trend towards more severity in ECL encounters several limitations. First and foremost, it does not create harmony amongst national legislation, since definitions offered are too broad and vague;⁸⁵ second, the increase in criminalisation suggested is merely formal as ECL does not account for practices of policing, prosecution and punishment in each Member State. Hence, whilst it can be argued that ECL is leading to a trend of increased formal criminalisation (the ‘law in the books’), the same cannot be said of substantive criminalisation (‘actual levels of criminalisation’ which are also dependent on the practices of criminal justice in each Member State--which remain unpredictable and substantially untouched by EU law).⁸⁶

Chapter 5 will provide an analysis of the legal mechanisms of ECL and focus on the principle of mutual recognition in criminal matters as the cornerstone of judicial cooperation. It will suggest that although the principle was thought to be politically more feasible than harmonisation, it has brought about deep and controversial changes to criminal justice across the European Union. It has done so by granting Member States enhanced tools for investigation, prosecution and punishment beyond their own national borders in relation not only to Euro-crime but also in relation to other serious criminality or, even in some cases, any criminality.⁸⁷ By doing so, the principle particularly benefits more ‘active’ States—those who more readily prosecute—as they will be more likely to make use of these tools. This punitive bias is further accentuated by the abolition of the principle of dual criminality in most mutual recognition instruments. The principle required an act to be considered a criminal offence in both legal systems involved in order for cooperation to be operated. The abolition of this principle thus clearly favours

⁸³ Chapter 4, section 3, 3.1 and 3.2.

⁸⁴ Chapter 4, section 3.3.

⁸⁵ Chapter 4, section 4.1.

⁸⁶ Chapter 4, section 4.2.

⁸⁷ Chapter 5, section 1.

legal orders that punish more severely to the detriment of more lenient ones. The punitive emphasis of the principle of mutual recognition has been highlighted through the introduction of the European Arrest Warrant (EAW) which aims at facilitating ‘extradition’ between Member States by introducing an almost automatic procedure and removing traditional State guarantees against extradition of individuals - such as the principle of non extradition of nationals, the principle of dual criminality and the refusal to extradite based on human rights’ grounds.⁸⁸ Indeed, the high number of the EAW issued suggests this instrument streamlined cooperation with a punitive emphasis across the European Union. More specifically, the great variation in how different States use the EAW brings to light how the principle suits different legal orders differently. Hence, whilst some Member States, such as Poland for example, have been enthusiastic issuers of EAWs, other States have used the new tool with considerably more restraint.

Chapter 5 will further illustrate how ECL was, for the first time, met with resistance from certain domestic legal orders that were reluctant to accept the different dimensions of the punitive bias of mutual recognition and of the EAW. Some Member States thus introduced qualifications as to whether or not and how they would allow the surrender of individuals to other Member States. These changes were primarily in the form of additional safeguards for defendants or resistance to the priority given to more severe legal orders.⁸⁹ In fact, it will be shown how these national reactions led to a subsequent moderation of mutual recognition also at the EU level.⁹⁰ To be sure, mutual recognition continued to expand in order to secure the recognition and enforcement of financial penalties,⁹¹ evidence,⁹² and imprisonment as well as alternative sanctions.⁹³ However, the principle of dual criminality was either partially or fully reintroduced in some of these measures and the impact of punishment on the individual began to be taken into account, mainly by the CJEU adjudication on the principle of *ne bis in idem*.⁹⁴ The protection of fundamental rights mainly via the endorsement of procedural rights has also been highlighted ever since the entry into force of the Treaty of Lisbon. Hence, these most recent developments suggest that a better balance between punitiveness and moderation is finding place in ECL.

⁸⁸ Chapter 5, section 2.

⁸⁹ Chapter 5, section 2.1, 2.1.1.

⁹⁰ Chapter 5, section 3.

⁹¹ Chapter 5, section 3.1.

⁹² Chapter 5, section 3.2.

⁹³ Chapter 5, section 3.3.

⁹⁴ Chapter 5, section 3 and 4.

Chapter 1 The silent birth of European Union Criminal law: the pre-Maastricht era (1957-1993)

Introduction

Chapter 1 will look at the European Communities' relationship with matters of law and order from the nineteen sixties until the early nineties. Criminal law was introduced in the realm of the Treaties only with the TEU(M) in 1993. Before that, arguably, criminal law was not part of the EC's remit nor did the European Communities have the competency to act in matters of crime control. However, both Member States, in an intergovernmental fashion, and the EC, in an indirect way, were not completely isolated from law and order related matters. This chapter seeks to explore the early origins of European Union criminal law and identify what initiatives were taking place as well as show how arrangements were being built and in turn silently reshaping the EC and Member States' relationship with law and order matters in the EC context. The chapter will argue that two broad narratives, the fight against organised crime and the protection of EC interests and policies, began to take form during those years and how these were pursued via indirect, informal and often secretive means. This *modus operandi* suited the EC's lack of proper competencies in criminal matters vis-à-vis its political will to have a say in this field regardless. Additionally, it will be shown how the EC's intervention in criminal law was narrow and discrete, yet, significant enough to raise concerns over its secrecy and lack of accountability in this area. Within the broad context of the thesis, this chapter will shed light on how the first and for many years central dynamic of European Union criminal law (ECL) emerged indirectly during this period and set the tone for the development of the field for many years to come.

The first section of this chapter will focus on the period up to 1985, a period when the EC's position on law and order matters was rather neutral. However, it will suggest that even though criminal law was not part of the EC's formal framework, a significant albeit indirect dialogue with national criminal law was taking place as the EC allowed or even facilitated the use of national laws to guarantee the enforcement of its own policies. This section will further show how the CJEU sought changes at the national level by, on occasion, removing domestic penal provisions which could hinder the functioning of the common market. At the same time, Member States began to see the EC structures as a convenient framework to develop parallel initiatives in police cooperation and counter terrorism. The second part of the chapter will look at the momentum created in 1985 with proposals for the completion of a single market and internal border removals to facilitate free movement within the EU space. It will note how both politicians and law

enforcement agencies were keen to expand police cooperation amongst Member States in order to combat the increasing fears of organised crime and illegal immigration although data on this possible increase were scarce. It will show how organised crime was, for the first time, endorsed as a concept underlying Member States' embryonic common field in law and order matters. Finally, this section will show how the nature of the arrangements created and their corresponding dynamics raised important apprehension regarding the lack of accountability and lack of transparency of EC's action in this field.

1. The EC and criminal law: the neutrality of the early years

Criminal law was initially not envisaged as being part of the European integration process and none of the three initial founding Treaties focused on matters of law and order. The ESCC (European Coal and Steel Community) Treaty, signed in Paris in 1951, aimed solely at establishing a common market in coal and steel and to supervise the conditions of production across Europe. The Euratom Treaty (European Atomic Energy Community) and the EC Treaty (European Economic Community), both enforced in 1957, aimed respectively at fostering the peaceful use of nuclear energy in Europe and at creating a common market by regulating issues such as a common union, the four freedoms (free movement of goods, persons, services and capital), commercial policy and a general degree of fiscal and economic coordination between Member States. Besides creating a common market the ECT also established a Common Agricultural Policy. The three Treaties were thus silent regarding criminal matters and did not attribute any competence to the EC to act in this field. This was further reasserted by the European Commission who noted in 1974, that penal law was a subject which did not enter the Community sphere⁹⁵ and by the CJEU who held in 1981 that

*“in principle, criminal legislation and the rules of criminal procedure are matters for which the Member States are still responsible.”*⁹⁶

This is not to say that there was no room for criminal law or criminal law related matters within the process of EC integration. First and foremost, one provision in criminal law related matters could be found in the Treaties. Article 194 (1) Euratom Treaty imposed an obligation of professional secrecy and required Member States to treat an infringement of this obligation as falling within their jurisdiction and therefore to prosecute the civil servant in question. This Article imposed a duty to prosecute upon

⁹⁵ European Commission, *8th Report of Activities*, Brussels, Luxembourg, February 1974, 79.

⁹⁶ Case 203/80 *Criminal proceedings against Guerrino Casati* [1981] ECR 2595, para 27.

the request of other Member States or of the Commission in similar conditions as it would prosecute

*“an act prejudicial to its rules on secrecy and as one falling, both as to merits and jurisdiction, within the scope of its laws relating to acts prejudicial to the security of the State or to disclosure of professional secrets”.*⁹⁷

Besides this minimal presence in the Treaties, there were other avenues through which criminal law was indirectly and slowly making its way into the political and legal spheres of the European project. This happened first as the EC made room for national laws to criminalise behaviours that could negatively influence EC policies or, more importantly, to introduce provisions—often of a penal nature—which could ensure efficiency and compliance with EC norms. Second, the EC’s role was shaped through an occasional influence of the CJEU. The latter sought to eliminate penal hindrances to the completion of the single market, setting aside domestic criminal law provisions. Lastly, at a political level, the EC provided a useful and suitable framework for the development of police cooperation primarily in relation to terrorism and later on with regard to serious criminality. These levels of influence will be described in the following section.

1.1. The pursuit of EC interests and policies via national criminal law

As mentioned, the ECT was silent in relation to criminal law. However, this is not to say that criminal law had no place in the broad framework of the EC’s development. In fact, during the first decades of the EC’s existence, Community law was increasingly influencing Member States’ criminal law, thus facilitating the realisation of the EC’s interests and policies. Hence, although the Community had no competence in criminal matters, national criminal law was indirectly being used as a tool to regulate the common market and to facilitate the enforcement of EC policies.

This influence took two forms. First, via legislative acts when EC measures were implemented into domestic legal orders via criminal law provisions. Second, when the CJEU would set conditions upon domestic criminal law. This influence was made possible mainly through two constitutional principles developed by the CJEU: the primacy or supremacy of EC law over national law and the principle of direct effect. The former was developed very early on in the case *Costa v Enel* in which the Court held that EC law could not be overridden by domestic legal provisions, however these were

⁹⁷ Article 194 Euratom Treaty, OJ C 84/1 [2010] (consolidated version).

framed.⁹⁸ The principle of direct effect, in turn, was recognised in *Van Gend en Loos* (and further developed in several subsequent cases) in which the Court held that provisions of EC law that were sufficiently clear, precise and unconditional, could be invoked by individuals before national courts.⁹⁹

Regarding the legislative influence of Community law in national criminal law, examples vary throughout policy areas such as transport, environmental policy, agriculture and fisheries. The EC's influence could be seen, for instance, in the Council Regulation on the harmonisation of social legislation related to road transport,¹⁰⁰ which sought to: determine the minimum age of drivers engaged in the carriage of goods and passengers,¹⁰¹ set limits on duration of continuous driving periods and daily driving time,¹⁰² stipulate resting periods,¹⁰³ and to enact mechanisms of control for these provisions.¹⁰⁴ The coordination of these elements targeted several objectives, which ranged from promoting harmonious competition in the domain of transport to an improvement in road safety as well as greater control by the EC (and national authorities) regarding the type and mode of road transport used in the EU space. The Regulation required vehicle crew members to carry an 'individual control book' where information regarding rest periods, driving hours, etc. should be registered. Finally, article 18 (1) of the Regulation provided that national legislation complementing the Council Regulation should cover the organisation, procedure and means of control as well as the penalties to be imposed in the case of a breach of such provisions.¹⁰⁵

The common fisheries policy was another important domain in which the effectiveness of EC measures was to be guaranteed by national legal orders. In this domain, a Regulation establishing control measures for the fishing activities of the Member

⁹⁸ Case 6/64 *Costa v Enel* ECR 1141 [1964], in particular at 594.

⁹⁹ Case 26/62 *Van Gend en Loos v Netherlands Inland Administration* ECR 1 [1963]; see for further developments of the principle, *inter alia*, Case 41/74 *Van Duyn* ECR 1337 [1974], Case 2/74 *Reyners* ECR 631 [1974], Case 43/75 *Defrenne* ECR 455 [1976].

¹⁰⁰ Regulation (EEC) No 543/69 of the Council of 25 March 1969 on the harmonisation of certain social legislation relating to road transport, OJ L 77/49 [1969].

¹⁰¹ Article 5, *ibid.*.

¹⁰² Articles 7, 8, 9 and 10, *ibid.*.

¹⁰³ Articles 11 and 12, *ibid.*.

¹⁰⁴ Articles 14 and 15, *ibid.*.

¹⁰⁵ Later on, intervention was streamlined with the adoption of Regulation 3820/85 on the harmonisation of certain social legislation relating to transport which repealed Regulation 543/69 - this Regulation aimed at harmonising competition between methods of inland transport, whilst improving working conditions and road safety. The same lines of action were maintained although the Regulation provided for fewer exemptions from the obligations to install the control mechanisms provided for in its text. Furthermore, it again reasserted that "*Member States shall, in due time and after consulting the Commission, adopt such laws, regulations or administrative provisions as may be necessary for the implementation of this Regulation. Such measures shall cover, inter alia, the organisation of, procedure for and means of control of the penalties to be imposed in case of breach.*", Council Regulation (EEC) No 3820/85 of 20 December 1985 on the harmonization of certain social legislation relating to road transport, OJ L 370/1 [1985].

States¹⁰⁶ sought to ensure the good functioning of common fisheries by providing mechanisms of control regarding the maximum fishing quotas assigned to each Member State. The Regulation required large vessels to fill out a declaration of landing at the end of each voyage, given that

“this declaration constitutes the sole means of monitoring their activities thereby permitting the degree of observance of conservation measures in force”.¹⁰⁷

More significantly, the Regulation imposed a general obligation on Member States to inspect Community vessels in their ports and waters and to ensure compliance with Community management regulation on fisheries as well as to prosecute or take administrative action whenever a breach was identified.¹⁰⁸

Further examples can be found in the domain of the common agricultural policy, particularly Regulation 729/70 on the financing of the common agricultural policy, which aimed at protecting the EC budget by seeking to ensure it was governed soundly.¹⁰⁹ In this context, the European Commission was responsible for the administration of the funds available, but the control of irregularities and negligence in the management of such funds was to be ensured by national authorities. Thus, the Regulation sought to guarantee good supervision of national expenditure by requiring Member States to ensure the prosecution of irregularities and the reclamation of the sums of money lost as a consequence of these irregularities.¹¹⁰ These national

¹⁰⁶ Council Regulation (EEC) No 2057/82 of 29 June 1982 establishing certain control measures for fishing vessels of the Member States OJ L 220/1[1982], amended by Council Regulation (EEC) No 1729/83 of 20 June 1983 on the same topic, OJ L 169/14 [1983] and by Council Regulation (EEC) No 3723/85 of 20 December 1985 with the same title, OJ L361/42 [1985]. For more details on these regulations and on Member States obligations in relation to fisheries see R.R. Churchil, *EEC Fisheries Law* (Dordrecht: Martinus Nijhoff Publishers, 1987) 23.

¹⁰⁷ Preamble, Regulation 2057/82, *ibid.*

¹⁰⁸ See, for instance, Articles 1, 2, 3, 4 and 5 among others, *ibid.* In this domain, new measures were also adopted later on, namely Regulation 2241/87 establishing certain control measures for fishing activities. This Regulation sought primarily to ensure that permissible levels of fishing (so-called “national quotas”) were observed. It required Member States to keep records and submit statements of their fishing activities and to “*verify the accuracy of entries in logbooks, landing and shipment declarations*” among other control activities. In particular, the Regulation stated that if the competent authorities of Member States observed that “*the relevant rules and control measures are not being complied with, they shall take penal or administrative action against the master of such a vessel or any person responsible.*”, Council Regulation (EEC) No 2241/87 of 23 July 1987 establishing certain control measures for fishing activities, OJ L 207/1 [1987].

¹⁰⁹ Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy, OJ L 94/13 [1970] subsequently replaced by Council Regulation (EC) No 1258/1999 of 17 May 1999 on the financing of the common agricultural policy, OJ L 160/103 [1999].

¹¹⁰ Article 8(1), Regulation (EEC) 729/70, *ibid.*

obligations were further confirmed by subsequent Regulations on the same matter and other related issues.¹¹¹

This *modus operandi* of securing the enforcement of EC norms via national criminal law was also taking place in the context of some directives, whose implementation led to the adoption of criminal sanctions at the national level. This was the case, for instance, with the Directive on insurance against civil liability of motorcars and on the enforcement of the obligation to insure against such liability.¹¹² This Directive sought to address the disparities between Member States' domestic legislation by abolishing vehicle checks between Member States, compensated for by the compulsory insurance of all vehicles circulating in the EU. By addressing disparities between Member States' domestic legislation, this measure spoke to the core of the single market, namely with regard to transport policy, by favouring the movement of goods and persons within the EC, whilst also endorsing the interests of persons who may be victims of accidents, and subtly leading to a *de facto* EC driven criminalisation at the national level.

However, none of these measures contained specific obligations to adopt criminal sanctions at the national level, leaving Member States with the freedom to decide which measures to adopt. Nonetheless, the text in these measures often carried a strong suggestion to use criminal law. The rule of thumb for this intervention was that the EC would set the norm and Member States would set the sanction.¹¹³ However, this was not a widespread method.¹¹⁴ Indeed, there were only sporadic examples in certain policy domains and EC law was never clear-cut about the type of action it required Member States to engage in. As shown, the EC set demands on Member States for the introduction of *means of control and penalties to be imposed in case of breach* regarding the respective provisions, to undertake *inspections*, to ensure *compliance* or to *prosecute or take administrative action*. These obligations were often reflected in the *de facto* adoption of criminal legislation at the national level.

¹¹¹ See, for instance, Council Regulation (EEC) No 3183/87 of 19 October 1987 introducing special rules for the financing of the common agricultural policy, OJ L 304/1 [1987].

¹¹² Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability, OJ L 103 [1972].

¹¹³ See J. Bigay, "Droit Communautaire et Droit Penal" *Revue trimestrielle du droit européen* 4 (1972) 725-734, and H. Sevenster, "Criminal Law and the European Community" (1992) 29 *Common Market Law Review* 29.

¹¹⁴ For a thorough analysis and more exhaustive exploration of examples see, R. France, "The Influence of European Criminal Law on the Criminal Law of the Member States" (1994) 4 *European Journal of Crime, Criminal Law and Criminal Justice* 324; C. Harding, "The European Communities and Control of Criminal Business Activities" (1982) *International and Comparative Law Quarterly* 246.

This could be seen, for instance, in relation to Regulation 543/69/EEC on the harmonisation of certain social legislation related to road transport.¹¹⁵ The UK adopted the Transport Act of 1968 and then the European Communities Act of 1972 providing for criminal penalties for the violation of the provisions of the EC Regulation.¹¹⁶ Furthermore, Regulation 1696/71 on the common organisation of the market in hops was implemented in the UK by the Hops Certification Regulation and introduced offences related to the uncertified and improperly packed hops which was penalised by fine or imprisonment.¹¹⁷

The Directives on insurance liability and conservation of wild birds also brought about the enactment of criminal provisions in the UK. Directive 72/166 on insurance against civil liability of motor cars was implemented in the UK by the Motor Vehicles (Compulsory Insurance) Regulations 1973 which created the summary offence of using a motor vehicle without an insurance policy covering civil liability, punishable by a fine. Likewise, the Wildlife and Countryside Act 1981 which implemented Directive 79/409 on the conservation of wild birds made it a criminal offence to engage in activities harmful to the conservation of wild birds and provided for criminal fines for the commission of such offences.¹¹⁸

This legislative dialogue between EC and national legal orders, which resulted at times in the implementation of EC measures via national criminal law, was clearly legitimised by the CJEU in *Amsterdam Bulb*.¹¹⁹ In this case, the Court held that Member States were required to ensure the fulfilment of the obligations derived from Community institutions' actions. In doing so Member States were entitled to choose the measures which they considered appropriate, including criminal sanctions.¹²⁰ Therefore, as Member States were clearly entitled to secure the protection of Community provisions via the application of criminal sanctions, it is apparent that criminal law was not completely outside the realm of Community law. As Harding noted, the CJEU's position in this case was permissive towards *more* rather less enforcement at the national level.¹²¹

¹¹⁵ Regulation (EEC) No 543/69, *supra* note 100.

¹¹⁶ R. France, "The Influence of European Community Law", *supra* note 114, 339; European Communities Act of 1972, Ch 68.

¹¹⁷ Reg. 3, S.I. 1979, N° 1095 in R. France, "The Influence of European Community Law", *supra* note 100, 338.

¹¹⁸ See, *inter alia*, for more examples, R. France, "The Influence of European Community Law", *supra* note 75;³⁴³ or M. Delmas Marty, "The European Union and Penal Law", *supra* note 100.

¹¹⁹ Case 50/76 *Amsterdam Bulb* ECR 137 [1977] para 32.

¹²⁰ Para 32, *ibid.*.

¹²¹ Our italics. C. Harding, "Member State Enforcement of European Community Measures: The Chimera of 'Effective' Enforcement" (1997) 4 *Maastricht Journal of European and Comparative Law* 8.

Moreover, other realms of interaction between EC and domestic criminal law were being shaped. Since very early on, the CJEU began to influence national criminal law in the context of some cases. At first, the Court's influence upon national criminal law differed from the legislative one seen above in that, instead of permitting or encouraging the introduction of penal provisions, it rather sought to remove them or tone them down when they would run counter to an EC provision or policy goal. Later on in the chapter it will be shown that, over time, the CJEU also began to set some positive obligations on Member States. Ultimately, the aim of the CJEU was to guarantee the effectiveness of EC policies and the completion of the common market regardless of any penal options Member States chose to pursue.

Sporadic examples of the Court's influence on national legal orders can be found quite early on.¹²² The CJEU influenced, for instance, the definition of national criminal offences. This took place in relation to the offence of 'smuggling' in the case *Redmond*.¹²³ A Northern Ireland regulation prohibited the transport of bacon pigs unless to specific purchasing centres and required the transporter to be in possession of a document authorising the transport to those centres. The Court found that this prohibition on transport was incompatible both with freedom of trade between Member States and with the common organisation of the market in pig meats. Thus, it could not be justified (not even as a means of frontier control against certain fraudulent operations). And therefore, it found that the national regulation amounted to a measure having the equivalent effect of a quantitative restriction on exports, hence violating the free movement of goods. Similarly, in relation to smuggling pornographic materials, the Court held in *Henn and Darby* that a ban to import pornographic materials into the UK could be authorised only in so far as the articles imported would be considered obscene under domestic law hence restricting the scope of the national offence.¹²⁴ This understanding was later on confirmed in *Conegate*.¹²⁵ Hence, material not considered obscene should not be covered by the national criminal law provision.

The Court also weighed in on the type and level of penalties found at the national level, often finding them incompatible with the effectiveness of EC goals and with the principle of proportionality. In relation to the free movement of persons and services, for example, the Court held in *Watson*—a case concerning an Italian law which obliged nationals to report non-nationals staying in the country within three days of their entry to

¹²² For a comprehensive overview and analysis of the influence of the CJEU on national criminal law from very early on until approximately the mid-1990s see *inter alia* E. Baker, "Taking European criminal law seriously" (1998) *Criminal Law Review* 361.

¹²³ Case 83/78 *Pigs Marketing Board v Raymond Redmond* ECR 2347 [1978].

¹²⁴ Case 34/79 *Regina and Maurice Henn and John Darby* ECR 3797 [1979].

¹²⁵ Case 121/85 *Conegate v HM Customs & Excise* ECR 1007 [1986].

the Italian police; failure to do so being punishable with a fine or a maximum of six months of detention¹²⁶ - that such a penalty was disproportionate to the gravity of the infringement and could become an obstacle to the free movement of persons.¹²⁷ Within the same subject matter the Court found in *Bonsignore* that the penal goal of ‘general deterrence’ or of a ‘general preventive nature’ was not in itself sufficient ground to order deportation of a person convicted of a criminal offence (according to the Court, a deportation order could only be made for breaches of the peace and public security which might be committed by the individual in question).¹²⁸ The Court further clarified this decision in *Bouchereau*, holding that previous criminal convictions can only be taken into account for grounds of deportation in so far as the circumstances which it gave rise to that conviction are evidence of personal conduct which remain a present threat.¹²⁹

Along the same lines, but in relation to commercial policy, the Court noted in *Cayrol*,

*“in general terms, any administrative or penal measure which goes beyond what is strictly necessary... must be regarded as a measure having equivalent effect to a quantitative restriction prohibited by the Treaty.”*¹³⁰

Equally, in *Donckerwolcke*,¹³¹ another case on commercial policy, the CJ held that an offence of false declarations made in order to facilitate the illegal import of goods should not be punished with criminal penalties. This, the Court noted, would be disproportionate to the nature of a contravention of a purely administrative nature and must be regarded as a measure having equivalent effect to a quantitative restriction prohibited by the ECT.¹³²

The Court also noted that EC law could affect domestic rules of criminal procedure. It did so, for instance, in both *Tymen and Bout* holding that where national criminal proceedings are brought by virtue of a national measure that is held to be contrary to EC law, a conviction under those proceedings will be deemed incompatible with EC law.¹³³

¹²⁶ Case 118/75, *Lynne Watson and Alessandro Belmann* ECR 1185 [1976], 3-4.

¹²⁷ *Ibid.*, para 21.

¹²⁸ Case 67/74 *Carmelo Bonsignore v Oberstadtdirektor der Stadt Koln* ECR 297 [1975] 6-7.

¹²⁹ Case 30/77 *Regina v Pierre Bouchereau* ECR 1999 [1977] 28.

¹³⁰ Case 52/77, *Leonce Cayrol v Giovanni Rivoira & Figli* ECR 2261 [1977] 39.

¹³¹ Case 41/76 *Suzanne Criel, née Donckerwolcke and Henri Schou v Procureur de la republique au tribunal de grande instance de Lille and Sirector General of Customs* ECR 1921 [1976].

¹³² Para 36-38, *ibid.*

¹³³ Case 269/80 *Regina v Robert Tymen* ECR 269/80 [1981], para 16; Case 21/81 *Criminal proceedings against Daniel Bout and BV I. Bout en Zonen* ECR 381 [1982] 11.

Hence, the Court, whilst recognising national autonomy and competency in criminal matters, set limits to the scope of criminal offences and penalties, noting that these should be compatible with the smooth functioning of the internal market and should not hinder the efficacy of EC law provisions. In *Guerrino Casati*, a case on the free movement of capital, the logic of the Court is spelled out quite clearly:

*“In principle, criminal legislation and the rules of criminal procedure are matters for which the Member States are still responsible. However, it is clear from a consistent line of cases decided by the court, that Community law also sets certain limits in that area as regards the free movement of goods and persons. The administrative measures or penalties must not go beyond what is strictly necessary, the control procedures must not be conceived in such a way as to restrict the freedom required by the Treaty and they 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.”*¹³⁴

Indirectly and occasionally then, the CJEU began to ensure that national criminal law was either not an obstacle or, when possible, facilitated the realisation of EC goals and the protection of EC’s interests and policies. With this *modus operandi*, the Court positioned itself to potentially influence any provision of national criminal law if it would affect the effectiveness of Community norms and policies.

1.2. Beyond EC policies and the common market: reaching out against transnational criminality

Besides this subtle emergence of a link between domestic criminal law and EC policies, a different and more significant set of arrangements in criminal matters were secretly taking place in Europe. After the Second World War, criminal matters at the international level was dealt with mostly under the auspices of the United Nations, the Council of Europe and the European Political Cooperation initiatives (EPC),¹³⁵ leading to the adoption of numerous conventions and the creation of cooperation *fora*. Whilst many of these initiatives were close to the EC through Member States memberships and shared concerns, they could not be taken on board by the latter given its lack of competence to engage in criminal matters and the delicate nature of such political issues.

¹³⁴ Case 203/80, *Casati*, *supra* note 96, para 27.

¹³⁵ EPC describes the initiatives taken from 1970 onwards among Member States on matters outside the competence of EC’s institutions, namely in matters of defence and foreign affairs. EPC was brought to the realm of the Treaties under the Treaty of Maastricht.

Nonetheless, this *status quo* began to be challenged in the 1970s, when Member States started seeing the European Communities as a forum where agreements in this area could be facilitated. The most emblematic example of this was the Trevi Group, an *ad hoc* forum, created outside of the Treaties framework in 1976 to discuss criminal matters from an operational perspective. The group was set up by EC's Justice and Home Affairs Ministers, following a UK proposal.¹³⁶ At the time, the UK faced internal challenges with the Irish Republican Army, which was responsible for a number of bombings in Aldershot, London, Guilford and Birmingham during the first half of the 1970s. Support for the UK's initiative was unsurprisingly easy to gather as most of its EC counterparts were likewise facing internal problems of political violence.¹³⁷ Furthermore, transnational connections between different states became very visible after the Scheleyer kidnapping in Germany in 1977, when Palestinians hijacked a Lufthansa plane to put pressure on German authorities to free imprisoned members of the German Rote Armee Fraktion, highlighting the potential international dynamics of terrorism.¹³⁸ Events such as this made terrorism one of the most salient security issues during those years and Trevi was set in motion in this context. The group was thus formed by the gathering of the Justice and Interior Ministers of the twelve Member States of the EC, as well as the so-called 'seven friends of Trevi', who attended the meetings as observers; namely Austria, Canada, Morocco, Norway, Sweden, Switzerland and the USA.

Trevi was not based on any convention or treaty and remained outside the framework of the EC institutions in a rather *ad hoc* and informal arrangement. This was further accentuated by the secretive nature of the group, whose documents surfaced in 1989, as noted by the Home Office Select Committee: "*December 1989 the first written communiqué, for public use, from a Trevi council meeting was made available.*"¹³⁹ Research on previous work done by this group is nearly impossible given the lack of proper archives.¹⁴⁰ A Home Office Circular, issued in April 1993, however does allow

¹³⁶ Some accounts mention Trevi as an acronym for 'Terrorism, Radicalism, Extremism and Political Violence', others believe it was chosen after the Trevi Fountain in Rome, where, in 1975, the negotiations to form the group were initiated. See, for example, E. Baker and C. Harding, "From Past Imperfect to Future Perfect? A longitudinal Study of the Third Pillar" (2009) 34 *European Law Review* 25, 29.

¹³⁷ Germany with the Meinhof Group and the Rote Armee Fraktion; Italy with the Red Brigades, among other countries. For more details see, for example, D. Bigo, "L'Europe de la sécurité intérieure", in D. Bigo (ed) *L'Europe des Polices et de la Securite Interieure* (Bruxelles: Editions Complexes, 1992) 13, 20; and V. Mitsilegas, J. Monar and W. Rees, *European Union and Internal Security: Guardians of the Treaties?* (Basingstoke: Palgrave Macmillan, 2003) 22-24.

¹³⁸ Mitsilegas et al., *European Union and Internal Security*, *ibid.*, 22-23.

¹³⁹ House of Commons, Home Office Select Committee, "Practical Police Cooperation in the European Community", Seventh Report, Session 1989-90, HC 363, 1990, xxii.

¹⁴⁰ House of Commons, "Practical Police Cooperation in the European Community", *ibid.*, xxiii.

for some understanding of the first years of Trevi and some review of its structure and aims.¹⁴¹

The group focused primarily on practical cooperation between national authorities adopting an operational and problem-solving approach by focusing on issues such as the exchange of information and the enhancement of police cooperation in relation to terrorist incidents, and the exchange of scientific and technical knowledge on police matters.¹⁴² The House of Commons, for example, defined the task of the group as merely to “develop cooperation on the ground”,¹⁴³ whereas Mitsilegas refers to it as a “looser mechanism of police cooperation”.¹⁴⁴ As mentioned, Member States’ transnational cooperation concerns at the time were focused largely on terrorism and on the facilitation of communication and intelligence between national police forces in order to implement counter-terrorist practices. In this regard, Trevi encouraged Member States to

*“produce reports outlining the experience gained from handling any major terrorist incident”; “exchange information on their arrangements for handling major terrorist incidents, particularly at governmental level, to enhance cooperation in the event of an incident involving more than one country”; “establish contact points for the exchange of information on international terrorist matters”; and provide and exchange information on “police technical matters and police training” “...on its present technical and training arrangements... in these fields.”*¹⁴⁵

To this end, two operational working groups of police and security officers were created in 1976 and focused respectively on the exchange of information on terrorist activity and the provision of mutual assistance during incidents, and on the exchange of scientific and technical knowledge on police matters and training.¹⁴⁶ Trevi was further composed of two more groups at a ministerial and senior official level where Interior Ministry

¹⁴¹ Home Office, “Home Office Circular 153/77: Conference of EEC Ministers of the Interior”, in T. Bunyan, *Key Texts in Justice and Home Affairs* (London: Statewatch, 1997) 33-34; The Circular was issued to Chief Officers of Police in April 1993, it referred to the first Trevi Conference of EC Ministers of Interior and criminal matters held in Luxembourg in June 1976. It described the official working groups established as a result of the Luxembourg meeting, and summarised their initial deliberations.

¹⁴² Mitsilegas refers to Trevi as a “looser mechanism of police cooperation” at the very early origins of Europol, V. Mitsilegas, *EU Criminal Law*, *supra* note 14, 162.

¹⁴³ House of Commons, Home Office Select Committee, “Practical Police Cooperation in the European Community”, Seventh Report, Session 1989-90 HC363, 1990, 11.

¹⁴⁴ V. Mitsilegas, *EU Criminal Law*, *supra* note 14, 162.

¹⁴⁵ House of Commons, “Practical Police Cooperation in the European Community”, *supra* note 143, 33-34.

¹⁴⁶ See Home Office Circular, *supra* note 141; See also Home Affairs Select Committee, “Practical Police Cooperation in the European Community”, *ibid.*, 43.

officials, police officers and security services participated.¹⁴⁷ The ministerial group met annually whilst the senior officials and the working groups met more frequently.¹⁴⁸ Before every ministerial meeting the working groups – effectively the most prominent part of Trevi’s structure – prepared a report that was channelled through the senior officials to the ministerial meeting.¹⁴⁹

Until 1985, this was the *status quo* of the EC’s relationship with criminal law in particular and with criminal matters in general. Although the Treaties were mostly silent in this regard and the official position of most institutions was that criminal law ought to be handled in the domestic sphere, there was an understanding that the EC did not need to absent from this field altogether. On the contrary, it would – and in fact did – make use of Member States’ legal and operational resources to indirectly pursue its own goals.

2. The emergence of a European Union narrative on crime: the 1985 shift

The initial limited remit of Trevi lasted approximately until the mid-eighties when a critical junction in security matters was reached at the EC level. Although 1985 was not the date of any particular treaty or significant change in the European integration process, it was the start of an era that deeply transformed the former understanding of criminal matters in the EU and which served as a background for the field of European Union criminal law. While criminal matters remained outside the framework of the Treaties, there was nonetheless a growing understanding that these matters were no longer to be merely tolerated or ignored by the EC. This turn came about mostly as a consequence of the release of two important texts for the European integration project. In 1985, the Commission released the White Paper on the completion of the single market¹⁵⁰ and the Schengen Agreement¹⁵¹ was negotiated and signed, both of which envisaging the removal of internal borders throughout the EC. In consequence, fears over an increase in transnational and organised crime began to surface.

The Commission acknowledged these concerns:

¹⁴⁷ T. Bunyan, “Trevi, Europol and the European State” in T. Bunyan (ed) *Statewatching the New Europe* (London: Statewatch, 1993) 15, 15-20.

¹⁴⁸ See for more details, T. Bunyan, “Trevi, Europol and the European State”, *ibid.*.

¹⁴⁹ J. Benyon, L. Turnbull, A. Willis, R. Woodward, R., A. Beck., *Police Co-operation in Europe: An Investigation* (University of Leicester, Centre for the Study of Public Order: November 1993) 154.

¹⁵⁰ European Commission, *Completing the Internal Market*, *supra* note 58.

¹⁵¹ The Schengen Agreement of 14 June 1985 and Convention implementing the Schengen Agreement of 14 June 1990, *supra* note 59.

*“The Commission’s efforts and initiatives in this area have been aimed at making checks at internal frontiers more flexible, as they cannot be abolished altogether until, in line with the concerns expressed by the European Council, adequate safeguards are introduced against terrorism and drugs.”*¹⁵²

Along the same lines, the Schengen Agreement also held that the signatory parties should,

*“...reinforce cooperation between their customs and police authorities, notably in fighting crime, particularly illicit traffic in drugs and arms, the unauthorised entry and residence of persons and customs and tax fraud and smuggling. To that end and in accordance with their national laws, the Parties shall endeavour to improve the exchange of information and to reinforce it where information likely to be of interest to the other parties in combating crime is concerned.”*¹⁵³

The release of these two documents essentially changed the criminal law related matters discourse in the European Union space.

Furthermore, Mitsilegas et al note how, during the 1970s and 1980s, besides the single market shift, there were increased pressures upon Member States, namely due to an expansion in

*“...drug trafficking, the growth of international trade and financial transactions, and the increasing economic interpenetration in Western Europe led to a spread of cross-border activities of organised crime groups almost everywhere in Europe.”*¹⁵⁴

Official data available from this time is scarce but Recommendation 1044 of the Council of Europe, for example, broadly refers to an,

“...alarming increase in international crime, that is, predominantly organised crime with international ramifications, in member countries of the Council of Europe and the world as a whole”.¹⁵⁵

¹⁵² European Commission, *Completing the Internal Market*, *supra* note 58, para 51.

¹⁵³ Schengen Agreement, *supra* note 59, Article 9.

¹⁵⁴ V. Mitsilegas, J. Monar and W. Rees, *The European Union and Internal Security: Guardians of the Treaties?* (Basingstoke: Palgrave Macmillan, 2003) 24-25.

¹⁵⁵ Council of Europe, *Recommendation 1044 (1986) on international crime*, Assembly debate on 20 September 1986 (14th Sitting) para 1.

After 1985 official documents continued to highlight that the removal of internal frontiers would bring about more criminality. For example, the Declaration of the Ministers of the Trevi Group in 1989, observed,

*“... we note with growing concern the development of organised crime across frontiers. Terrorists and professional criminals are increasingly adept at exploiting the limits of competence of national agencies, the difference between legal systems which exist between countries, and gaps in cooperation between respective services. Crimes such as terrorism, drug trafficking, traffic in human beings, as well as the laundering of profits obtained in these and other criminal activities, are now being planned and organised on a transnational scale, taking advantage of all facilities offered by the development of communications and international travel. Furthermore, these facilities bring about certain risks with respect to public order and internal security.”*¹⁵⁶

The scarcity of information on this sort of criminality, though, is not surprising as its measurement and tracking are extremely difficult. The European Institute for Crime Prevention and Control, affiliated with the United Nations, voiced—nearly three decades later in 2010—how the measurement of this type of crime is still not straightforward, noting the

“current availability of data, especially administrative statistics, on such crimes is particularly limited, thus making the analysis and understanding of the dimensions and characteristics of crime problems a very difficult task.”

These complexities might explain why the United Nations only covered this type of criminality in its surveys and reports very recently.¹⁵⁷ In 2012, Maguire notes there is

“very little strong evidence available about the scale of crime that crosses international borders (such as EU-subsidy fraud, money-laundering, smuggling, and drug or people

¹⁵⁶ Trevi Ministers, “Declaration of Ministers of the Trevi Group”, Paris, 15 December 1989, in Bunyan, *Key Texts on Justice and Home Affairs*, *supra* note 141, 35, para 3.

¹⁵⁷ The measurement of ‘complex crimes’ (UN’s denomination) such as organised crime, trafficking in persons, smuggling of immigrants, currency counterfeiting and corruption was undertaken by the UN for the first time in its Tenth United Nations Survey of Crime Trends and Operations of Criminal Justice Systems (UN-STS), S. Harrendorf, M. Heiskanen and S. Malby (eds), *International Statistics on Crime and Justice*, HEUNI, No64, European Institute for Crime Prevention and Control, United Nations Office on Drugs and Crime, 2010, 65.

trafficking), and especially about crime that is committed by highly organized groups.”¹⁵⁸

The scarcity of data on international crime during the 1980s led Bigo to argue that many of the concerns with criminality that emerged after 1985, did so in the absence of significant research on whether the removal of internal borders in particular and the single market in general would have a significant impact on levels of criminality. Bigo further suggested that Justice and Home Affairs ministers did not want to be perceived as anti-European at that point in time, thus they had to accept the principle of free movement of persons. In turn, they decided to create mechanisms that could compensate for the abolition of internal borders and for the consequent ‘security deficit’ that this could bring. Hence, under the label of the fight against terrorism and increase in organised crime, the ministers were actually aiming to defend against a potential wave of illegal immigration and refugees coming into Europe.¹⁵⁹

Indeed, the above mentioned preliminary study carried out in 1993 by the Centre for the Study of Public Order of the University of Leicester suggested,

*“international terrorism will neither increase nor decrease as the consequence of the open borders’ and that ‘the relaxation of border controls is unlikely to see the pattern of organized drugs trafficking in the European Union change significantly.”*¹⁶⁰

Benyon et. al. found that there was no relevant increase in serious or transnational criminality and that the increasing threats of terrorism and organised crime appeared, in the light of the data analysed, merely the official justification for adopting these new security measures.¹⁶¹ In fact, although it is not an unreasonable assumption that the creation of the single market and the establishment of the four freedoms could have an effect on the levels and shapes of criminality, that link was clearly uncertain at the time.¹⁶²

¹⁵⁸ M. Maguire, “Crime Statistics and the Construction of Crime”, in M. Maguire, R. Morgan and R. Reiner (eds) *The Oxford Handbook of Criminology* (Oxford: OUP, 20012, Fifth Edition) 206, 233.

¹⁵⁹ D. Bigo, “L’Europe de la sécurité intérieure”, in D. Bigo (ed) *L’Europe des Polices et de la Sécurité Interieure* (Bruxelles: Editions Complexes, 1992) 17-20.

¹⁶⁰ Benyon et al., *Police Cooperation in Europe*, *supra* note 149, 60.

¹⁶¹ Benyon et al., *ibid.*, 60.

¹⁶² In fact, more recent data seems to suggest that the enlargement of spaces of free movement – such as happened with the 2004 European Enlargement – does not necessarily lead to more organised crime. Changes seem to be either linked to internal factors to those groups or external factors such as “economic, social and technological developments.” Borders can have an impact in isolated situations only “tightening of controls at certain border crossing-points and its subsequent effects change crime opportunities.”, Europol Organised Crime Threat Assessment

The fear around the relaxation of internal borders was significant as, in the beginning of the 1990s, anxieties about security increased as immigration and asylum became a major concern in some Member States, most prominently so in Germany. The fall of the Berlin Wall in 1989, a liberal asylum law and a particularly attractive geographical location made Germany especially vulnerable to immigration pressures. Lavenex and Wallace note how in the early 1990s nearly two and half million people from former socialist countries arrived in Germany claiming citizenship by virtue of their descent.¹⁶³ Mitsilegas et al. further mention how, in the period between 1987 and 1992, the number of asylum applications in Germany rose from 57,379 to 438,191. Whilst numbers in all Member States at the time were increasing, applications lodged in Germany comprised 78.76 percent of that total.¹⁶⁴ It is no surprise then that in the 1990/1991 International Conference, Germany took the (failed) initiative to set up a European asylum and immigration policy.¹⁶⁵ But Germany was not the only country facing these pressures: the UK, Spain, France, Italy and the Netherlands all saw a significant increase in entrance of asylum seekers and immigrants during this time period.¹⁶⁶

In addition to the important role of politicians who were dealing with incoherent data on crime while addressing their own fears regarding floods of immigrants, national police forces were under great internal pressure during those years as well due to an increase in domestic crime. As Reiner notes “*The 1980s were a decade of explosive crime increase*” with the recorded crime between 1981 and 1993 almost doubling in the UK. This trend was also seen in a large majority of European countries, both in relation to property crime and violent crime, namely criminal damage and violence against the person.¹⁶⁷

2006, at 8-9, available at: https://www.europol.europa.eu/sites/default/files/publications/octa2006_0.pdf.

¹⁶³ S. Lavenex and W. Wallace, “Towards a ‘European Public Order?’” in H. Wallace, W. Wallace and M.A. Polak (eds) *Policy Making in the European Union*, 5th Edition (Oxford/ New York: OUP, 2005) 457, 461.

¹⁶⁴ Mitsilegas et al., *European Union and Internal Security*, *supra* note 154, 26.

¹⁶⁵ It succeeded however in bringing asylum and immigration into the future third pillar created under the Maastricht Treaty, mostly with the support of Italy, The Netherlands and Spain. V. Mitsilegas et al, *European Union and Internal Security*, *supra* note 154, 27.

¹⁶⁶ Mitsilegas et al., *European Union and Internal Security*, *ibid.*, 26.

¹⁶⁷ R. Reiner, *Law and Order, An Honest Citizen’s Guide to Crime and Control* (Cambridge: Polity, 2007) 66-69; on UK statistic and other Western countries see also M. Maguire, “Crime data and statistics”, *supra* note 158, 255-284; J.J. van Dijk and P. Mayhew (Ministry of Justice), *Crime Victimization in the Industrialised World*, Key Findings of the 1989 and 1992 International Crime Surveys, United Nations Interregional Criminal Justice Research Institute – UNICRI - Rome, November 18-20, 1992, 1-65; S. Harrendorf, M. Heiskanen and S. Malby (eds) *International Statistics on Crime and Justice*, *supra* note 157; or A. Tseloni et al., “Exploring the international decline in crime rates” *European Journal of Criminology* 7 (2010) 375-394.

The central actors in the Trevi framework – Interior Ministers and police officers - were thus both under major internal pressures. Politicians faced the fear of losing control of the quantity and quality of immigrants and asylum seekers arriving upon their domestic territory. Likewise, police forces faced an additional strain on their already pressurised domestic crime landscape. Both sides fed each others' fears while also offering helpful remedies.

Anderson et al. noted how the general expectation that the removal of internal borders was to make crime control more difficult was in fact the general perception mostly in law enforcement circles (although literature had conflicting views on whether borders are useful in the fight against crime).¹⁶⁸ Consequently, regardless of the seeming lack of clear data or studies on the existent levels of criminality and on its potential increase with the completion of the single market, in the years between 1985 and 1993 (year of the entry into force of the TEU(M)), cooperation in criminal matters was streamlined. As will be explained below, the Trevi structure was expanded and many other *ad hoc* groups were created. The scope of intervention was broadened and issues ranging from terrorism to illegal immigration, drug trafficking, trafficking in human beings or hooliganism among others began to be addressed in this transcontinental context. Overall, a narrative of the need to fight an increasing threat of organised crime (broadly understood and deeply related to the single market) began to emerge in the background of European integration, in what can be called the early origins of Euro-crime.¹⁶⁹ Post-1985 was thus an era of the relative formalisation and rationalisation of law criminal law related concerns and initiatives across the EC which ultimately allowed for their incorporation later on into the TEU(M).

2.1. An incremental claim: expanding structures and themes

After 1985, the change in the political discourse on crime, together with the internal market, brought about changes in criminal law related matters, namely a significant proliferation of structures and the broadening scope of the EC's interest in criminal matters as well as an attempt at the formalisation and rationalisation of such a framework. The legacy of those years remained at the core of the new developments that created additional layers to the initiatives already in place. From a structural point of view, the most significant and immediate change was the expansion of Trevi's configuration. First, the remit of the second working group, which had been established in 1976, was expanded to cover matters such as football hooliganism, leading to the

¹⁶⁸ M. Anderson., et al., *Policing the European Union* (Oxford: Clarendon Press, 1995) 16-19.

¹⁶⁹ See chapter 2.

establishment of a permanent correspondents network created to monitor and exchange information on football supporters.¹⁷⁰ Besides the two initial operational groups on terrorism and police cooperation, a third group on Serious Organised International Crime was established in 1985. It aimed at the coordination of activities against serious crime, especially drug trafficking but also money laundering, environmental crime or stolen vehicles and illicit traffic in works of art. In 1988 a fourth working group was created called “Trevi 1992”. The group addressed the national security implications of the removal of internal borders and sought to adopt compensatory measures for the free movement of persons, such as the intensification of exchange of information across borders. In 1992, yet another Working Group on Europol was set in place with the aim of establishing a European Drugs Unit (EDU) and later on, a European Police Office (Europol).¹⁷¹

Additionally, other groups were also formed alongside Trevi, many of which centred on very similar topics to the ones explored by the Trevi ministers. These groups were not formally part of the Trevi’s structure but reported to the Trevi ministers and their representatives were identical to those of the Trevi working groups, often meeting at the same time and venues. Examples of these groups include the Ad Hoc Group on Immigration set up in October 1986 under the UK presidency, composed of senior civil servants from the national immigration departments. The group was responsible for drafting or helping to draft conventions on asylum and external borders; the most notable example being the Dublin Convention.¹⁷² Additionally, the Working Group on Judicial Cooperation in Criminal Matters composed of senior officials was in charge of drafting conventions and agreements in order to facilitate mutual legal assistance in areas such as facilitation and simplification of extradition, terrorism funding and fraud against EC budget.¹⁷³ In 1988, a Coordinators Group on the free movement of persons was created at the Rhodes European Council meeting in December and was set up to bring together the different groups on terrorism, policing, customs, drugs, immigration, and legal cooperation, as well as to prepare the infrastructure which was to underpin

¹⁷⁰ Benyon et al., *Police Co-operation in Europe*, *supra* note 149, 193-94. At the Council of Europe level the European Convention in Spectators Violence had already been drafted and signed in 1985 and intended to formulate and implement measures to prevent and control violence and misbehaviour from spectators. Furthermore, a network of permanent correspondents related to hooliganism at sports meeting was put in place in 1987, through the “Declaration of the Belgian Presidency : Meeting of Justice and Home Affairs Ministers of the European Community”, Brussels, 28 April 1987, in Bunyan, *Key Texts in Justice and Home Affairs*, *supra* note 141, 9-11.

¹⁷¹ Benyon et al., *Police Co-operation in Europe*, *supra* note 149,156-159.

¹⁷² Benyon et al., *Police Co-operation in Europe*, *ibid.*,162. The Dublin Convention addressed the issue of the examination of applications for asylum lodged in one of the Member States.

¹⁷³ Benyon et al., *Police Co-operation in Europe*, *supra* note 149,162-163.

justice and home affairs matters under the TEU(M).¹⁷⁴ The meetings of the Group were not meant to be an extra forum for discussion but rather a tool to unblock the

*“...whole complex of intergovernmental and Community work in the field of free movement of persons”, to draft a “report on the free movement of persons and the establishment of an area without frontiers, including the measures to be adopted by the responsible bodies and a timetable for their implementation”.*¹⁷⁵

Finally, the Ad Hoc Group on International Organised Crime was created in September 1992 at a meeting of the ministers of Interior and Justice called for by Italy and France after the murders of Italian anti-mafia judges in the summer of that same year. The Group was established to fight international organised crime at an intergovernmental level, and more specifically to collect and document the nature and structure of the Mafia and other organised crime groups across Europe.¹⁷⁶ The group also agreed to continue to collect data on the spread of organised crime, to establish a network of contact points to facilitate cooperation in specific cases, to analyse legislation in the different Member States in order to identify obstacles to practical cooperation and to urge the Working Group on Judicial Cooperation in Criminal Matters to prioritise its work in relation to extradition.

These *fora* continued to focus primarily on operational matters, particularly police-related. Indeed, as seen in the two previous paragraphs, Trevi III aimed at coordinating activities in several domains of serious crime such as drug trafficking, money laundering, environmental crime among others, Trevi 92 was dedicated to an intensification of exchange of information and Trevi II was extended and put in charge of the creation of a network of correspondents to monitor and exchange information, particularly through a telegram reporting system in relation to football hooliganism. Along the same lines, the Ad Hoc Group on International Organised Crime aimed at the collection and documentation of the nature and structure of the mafia across Europe, the establishment of a network of contact points and the identification of legal obstacles to practical cooperation.

¹⁷⁴ The coordinators group proposed that under the Treaty of Maastricht the existing ad hoc groups were to be taken over by the ‘K4 Committee’ which would have a member of each Member State and a member of the Commission and that would be divided into three ‘senior steering groups’ which would have several working groups. The three steering groups covered immigration and asylum, security and law enforcement, police and customs cooperation and judicial cooperation, Bunyan, “Trevi, Europol and the European State”, *supra* note 147, 30-31.

¹⁷⁵ Coordinators’ Group, “The Palma Document” Free Movement of Persons, A Report to the European Council by the Coordinators’ Group, Madrid, June 1989, Section A(b), in T. Bunyan, Key Texts in Justice and Home Affairs, *supra* note 141, 12.

¹⁷⁶ Benyon et al., *Police Co-operation in Europe*, *supra* note 149, 161.

This operational drive arose strongly from several documents issued by Interior Ministers along with several police forces. The Declaration of the Belgian Presidency in 1987, for example, approved the constitution of an international exchange of information on thefts and discoveries of arms and explosives for terrorist purposes and approved a procedure for evaluating terrorist threats in the EC Member States.¹⁷⁷ Moreover, it allowed for drug liaison officers posted in third countries to be used for the benefit of the EC and agreed on the continuation of work on special enquiry methods for illegal drug trafficking.¹⁷⁸ Likewise, the Palma Document, a Declaration drawn up by the ‘Coordinators Group on the Free movement of persons’ distributed the work throughout the numerous groups created within and outside the Trevi structure and called for the adoption of measures in a wide range of topics from terrorism, to drugs, immigration, visas and control of external borders (see below, for more details). It incentivised the adoption of measures that would

*“...involve closer cooperation between the Member States’ law enforcement authorities and agencies, and an improved system for exchanging information.”*¹⁷⁹ It also called for measures on the *“intensification of the exchange of information about the removal of citizens of third countries which represent a possible terrorist danger to security”*,¹⁸⁰ for a *“permanent exchange of information concerning known members of and activities of terrorist groups”*,¹⁸¹

for the intensification of coordination between police forces;¹⁸² for the establishment of a public registry of false documents, explosives, detonators, and other information which could strengthened the fight against terrorism;¹⁸³ and the creation of a common system for the identification of wanted persons.¹⁸⁴ Furthermore, it also asked Member States to create or designate a central authority responsible for transmitting and receiving extradition requests and called for the ratification of the European Convention on Extradition by those Member States who had not yet done so,¹⁸⁵ among other measures.

¹⁷⁷ Trevi Ministers, ‘Declaration of the Belgian Presidency’, Brussels 28 April 1987, Section II B, in T. Bunyan, *Key Texts in Justice and Home Affairs*, *supra* note 141.

¹⁷⁸ Trevi Ministers, ‘Declaration of the Belgian Presidency’, *ibid.*, section II C.

¹⁷⁹ Coordinators’ Group, ‘The Palma Document’ Free Movement of Persons, A Report to the European Council by the Coordinators’ Group, Madrid, June 1989, Section A (b), *supra* note 175, 12-16.

¹⁸⁰ Section IV, A (1), *ibid.*

¹⁸¹ Section IV, A (2), *ibid.*

¹⁸² Section IV, A (3), *ibid.*

¹⁸³ Section IV, A (4), *ibid.*

¹⁸⁴ Section IV, A (5), *ibid.*

¹⁸⁵ Section VIII (1) and (4), *ibid.*

Likewise, the Programme of Action to combat terrorism and other forms of organised crime also reasserted the operational goals of cooperation amongst Member States during those years. Among many other examples it stated that

“central departments shall intensify their regular exchanges and permanent updating of detailed information concerning the activity of terrorist groups”.¹⁸⁶

Additionally, liaison officers in terrorist matters were to be appointed; common standards for ‘wanted posters’ were to be agreed to,¹⁸⁷ and similar measures in relation to drug trafficking¹⁸⁸ and organised crime¹⁸⁹ were proposed. Furthermore, the Programme called for an evaluation of the conditions under which trans-frontier observation and pursuit rights could be given to national authorities when serious offences were committed.¹⁹⁰ It also called for the study of a common information system containing data and description of persons and objects.¹⁹¹

The Schengen Convention¹⁹² was signed in 1990 and laid down the specific provisions implementing the 1985 Schengen Agreement, which at that date provided for the gradual removal of internal borders between Belgium, France, Luxembourg, Netherlands and Germany.¹⁹³ The Schengen area and cooperation established by the Schengen Agreement - and further implemented by the Schengen Convention - remained outside the scope of the Treaties and it did not involve all EC Member States, although the number of participating Member States was gradually increasing.¹⁹⁴ Hence,

¹⁸⁶ Trevi Ministers, ‘Programme of Action relating to the reinforcement of police co-operation and of the endeavours to combat terrorism or other forms of organised crime’, June 1990, para 2.1, in T. Bunyan, *Key Texts in Justice and Home Affairs*, *supra* note 141, 37.

¹⁸⁷ Both measures in para 2.3, *ibid.*.

¹⁸⁸ Para 3, *ibid.*.

¹⁸⁹ Para 4, *ibid.*.

¹⁹⁰ Para 13, *ibid.*.

¹⁹¹ Para 15, *ibid.*.

¹⁹² The Schengen Convention was signed in 1990 and laid down detailed rules applying to the Schengen Agreement, namely measures on visas and asylum, cooperation between police forces in matters of hot pursuit and observation, on mutual assistance in criminal matters, extradition, protection of personal data, transport and movement of goods, transfer and execution of criminal judgments, fight against drugs, coordination of fire arms legislation and it established the Schengen Information System (SIS), *supra* note 59.

¹⁹³ *Supra* note 59.

¹⁹⁴ The Convention came into force on 1 September 1993 in France, Germany, Belgium, Luxembourg and the Netherlands, Spain and Portugal. Subsequently accession Treaties were signed with Italy, Greece, Austria, Sweden Denmark and Finland. An Association Agreement with Iceland and Norway was also adopted. See for details Annual Report of the Schengen Central Group for 1997 (Sch/C (98) 60, 22 June 1998). The Schengen *acquis* was later on incorporated into the framework of the ECT and TEU Treaties (see Schengen Protocol, annexed to the Amsterdam Treaty, integrating the Schengen *acquis* into the framework of the European Union; Council Decision 1999/435/EC of 20 May 1999, OJ L 176/1 [1999] and Council Decision 1999/436/EC of 20 May 1999, OJ L 176/17 [1999]). In 1999 and 2000, the UK and Ireland asked

in relation to the participant States at the time Schengen further contributed to streamline the operational nature of cooperation in police matters by introducing measures which allowed for police officers to carry out cross border observation¹⁹⁵ and the pursuit of criminals across borders (so-called ‘hot pursuit’) into the territory of other signatory States.¹⁹⁶ Furthermore, Schengen proposed the setting up of an information system with data on persons,¹⁹⁷ the application of the *ne bis in idem* principle transnationally,¹⁹⁸ the facilitation of extradition¹⁹⁹ and the transfer of the execution of criminal judgements between the signatory States.²⁰⁰ Operational concerns were taken further with the proposal for a European Police Office (Europol) in 1991²⁰¹ and its predecessor – the European Drugs Unit (EDU). The latter paved the way to Europol and was to be focused on the “*exchange and analysis of intelligence in relation to illicit drug trafficking, the criminal organisations involved and associated money laundering activities affecting two or more Member States.*”²⁰² However, the Schengen Convention, EDU and later Europol only entered into force after the TEU(M).

Whilst *for a* for cooperation were proliferating, the scope of cooperation in these matters was also becoming broader. From a substantive point of view, the activities of the several groups created under Trevi and the other *ad hoc* groups expanded the domains of intervention considerably. Whilst before 1985 the focus was on counter terrorism measures, it was considerably enlarged after 1985, as measures in different areas ranging from terrorism, to illegal immigration, drug and human trafficking, hooliganism among others, began to be considered. Indeed, the previously referred to Declaration of the Belgian Presidency,²⁰³ issued in 1987, called for the strengthening of cooperation in relation to immigration, the fight against drugs and terrorism, and more specifically, for a unified system of visas, the strengthening of controls at external borders, including the

to take part in some aspects of Schengen, namely police and judicial cooperation in criminal matters, the fight against drugs and the SIS, see Council Decision 2000/365/EC, OJ L 131/43 [2000]; Council Decision 2002/192/EC, OJ L 64/20 [2002]; and Council Decision 2004/926/EC, OJ L 395/70 [2004]. The Schengen Protocol annexed to the Amsterdam Treaty and the UK, Ireland and Denmark participation were subsequently amended by the Treaty of Lisbon; see Protocol on the Schengen *acquis* integrated into the Framework of the European Union, OJ C 310/348 [2004]. See also *supra* note 59.

¹⁹⁵ Article 40, Schengen Convention, *ibid.*.

¹⁹⁶ Article 41, *ibid.*.

¹⁹⁷ Articles 92 and 94, *ibid.*.

¹⁹⁸ Article 54, *ibid.*.

¹⁹⁹ Article 59, *ibid.*.

²⁰⁰ Article 67, *ibid.*.

²⁰¹ “The Development of Europol: Report from Trevi Ministers to the European Council in Maastricht”, Maastricht, December 1991, in Bunyan, *Key Texts on Justice and Home Affairs*, in T. Bunyan, *Key Texts in Justice and Home Affairs*, *supra* note 141, 40-41.

²⁰² Ministerial Agreement on the establishment of the European Drugs Unit, Copenhagen, 2 June 1993, in Bunyan, *Key Texts on Justice and Home Affairs*, in T. Bunyan, *Key Texts in Justice and Home Affairs*, *supra* note 141, 47.

²⁰³ Trevi Ministers, “Declaration of Ministers of the Trevi Group”, *supra* note 156.

means to repatriate third country nationals illegally residing in the Community, for measures to avoid abuse of political asylum and a further intensification of cooperation in the fight against terrorism, illegal immigration and drug trafficking. The document also referred briefly to cooperation in the domains of fire, firearms and hooliganism. This Declaration of the Trevi Ministers makes official the shift from the subject matter of terrorism alone, which continued to be central, to other domains such as drug trafficking and illegal immigration.

From 1987 onwards these issues began to be addressed together in many declarations, actions plans and other official documents. This was clear, for instance, from the Palma document which defined the type of measures that should be decided by a group or groups and which called for measures on the fight against terrorism, drug trafficking and other illicit trafficking, improved cooperation of law enforcement bodies, judicial cooperation in criminal matters and the control of articles accompanying travellers. Regarding the external frontiers of the EC, it called for administrative and technical instruments for the treatment of non-Community citizens, namely a visa policy, a list of persons to be refused entry and the determination of competencies to decide on asylum applications.²⁰⁴ Along the same lines, the Schengen Convention brought in the possibility for cooperation in police and security matters in relation to offences such as murder, rape, counterfeiting, armed robbery, extortion, traffic in human beings, illicit traffic in narcotic drugs and psychotropic substances, illicit explosives and illicit carriage of toxic and dangerous waste among others.²⁰⁵ The umbrella of interest amongst EC related groups was gathering more and more areas of criminality in a crescendo of topics and initiatives that would finally be officially absorbed by the European Union in 1993 with the entering into force of the TEU(M).

2.2. A broader scope: beyond core EC policies

At the EC level, there was an expanding rationale for intervention in criminal matters. As seen in the first part of this chapter, the protection and enforcement of Community policies could influence domestic criminal laws. This influence was taking place on two different levels: through the choice of implementation of Community measures via national criminal law; and via the Court's judicial intervention, setting limits to the scope of national criminal offences and penalties.

²⁰⁴ Trevi Ministers, "Programme of Action relating to the reinforcement of police co-operation and of the endeavours to combat terrorism or other forms of organised crime", June 1990, para 2.1, in T. Bunyan, *Key Texts in Justice and Home Affairs*, *supra* note 141.

²⁰⁵ See for examples Articles 40 (7) and 41 (4) (a) of the Convention applying the Schengen Agreement of 14 June 1985, *supra* note 59.

After 1985, indirect requests for Member States to use their national law as a means to protect EC interests, were also further expanded to other domains of criminality with measures adopted on money laundering, drugs and weapons control as well as insider dealing practices. In these measures, the use of criminal offences and penalties by the national legislator was implied or even, on occasion, referred to in a direct way.

Intervention in drug related matters was said to be essential for the completion of the single market, particularly related to the correct application of law and customs regulations in agricultural matters.²⁰⁶ The Council noted that it was important in this context “*that each Member State provide for sufficiently dissuasive penalties.*”²⁰⁷ Therefore, a Regulation laying down measures to be taken to discourage the diversion of certain substances to the illicit manufacture of narcotic drugs and psychotropic substances, for instance, provided for the introduction of measures

*“...to monitor trade between the Community and third countries in substances frequently used for the illicit manufacture of narcotics drugs and psychotropic substances for the purposes of preventing the diversion of such substances.”*²⁰⁸

The Regulation went beyond monitoring by providing that

*“Each Member State shall determine the penalties to be applied for infringement of the provisions of this Regulation. The penalties shall be sufficient to promote compliance with those provisions.”*²⁰⁹

Likewise, Directive 91/308 on the prevention of the use of the financial system for the purpose of money laundering was adopted. Strikingly, the use of criminal law at the national level was specifically mentioned in the preamble.²¹⁰ Moreover, the body of the Directive did not make express reference to criminal provisions, yet article 14 of the Directive held that

²⁰⁶ Preamble of the Council Regulation (EEC) No 3677/90 of 13 December 1990 laying down measures to be taken to discourage the diversion of certain substances to the illicit manufacture of narcotic drugs and psychotropic substances, OJ L 357/1 [1990].

²⁰⁷ *Ibid.*

²⁰⁸ Article 1, *ibid.*

²⁰⁹ Article 8, *ibid.*

²¹⁰ Preamble of the Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, OJ L 166/77 [1991].

*“Each Member State shall take appropriate measures to ensure full application of all the provisions of this Directive and shall in particular determine the penalties to be applied for infringements of the measures adopted pursuant to this Directive.”*²¹¹

Likewise, Article 15 once again left Member States the option to adopt stricter measures than the ones provided for by the Directive. Finally, Directive 91/477 on control of the acquisition and possession of weapons called for the harmonisation of measures on weapon control, namely for the purposes of hunting and target shooting.²¹² Once again the Directive made use of the usual formula and stated that

*“Member States shall introduce penalties for failure to comply with the provisions adopted pursuant to this Directive. Such penalties must be sufficient to promote compliance with such provisions.”*²¹³

Directive 89/592, which coordinated regulations on insider dealing, was a further example of the Court’s influence in national criminal law.²¹⁴ The initial proposal made by the Commission expressly required Member States to make insider dealing a criminal offence.²¹⁵ The final draft was not as ambitious but still used a language that clearly incentivised Member States to adopt a criminal approach to insider dealing. First, Article 2 stated that *“Each Member State shall prohibit any person who”* possesses inside information by virtue of his membership, holding capital or access to information, from taking advantage of that information.²¹⁶ Furthermore, Article 3 held that,

“Member States shall prohibit any person subject to the prohibition laid down in Article 2 who possesses inside information from: (a) disclosing that inside information to any third party [or to] (b) recommend or procuring a third party on the basis of that information [...].”

²¹¹ *Ibid.*. For details on the debate on how much the Directive and follow up Directives could push for the adoption of criminal measures, on the background of negotiations and on the legal basis of the Directive, see V. Mitsilegas, *Money Laundering Counter-Measures in the European Union* (The Hague/ London : Kluwer Law International, 2003) chapter 3.

²¹² Preamble of Council Directive 91/477/EEC of 18 June 1991 on control of the acquisition and possession of weapons, OJ L 256/51 [1991].

²¹³ Article 16, *ibid.*.

²¹⁴ Council Directive 85/592/EEC of 13 November 1989 coordinating regulations on insider dealing, OJ L 334/30 [1989].

²¹⁵ Roger France, “The Influence of European Community Law on the Criminal Law of the Member States”, *supra* note 114, 340.

²¹⁶ For more details see Article 2 Council Directive 85/592/EEC, *supra* note 214.

Finally, in Article 6, the Directive specifically left the door open for Member States who wished to adopt more stringent provisions than those laid down by the Directive.²¹⁷

These measures mainly called for the use of national criminal law to protect the aims of the respective EC measures, clearly leading to an ‘augmentation effect’²¹⁸ or ‘extension of national criminal law.’²¹⁹ This augmentation effect was further qualified by the CJ in 1988 in the case *Greek Maize*.²²⁰ In this dispute, the Court made use of yet another principle of EC law to protect EC interests and policies via national criminal law. It relied on the principle of loyal cooperation laid down initially in Article 5 TEC, which stated that

“Member States shall take all appropriate measures, whether general or particular, to ensure the fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of Community’s tasks.”

Hence, based on Member States’ duty of loyal cooperation the Court held that,

“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.”²²¹

The Court went on noting that,

“It should be observed that where Community legislation does not specifically provide for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 5 of the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law.”²²²

²¹⁷ Article 6, *ibid.*

²¹⁸ The term is used by Delmas Marty, see “The European Union and Penal Law”, *supra* note 2, 97-106.

²¹⁹ As noted by Roger France, “The Influence of European Community Law on the Criminal Law of the Member States”, *supra* note 114, 325.

²²⁰ Case 68/88 *Commission v Greece* [1989] ECR 2965, para 24.

²²¹ Para 22, *ibid.*

²²² Para 23, *ibid.*

*“For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.”*²²³

In *Greek Maize* the Court set two general obligations upon Member States. First, an obligation of assimilation or equivalence, by requiring Member States to ensure that breaches of Community law are sanctioned on conditions, substantive and procedural, analogous to those applying to breaches of national law of a similar nature and importance; and that national authorities must proceed in relation to breaches of Community law with the same diligence as they use in implementing national law. And, second, an obligation of efficacy, holding that whilst Member States retain a choice of sanctions, measures taken should in every case confer on the sanction an effective, proportionate and dissuasive character.

Klip has suggested that this decision can cause difficulties of interpretation in some legal orders as the decision to prosecute or not to prosecute at a national level can be discretionary in some Member States. Whilst in some national legal orders prosecution of crimes is pursued based on the principle of legality, which holds that all offences that come to the attention of the police or the prosecution must be prosecuted; other legal orders allow for more discretion, in accordance with the principle of opportunity, which conveys that a prosecutor may decide not to prosecute based on general interest. In practice, however, differences between the two are not very steep as both principles allow for exceptions and have qualifications made to them. According to Klip the enforcement obligation set by the CJEU

*“... does not require Member States to do the impossible. In other words, if the case has been seriously investigated and there is simply insufficient evidence to sustain a conviction, a Member State may refrain from bringing charges, on condition that it would do the same with regard to the enforcement of national law unrelated to Union law.”*²²⁴

The requirement of ‘effectiveness’ set by the CJEU in *Greek Maize* can also leave some room for doubt as to the exact meaning of the ‘effective, dissuasive and proportional’ character of a sanction; the Court did not elaborate upon this. Harding offered some guidance in how to read these these criteria. First, the author notes that the Court, in it’s

²²³ Para 24, *ibid.*

²²⁴ A. Klip, *European Criminal Law*, *supra* note 15, 251.

reasoning, clearly places effectiveness as the main goal and links it directly with proportionality and dissuasion. Then Harding moves on to explain what can be understood by the three criteria proposed by the Court, suggesting that,

*“Beginning with the, perhaps obvious but nonetheless crucial, statement that in the present context effectiveness means supporting and reinforcing the value of the norms and standards which have been breached, it should be clear that such strategy requires (a) taking into account the nature and gravity of and the damage caused by the breach, and (b) acting in a way to secure the rules or standards in the future, inhibiting further violations. The first of these elements, proportionality of response, is important in achieving a sense of fairness in enforcement, which in turn helps to ensure confidence in and general support for the system of enforcement. The second element, dissuasion, is a natural objective of a measure taken in response to the breach of a prohibitive norm, in that it seeks to guarantee future respect for such a norm.”*²²⁵

As Harding further notes, the conduct in question in *Greek Maize* was a relatively straightforward example as the fraudulent conduct of the Greek authorities and fraud, in general, attracted a clear and widespread moral condemnation. Hence, according to the author, in the case in question,

*“a failure to use criminal proceedings to deal with such offending conduct would not only breach the principle of assimilation, but would also undoubtedly be regarded as insufficiently dissuasive.”*²²⁶

As the author continues, the question was however left open in relation to other cases and it necessarily requires a consideration of each particular case and of the use of particular measures in particular contexts of enforcement as this will vary from Member State to Member State.²²⁷

Regardless of this possible variation, the Court deeply reshaped the relationship between the Community and national criminal law with this judgement. Most of the CJEU’s intervention had thus far been in setting limits to national criminal law when the latter would impair the attainment of an EC goal or provision. *Greek Maize* however, clearly set an obligation that can potentially involve measures of criminal nature at a national level, namely criminal prosecution and application of criminal penalties. This rather than

²²⁵ C. Harding, “Member State Enforcement of European Community Measures: The Chimera of ‘Effective’ Enforcement” *supra* note 121, 11.

²²⁶ *Ibid.*, 17.

²²⁷ *Ibid.*, 22.

limiting national criminal law, it potentially expands Member States' action in criminal matters.

This relationship between Community law and national criminal law thus brought the EC much closer to criminal law, even if the ECT remained silent in relation to criminal matters. The pursuit of this goal was indirectly expanding the Community's influence into substantive and procedural criminal law of the Member States. The driving force behind this legislative and judicial intervention was clearly the effectiveness of Community law. National criminal law was thus increasingly being used as a tool to regulate the single market and accomplish EC goals.

2.3. The shaping of organised crime as the motto for the European Union narrative on crime

Pertinent to the narrative of protection and enforcement of EC policies via national penal laws, the idea of the fight against organised crime as an underlying rationale for intervention in EC criminal matters began to quietly emerge out of this expanding dynamic of intervention. Step by step, organised crime began to provide a political and legal rationale for integration in criminal law related matters, although this intervention was only formally established after 1999 with the adoption of the TEU(A). In the Declaration of Ministers of the Trevi Group issued in 1989 the idea of organised crime as an all-embracing concept came across very clearly,

*"... we note with growing concern the development of organised crime across frontiers. Terrorism and professional criminals are increasingly adept at exploiting the limits of competence of national agencies, the difference between legal systems which exist between countries, and gaps in cooperation between respective services. Crimes such as terrorism, drug trafficking, traffic in human beings, as well as the laundering of profits obtained in these and other criminal activities, are now being planned and organised on a transnational scale, taking advantages of all facilities offered by the development of communications and international travel."*²²⁸

In view of these realities, Interior Ministers called for an increase in cooperation in counter terrorism, illicit drug trafficking, traffic in human beings and other principal aspects of organised crime including laundering of illicit profits, and called for an improvement in exchanges and communications between national agencies.²²⁹ Types of

²²⁸ Trevi Ministers, "Declaration of the Ministers of the Trevi Group", *supra* note 156, para 3.

²²⁹ *Ibid.*, para 3 and 4, 35-36.

criminality that could also be understood separately were brought together under the unifying concept of organised crime.

Furthermore, the 1990 Programme of Action, mentioned earlier, further explored this discourse by introducing a single section on the fight against organised crime, together with two other sections on counter terrorism and drug trafficking. Specifically, the Declaration called for the regular exchange and permanent update of information with regard to

*“...various forms of organised crime, in particular as far as armed attack is concerned, and crimes connected with the traffic of individuals, arms and explosives or dangerous products, valuable pictures, works of art, cultural property, forged currency, vehicles as well as the laundering of illicit profits.”*²³⁰

Along the same lines, the Declaration of the Ministers of the Trevi Group noted that the purpose of the Declaration was

*“...to give a wider publicity to the measures which Interior Ministers and Justice Ministers of European Community Member States are seeking to develop to reinforce co-operation in the fields of law enforcement and security, in view of the growth of international organised crime and the completion of the Single Market after 1992.”*²³¹

The “Programme of Action relating to the reinforcement of police cooperation and of endeavours to combat terrorism and other forms of organised crime” also signalled the intertwined nature of the single market, organised crime, terrorism and illegal immigration, namely by proposing a

²³⁰ Trevi Ministers, “Programme of Action relating to the reinforcement of police co-operation and of the endeavours to combat terrorism or other forms of organised crime”, *supra* note 204, para 4. The activities of all the new groups and the generalised concern with criminality across borders, which comes across in these documents, led Bigo to point out the emergence of an internal security landscape closely linked to the completion of the single market. According to the author, this led to the emergence of an ideology of a continuum of security – from drug trafficking to immigration or asylum – in which the prevention and repression of crime and the prevention and repression of illegal immigration seemed to have a direct link. These changes were at the heart of the emergence of a so-called ‘European security field’ or a ‘European crime prevention space.’ D. Bigo, “The European Internal Security Field: Stakes and Rivalries in a Newly Developing Area of Police Intervention”, in M. Anderson, M. Den Boer (eds) *Policing Across National Boundaries* (London: Pinter Publications, 1994) 63; L’Europe des Polices et de la Securite Interieure (Brussels: Editions Complexes, 1992) 32.

²³¹ Trevi Ministers, “Declaration of Ministers of the Trevi Group”, *supra* note 156, 35, para 2.

*“...synthesis of the arrangements considered between police and security services with a view to more effective prevention and repression by those services of terrorism, drug trafficking or any forms of crime including illegal immigration.”*²³²

This was all to take place through an increased cooperation between Member States.

2.4. Moving away from the state: concerns over lack of accountability and transparency

The high level of intergovernmental activity in criminal matters outside of the Treaties and national framework, raised concerns and difficulties. Similarly to what happened before 1985, the multitudes of groups created were outside the framework of the Treaties and operated in an *ad hoc* basis with no scrutiny from national or European Parliament. Neither did they receive review by the CJEU in what seemed to now be the traditional formula for cooperation amongst Member States in security related matters;²³³ whilst at the national level national bureaucracies were able to evade procedural and political constitutional constraints.²³⁴ The European Parliament, for instance was very critical of its non-role.²³⁵ Similarly, the Home Affairs Select Committee was also concerned with the fact that the

*“consultative and democratic procedures of the Community were not followed in the case of Trevi.”*²³⁶

However, despite these concerns over the accountability of this system and its actors, others felt this was not so problematic. The British Home Secretary, for example, was of the opinion that accountability of Trevi and the Working Groups was not necessary. He noted to the Home Affairs Select Committee of the House of Commons

“It does not need any safeguards. You have to remember what Trevi is. Trevi is merely a gathering together of the Ministers of the Interior of the EC countries to give, hopefully, political impetus to various plans or closer policing co-operation. That is all it is. It is not an executive body. Therefore, accountability is from individual Ministers of the

²³² Trevi Ministers, “Programme of Action relating to the reinforcement of police cooperation”, *supra* note 204, 37.

²³³ For an overall explanation of these patterns of intervention in EU criminal matters see E. Baker and C. Harding, “From Past Imperfect to Future Perfect?”, *supra* note 2, 5.

²³⁴ See D. Chalmers, “Bureaucratic Europe: From Regulating Communities to Securing Unions”, CES Working Paper, Baltimore, 1998, 9.

²³⁵ House of Commons, “Practical Police Cooperation in the European Community”, *supra* note 143, 59.

²³⁶ *Ibid.*, xxii.

*Interior to their own governments, and there is no need for the body as a whole to be thought of as responsible to any organisation.”*²³⁷

Along the same lines, Walker also noted that

*“For all the political salience of its areas of interest, Trevi was no more than a forum for policy discussion and information exchange, one that operated in the shadow of the supranational legal structure.”*²³⁸

Whilst the issue of the lack of accountability was left untouched, small improvements resulting from these criticisms of Trevi and Trevi-like structures began to be made. Steps towards more transparency, for example, were taken and the former secretive nature of Trevi began to be abandoned. Indeed, after 1985, several documents of the Trevi Ministers, of European Councils of the Justice and Home Affairs meetings and of the work of several Groups began to be released to the public. This was important given the negativity around the secrecy of Trevi on the part of national authorities and academics alike. Indeed, as mentioned earlier, the activities of Trevi before 1986 are difficult to pin down, as there are very few documents available from the work of the group during those years, highlighting the secret nature for which Trevi came under criticism. Bunyan, for example, notes how between 1976 and 1993 the Trevi Group worked in secret without accountability and how much of the information available today especially in reference to the period before 1986 only surfaced in 1993.²³⁹

Hence, the first document to be released was the “Declaration of the Belgium Presidency” issued in 1987 by the Trevi Group Ministers with the single market in mind.²⁴⁰ Subsequently, the Palma document, drawing the structures to be created under the TEU(M), was adopted in 1989.²⁴¹ In the same year the Ministers of the Trevi Group issued a Declaration to give wider publicity to the measures the Ministers of Interior and Justice were seeking to develop and in 1990 the Trevi 92 Group drafted the Programme

²³⁷ *Ibid.*, 162-163.

²³⁸ N. Walker, “The pattern of Transnational Policing”, in T. Newburn (ed) *Handbook of Policing* (Devon: Willan Publishing, 2008, 2nd Edition) 119, 126.

²³⁹ T. Bunyan, *Key Texts in Justice and Home Affairs*, *supra* note 141, 33. Furthermore, the scarcity of data on Trevi was a concern also shared by national authorities, namely by the House of Commons as mentioned earlier in this section, House of Commons, “Practical Police Cooperation in the European Community”, *supra* note 143, para 62, xxiii.

²⁴⁰ Declaration of the Belgium Presidency”, *supra* note 177.

²⁴¹ Coordinators’ Group, “The Palma Document” Free Movement of Persons, A Report to the European Council by the Coordinators’ Group, *supra* note 175.

of Action relating to the reinforcement of police cooperation and of endeavours to combat terrorism and other forms of organised crime.²⁴²

Conclusion

This chapter has suggested that the origins of European Union criminal law date back to the early period of European integration. It showed that although until 1993 the EC lacked a mandate to act in criminal matters, such issues were being pushed forward mostly by Interior Ministers and civil servants in police cooperation domains, or by EC bureaucrats, experts in the single market. The field was thus starting to be driven mostly by political concerns rather than penological ones. Regardless, during those years, through indirect, *ad hoc* and at times secretive means, the EC built the founding structure of the future field of justice and home affairs.

It did so, on the one hand, by infusing national criminal law with its hidden demands for the enforcement of its own norms. At stake here were no longer concerns over terrorism and organised crime but rather the completion of the single market and the proper enforcement of EC policies. On the other hand, the chapter also argued that a criminal law related sphere was being further built through a number of intergovernmental arrangements such as Trevi and its structures, seeking cooperation at first in terrorism matters and later on in a panoply of topics – primarily those around transnational criminality - which was easily integrated under the umbrella of organised crime. Such cooperation was narrow and mostly focused on operational matters. Yet, the displacement of criminal matters issues from the realm of the state into other *fora* raised concerns over the lack of transparency and lack of accountability of these new structures and arrangements.

The chapter suggests that the foundation for the future architecture of ECL, to be set in motion by the TEU(M), was laid very early on in the history of EU integration. As the thesis is developed, it will be shown how some of these indirect and rather secretive patterns of intervention, the areas of criminality explored, and concerns voiced before 1993, remained central to criminal matters in the EC and EU. The next chapter will analyse the so-called Maastricht era and show how the EU set its first official and formal claim as an actor in criminal matters in the European Union.

²⁴² Trevi Ministers, ‘Programme of Action relating to the reinforcement of police cooperation’, *supra* note 204.

Chapter 2 - The Evolution of European Union criminal law during the Maastricht era: shaping Euro-rationales and Euro-crime (1993-1999)

Introduction

This chapter will analyse the evolution of European Union criminal law (ECL) during the Maastricht period.²⁴³ The Treaty of Maastricht (TEU(M)) brought criminal law into the context of the Treaties, officially recognising the EU as an actor in criminal matters. It envisaged the EU's role as limited to areas of 'common interest' to Member States and established mechanisms of judicial and police cooperation aiming mostly at coordinating action and information sharing between national authorities. Overall, the EU's role was envisaged as limited and complementary to that of Member States. However, it will be argued that the arrangements set in place were in fact broad, both from a structural and substantive perspective overshadowing the minimalist approach laid down by the TEU(M). Indeed, the latter was interpreted by the legislator in a very ambitious manner. First, both judicial and police cooperation – to which the TEU(M) made specific reference to - were developed significantly. Secondly, despite the silence of the TEU(M) in relation to the harmonisation of national criminal law, the latter began to take place, namely regarding the minimum elements that constitute crimes and penalties.

This broad approach was even more poignant from a substantive point of view. The TEU(M) made reference in Article K.1 to cooperation in areas of common interest, namely judicial cooperation in criminal matters and police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime. These categories blossomed into intervention in a wide range of criminality. This wide scope was facilitated by the reaffirmation - both in political declarations and through the legal measures adopted - of the fight against organised crime and the protection of EC interests as being priorities in this arena. Indeed, organised crime, although not directly mentioned by the TEU(M), became the primary rationale for the adoption of legislation, both in relation to mechanisms of judicial and police cooperation and harmonisation amongst Member States. A large majority of resolutions, declarations, joint actions and conventions made particular reference to the organised criminality ravaging Europe. The emergence of this idea took place mostly in the absence of significant data on this topic, yet under the perception that

²⁴³ The Treaty of Maastricht - ECT(M) and TEU(M) - was signed on 7 February 1992, and entered into force on 1 November 1993 and was replaced by the Treaty of Amsterdam – ECT(A) and TEU(A) - signed on 2 October 1997 which entered into force on 1 May 1999.

the single market and the consequent internal border removal were facilitating the increase and *modus operandi* of such criminality. Consequently, organised crime became an ‘umbrella concept’ justifying the adoption of measures ranging from trafficking in human beings to fraud and counterfeiting of non-cash means of payment or corruption, among many others. This was particularly so as organised crime was referred to in political declarations and in the preambles of most legal measures adopted (mostly joint actions and conventions) as a main rationale for the adoption of many of these measures. Furthermore, the narrative of protection of EC interests and policies also became stronger. Indeed, although Article K.1 did not make particular reference to crimes affecting EC policies and interests, measures with such aim were adopted, namely those aimed at the fight against fraud and corruption affecting EU financial interests. Furthermore, the CJEU and secondary legislation continued to play an important role in increasing the protection of EC policies via national criminal law. This chapter will draw attention to how the articulation of these two main legal and political rationales by the EU legislator facilitated the EU’s focus on a specific type of criminality – Euro-crime – a fluid concept which predominantly relates to modern times, largely involving collective action, the use of some form of infrastructure and often the attempt against institutional goods. Crimes of trafficking, money laundering, terrorism, illegal immigration and fraud on a transnational scale are all offences that differ from rape, murder, and robbery among many others—offences that were left within the domestic sphere. Thus, during the Maastricht years, the EU began to lay claim to particular discourses and ideas of criminality.

1. The Treaty of Maastricht and criminal matters: a limited framework for criminal law in the European Union

The TEU(M) introduced a brand new dynamic into European integration in general and into security matters in particular. It paved the way to political integration, with the introduction of a EU citizenship, the reinforcement of the parliamentary powers and the launch of the economic and monetary union (EMU), among other initiatives. The new TEU(M) ventured into new domains, envisaging new objectives and more nuanced frameworks for decision-making. For that, it created a European Union divided into three distinct legal and institutional groups –the so-called “three pillars”. The first pillar comprised the European Communities; the second, Common Foreign and Security Policy (CFSP); and the third, Justice and home affairs, namely police and judicial cooperation in criminal matters and matters of immigration, asylum, visas and judicial cooperation in civil matters (JHA). The inclusion of the latter domain in the Treaties established the EU as an actor in criminal matters and allowed for the formalisation and

solidification of many developments which had begun to take place outside the framework of the Treaties in the previous decades.²⁴⁴

The EU's claim in criminal matters was to be complementary to Member States which remained central in this regard. This was made clear in the TEU(M), which clarified the EU's new competencies in this domain:

*“This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.”*²⁴⁵

Hence, the EU claimed competence on discrete areas of “*common interest*” only, where cooperation in justice and home affairs in general was to be developed, namely those of asylum, external borders, immigration, drugs issues (trafficking and addiction), fraud on an international scale, judicial cooperation in civil and criminal matters, customs cooperation and police cooperation in the domains of terrorism, drug trafficking and other forms of international crime.²⁴⁶

More specifically, in the criminal justice matters concerned, Article K.1 of the TEU(M) stated:

“For the purposes of achieving the objectives of the Union, in particular the free movement of persons, and without prejudice to the powers of the European Community, Member States shall regard the following areas as matters of common interest: ...

7. judicial cooperation in criminal matters; ...

9. police cooperation for the purposes of preventing and combatting terrorism, unlawful drug trafficking and other serious forms of international crime, including if necessary certain aspects of customs cooperation, in connection with the organization of a Union-wide system for exchanging information within a European Police Office (Europol).”

The scope of intervention in these areas of common interest was addressed in Article K.3, which mentioned that, in the areas referred to in article K.1, Member States should “*inform*” and “*consult*” one another within the Council in order to “*establish cooperation*” between the relevant departments of their administrations.

²⁴⁴ See chapter 1.

²⁴⁵ Article K.2 (2) TEU(M) OJ. C. 191, 29 July 1992.

²⁴⁶ Article K.1, *ibid.*.

Rather limited in scope and depth, the TEU(M) maintained that Member States should remain at the centre of these new arrangements but attributed the most prominent role to the Council and a rather secondary role to all other main institutions. Hence, the Council was the central institution and its work was to be supported by a Committee – the K4 Committee – which ought to give opinions and prepare the Council’s discussions.²⁴⁷ Other institutions were given minor roles only. Article K.4 (2), for example, provided that the European Commission did not have any right of initiative in criminal law related matters even if it ought to be “*fully associated*” with the work developed in the domains of police and judicial cooperation in criminal matters.²⁴⁸ The European Parliament had no role in the decision making process but again, similarly to the European Commission, was also to be “*informed*” of the discussions in the area involving themes in Title VI and consulted on the “*principle aspects of activity*”. Finally, the Court of Justice was also given no jurisdiction in criminal matters except if a specific Convention would stipulate its jurisdiction to interpret their provisions and to rule on disputes regarding their application.²⁴⁹

These institutional arrangements centred on the Council and the K4 Committee, leaving the European Commission, the European Parliament and the Court of Justice in the periphery of the decision-making process, in turn prolonging and accentuating old concerns over the lack of transparency and accountability of the EU’s activity in criminal law related matters. The European Commission, for example, which, according to the TEU(M), was to be fully associated with the role of the K4 Committee, had very little opportunity to do so and there is very little evidence that the Committee associated the former with its work as stipulated.²⁵⁰ As for the EP, it was consulted only once before 1997.²⁵¹ In a similar fashion, the CJEU’s limited competencies were not used at all during these years. As a matter of fact, only in 2008 and 2010 did two preliminary references regarding conventions signed during the Maastricht period reach the Court – both regarding Europol staff disputes.²⁵²

²⁴⁷ Article K.4 *ibid.*.

²⁴⁸ Article K.3 (2) gave the European Commission rights of initiative in other domains of Justice and Home Affairs, *ibid.*.

²⁴⁹ Article K.3, *ibid.*.

²⁵⁰ Even in relation to the domains where the Commission had the right of initiative, such as immigration and border control, for instance, in practice it did not make much use of such a right until 1997. Even after this, Peers points out how only two of the Commission’s Proposals were agreed on before the entry into force of the Treaty of Amsterdam, S. Peers, *EU Justice and Home Affairs Law* (Oxford: OUP, 2006, Second Edition) 12.

²⁵¹ S. Peers, *ibid.*, 13.

²⁵² Case C-133/08 *ICF v BV* ECR I-9687 [2009] and C-29/10 *Heiko Koelzsch v Luxembourg* ECR I-01595 [2010].

Furthermore, as suggested by some authors, this weak role of the EP, Commission and CJEU was not compensated for by the intervention of national parliaments or courts.²⁵³ As a matter of fact, as Chalmers notes, these new arrangements allowed Member States to evade national political controls, e.g. national parliaments, while enacting legislation in criminal matters.²⁵⁴ Thus, justice and police cooperation in criminal matters were almost completely reliant on Member States' political will and unanimous votes causing discomfort in a domain where the rule of law and constitutional guarantees were strongly associated with the national level.

Furthermore, besides this limited framework regarding accountability, transparency continued to be a main concern, as all stages of decision-making remained rather secretive during the Maastricht period. Indeed, the Council's work continued to be carried out in a very reserved fashion; the decision making process at the working group level was equally guarded.²⁵⁵ O'Keefe pointed out in 1996 how the structure of the K4 Committee,

*“was and still is largely unknown, save to the specialists. Its subgroups meet in secret and are not subject to the ‘copious leaks’ which occur at community level and which are an unorthodox but practical way of remedying the information deficit.”*²⁵⁶

The lack of transparency in the decision making process was further aggravated by the complex institutional arrangements set in place. This was mainly noteworthy again at the level of the coordinating Committee – K4 – but also in relation to the Schengen Group.²⁵⁷ Both groups seemed to have wide and bureaucratic structures - the K4 Committee, for example, was assisted by three Steering Committees, whilst Schengen was also assisted by several subgroups.²⁵⁸

²⁵³ C. Fijnaut, “Introduction to the Special Issue on Police Accountability in Europe” (2002) 12 *Policing and Society* 243, 244.

²⁵⁴ D. Chalmers, “Bureaucratic Europe”, *supra* note 234, 8-9.

²⁵⁵ Of particular relevance to this issue see Chapter 1 to 4 in T. Bunyan, *Secrecy & Openness in the European Union*, at <http://www.statewatch.org/secret/freeinfo/index.html>, last visited on 3 August 2011.

²⁵⁶ D. O'Keefe, “A critical View of the Third Pillar”, in A. Pauly (ed) *De Schengen à Maastricht: voie royale et course d'obstacles* (Maastricht: European Institute of Public Administration, 1996) 1, 8.

²⁵⁷ The Schengen area and cooperation remained at this stage outside the framework of the TEC and TEU(M), see for more details *supra* notes 59 and 194.

²⁵⁸ The K4 Committee was thus assisted by several working groups: one was responsible for immigration and asylum issues; another for police and frontiers; whilst a third was responsible for civil and penal justice. Each of these steering committees was subdivided into further working groups. Hence the Steering Committee on immigration and asylum had six sub groups, whilst the Steering Committee on police and frontiers had seven sub groups, respectively on terrorism, police cooperation, drugs, Europol, organised crime, customs and cooperation. Finally, the sub

The need for more openness in the work of the Council was recognised in 1994 by the European Council in Corfu:

*“The European Council ... stresses that openness and subsidiaries are essential components which require further elaboration.”*²⁵⁹

Steps began to be taken in this direction, which were acknowledged at national level. This was the case in the UK, for example, with the House of Commons noting in 1994 that

*“On 6 December 1993, the Council adopted new Rules of Procedure which provided for greater publicity for Council proceedings as envisaged in the Edinburgh Conclusions, except in the case of decisions taken under the two inter-governmental pillars”*²⁶⁰

Yet, the impact of these changes was limited. This was well illustrated by three cases reaching the CJEU aimed at obliging the Council to release documents, mainly minutes of meetings and working programmes agreed to during the Maastricht years.²⁶¹ The unwillingness of the Council to do so was clear in the exchange of letters between the journalist John Carvel of the Guardian and the Council, the origin of the first of those cases. In these letters the Council said that the journalist could not have access to documents of three specific Council meetings because

group on civil and penal justice incorporated six sub groups, specifically on extradition, penal law, commercial law (mostly protection of financial interests), extension of the Brussels Convention, simplification of transmission of documents and the right to drive motor vehicles. The Schengen structure was also rather complex: it comprised an executive committee which was basically the Council of Ministers and met biannually; a Central group which directed six working groups and comprised a hundred and twenty officials (both civil servants and police officials). The six working groups related respectively to Police and Security (Schengen I), Free movement of persons and external border control (Schengen II), Transport Issues ((Schengen III), Customs, movement of goods and agricultural products and risk in transportation (Schengen IV), stupefacients and drugs (STUP) and SIS (ORSIS). Whilst the division in working groups certainly allowed for more specialisation and hence better expertise, the large number of actors involved in the “pre” decision-making process made the whole area rather complex and less transparent; J. Benyon et. al., *Police Co-operation in Europe*, *supra* note 149,133-137.

²⁵⁹ European Council, Conclusions of the Presidency, Corfu 24-25 June 1994.

²⁶⁰ V. Miller, International Affairs and Defence Section, House of Common Library, “Openness and Transparency in the European Union”, Research Paper 94/107, London, 24 October 1994, 2.

²⁶¹ Case T-194/94 *John Carvel and Guardian newspapers ltd v Council* ECR II-02765 [1995]; Case T-105/95 *WWF UK v Commission* ECR II-00313 [1997]; and Case T-174/95 *Svenska Journalistförbundet v Council* ECR II-02289 [1998]. In general, although in all three cases the Court decided for the annulment of the decisions not to release the documents, the Court took a balanced approach and held that a balance should be made between the interest of the citizen in obtaining access to the documents and the interest of the institution in protecting the confidentiality of its deliberations.

“they refer directly to the deliberations of the Council and its preparatory instances. If it did allow access, the Council would fail to protect the confidentiality of the proceedings... [including] the position taken by Member States of the Council during the deliberations.”²⁶²

The CJEU annulled this and other Council decisions to refuse to access the documents, but even then the Council showed some reservations in releasing all the documents that had been asked for.²⁶³ The logic at play was similar to the pre-Maastricht years when criminal matters were discussed secretly and were far removed from public debate as they were thought to be mere cooperation initiatives.

Indeed, the TEU(M) limited remit in this domain was felt further, for example, in the nature, legal value and scope of the legal instruments specifically created for the new third pillar - joint positions, joint actions and conventions.²⁶⁴ Although these were clearly meant to be weaker than the instruments available in the first pillar – regulations and directives - the TEU(M) did not offer details regarding their nature, legal value or scope. Joint positions were seldom used and their legal value seemed to be very weak.²⁶⁵ This could be derived from the text of the Joint Position on the definition of ‘refugees’, for example, which clearly stated that it would “*not bind the legislative authorities or affect decisions of the judicial authorities of the Member States*”.²⁶⁶ Conventions were better known as typical instruments of international law, hence they were legally binding upon Member States after being duly ratified.²⁶⁷ Joint actions were the measures more frequently adopted. Their legal value was nonetheless still relatively weak compared to first pillar instruments such as directives or regulations, not only because they had to be adopted by unanimity, but also because they lacked direct or indirect effect²⁶⁸ and were

²⁶² T. Bunyan, *Secrecy & Openness* – chapter 2, *supra* note 255.

²⁶³ *Ibid.*

²⁶⁴ Article K.3 TEU(M).

²⁶⁵ Only two Joint Positions were adopted, namely the Joint Position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term 'refugee' in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees, OJ L 63/2 [1996]; and the Joint Position of 25 October 1996 defined by the Council on the basis of Article K.3 (2) (a) of the Treaty on European Union, on pre-frontier assistance and training assignments, OJ L 281/1 [1996].

²⁶⁶ Preamble of the Joint Position, *ibid.*

²⁶⁷ Peers however makes a distinction between Conventions as instruments of international law and Conventions as in the EU context by noting that: “*in the absence of any indication that the EU Treaty aimed to create a supranational legal system like the Community’s, it was presumably still left up to each Member State to determine the legal effect of a Convention in their national law.*” S. Peers, *EU Justice and Home Affairs Law*, *supra* note 250, 16.

²⁶⁸ Direct effect, briefly, is a principle which allows individuals to invoke EU law provisions in a national court against the State or against an individual (horizontal direct effect); indirect effect is a principle which requires national courts to interpret national law in the light of EU law. See for

not subject to control or enforcement mechanisms. It was thus difficult to control their implementation by Member States or to follow through on any steps taken at the domestic level. Their exact legal value was also contested. The large majority of Member States and the Council were of opinion that joint actions were

*“obligatory in law and that the extent of the obligation on the Member States depends on the content and the terms of each Joint Action.”*²⁶⁹

But other Member States such as the UK and Portugal disagreed with this view and had the opinion that Joint Actions were not automatically binding and that this would depend on the text of each measure. Such an understanding appeared to be shared by Calderoni who notes,

*“the lack of obligations on Member States made Joint Actions useful tools for political purposes without any actual obligation upon governments.”*²⁷⁰

The heart of the matter was that, as Walker noted, these third pillar measures revealed themselves to be rather weak as they

“tended to be ‘soft’ rather than ‘hard’- facilitative rather than compulsory – and did not penetrate the national legal systems sufficiently to confer rights and obligations on individuals”.²⁷¹

This section has shown how the TEU(M) empowered the EU as an actor in criminal law related matters for the first time in the history of European integration. It did so by attributing a rather limited role to the EU in such a field. However, it will be seen in the following section how this restrained formal approach was in contrast with the wide and fast political and legal narratives on crime which were particularly felt at a structural level.

more details D. Chalmers, G. Davies and G. Monti, *European Union Law* (Cambridge: Cambridge University Press, 2010) 268-300.

²⁶⁹ Outcome of proceedings of K.4 Committee of 7 April 1995, Council Document 6684/95 of 4 May 1995.

²⁷⁰ F. Calderoni, “A Definition that Could not Work: the EU Framework Decision on the Fight Against Organised Crime” (2008) 16 *European Journal of Crime, Criminal Law and Criminal Justice* 266.

²⁷¹ N. Walker, “The pattern of transnational policing”, *supra* note 238, 127. It should also be noted that the Council, in the JHA domain in general and especially in asylum and immigration matters, also made a large use of soft law instruments such as decisions and recommendations and that these were necessarily non-binding upon Member States, Peers, *EU Justice and Home Affairs Law* (Oxford: OUP, 2011, Third Edition) 14.

2. Beyond the tools given by the Treaty: police, judicial cooperation and more

As seen in the previous section, Article K.3 envisaged that Member States should *inform* and *consult* one another in order to *establish cooperation* in the areas of common interest mentioned by Article K.1. These included

*“judicial cooperation in criminal matters” and “police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime, including if necessary certain aspects of customs cooperation, in connection with the organization of a Union-wide system for exchanging information within the European Police Office (Europol).”*²⁷²

The wording of the TEU(M), especially in reference to informing and consulting between Member States in order to establish cooperation, indicates a limited functional remit in criminal matters which was compatible with the understanding, laid down by the TEU(M) as well, that Member States were to remain primarily responsible for criminal matters regardless of the new actor in this field, i.e. the EU.

In practice, however, the framework built in the implementing of these TEU(M) provisions was far from minimal, both from a functional and from a substantive perspective. Judicial and police cooperation were treated in great depth with the creating of contact points, networks for information sharing and mutual training, as well as specific EU or multinational organs to facilitate cooperation among other initiatives. Yet, the extent of the wide interpretation given to the words of the TEU(M) was even better portrayed in several initiatives of approximation of national laws, which could hardly find correspondence in any of the terms and wording of the TEU(M). The EU was clearly comfortably stepping into its new role and even stretching it with regard to its corresponding competencies.

2.1. Police and judicial cooperation

Regarding police and judicial cooperation, mechanisms were made easier, networks of police and judicial authorities were established, specific programmes of training and exchange between national authorities were set in place, whilst specific EU bodies to facilitate such cooperation were created. In general, most of these initiatives were seeking a broader, general goal of efficient exchange of information between national authorities: information on goods, on know-how, on expertise and most importantly, on

²⁷² Article K.1 (9) TEU(M).

the individual. The building of a mutual understanding and of a framework where cooperation and information sharing were to be easier was thus initiated through the simplification and streamlining of mechanisms aimed at a better mutual understanding of national systems and at facilitating prosecution across Member States. The number and depth of measures adopted was considerable in this regard which perhaps comes as no surprise given the high level of development of this field even prior to the TEU(M).

This was seen where judicial cooperation was concerned, for example, in 1995 when a Convention was signed on the simplification of extradition which sought to reduce the time necessary for extradition and to make procedures easier.²⁷³ The Convention dealt mainly with issues of consent and sought to impose a maximum period of twenty days for the extradition to take place.²⁷⁴ Additionally, specific networks of experts were formed, namely the European Judicial Network – a network of judicial contact points between the Member States, which sought to enable direct contacts between the national judicial authorities in order to help the prevention and combat of all forms of international crime, including organised crime.²⁷⁵ Along the same lines, the Grotius Programme – a programme of incentives and exchanges for legal practitioners – was also set in place, with the aim of fostering a mutual knowledge and understanding of the EU's legal and judicial systems and to facilitate the lowering of barriers to judicial cooperation between Member States, namely through training, exchange and work-experience programmes, meetings, studies, research and the distribution of information.²⁷⁶

Other efforts to improve mutual understanding were also taken, such as the adoption of a Joint Action on good practice on mutual legal assistance, requiring each Member State to deposit a “Statement of good practice” in executing and sending requests to other

²⁷³ The Convention drawn up on the basis of Article K.3 of the Treaty of the European Union, on simplified extradition procedure between the Member States of the European Union, OJ C 78/2 [1995]. The effort to simplify and make extradition quicker was criticised by R. Errera, for example, who thought that the previous regime – under the 1957 European Convention on Extradition – was satisfactory and allowed for the creation of an authentic European common place in relation to extradition. Furthermore, whilst the author recognised that making extradition simpler could be a noteworthy objective, he also recalled that it would only be so as long as the basic principles of the rule of law were respected, namely the right of judicial review, which was lacking in the Convention, in R. Errera, “Combating fraud, judicial criminal matters and police cooperation”, in J. Winter, D. Curtin, A. Kellermann and B. de White, *Reforming the Treaty of the European Union* (TCM Asser Institute: Kluwer Law International, 1995) 407, 410.

²⁷⁴ Articles 7, 8, 11 and 12 of the Convention on simplification of extradition, *ibid.*.

²⁷⁵ Joint Action 98/428/JHA of 29 June 1998 adopted by the Council on the basis of Article K.3 of Treaty on European Union, on the creation of a European Judicial Network, OJ L 191/4 [1998].

²⁷⁶ Preamble and Article 1 (3) of the Joint Action of 28 October 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on a programme of incentives and exchanges for legal practitioners, OJ L 287/3 [1996].

Members.²⁷⁷ The Joint Action on drug trafficking made a similar call and urged Member States to

“make the practices of their police, customs services and judicial authorities more compatible with each other”.²⁷⁸

Along the same lines, the Joint Action on combating racism and xenophobia also called upon Member States to improve their judicial cooperation in relation to contact points, sharing of information and the seizure and confiscation of tracts, pictures or material containing expressions of racism and xenophobia.²⁷⁹ All these measures aimed at developing better communication and mutual understanding between national authorities.

Police cooperation was the domain where initiatives were more numerous and significant. This came as no surprise given the strong inheritance the pre-Maastricht years had left at this level. Hence, many of these initiatives came to formalise and make official structures and initiatives already taken and debated during the Trevi period. Nonetheless, significant new steps and projects were put forward, namely attempts at centralisation and the creation of more structured arrangements for cooperation. Overall, police cooperation followed the same objective and rationale as judicial cooperation – sharing information and knowledge.

²⁷⁷ Article 1 of the Joint Action 98/421/JHA of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty of the European Union, on good practice in mutual legal assistance in criminal matters, OJ L 191/1 [1998].

²⁷⁸ Article 2 of the Joint Action, *ibid.*

²⁷⁹ Joint Action 96/443/JHA of 15 July 1996 adopted by the Council on the basis of Article K.3 of the Treaty of the European Union, concerning action to combat racism and xenophobia, OJ L 185/5 [1996], Title I (B). More Joint Actions, besides the ones mentioned, called for similar improvements in cooperation, such as Joint Action on the targeting criteria for police, Joint Action 97/372/JHA adopted by the Council on the basis of Article K.3 of the Treaty of the European Union, for the refining of targeting criteria, selection methods, etc., and collection of customs and police information, OJ L 159/1 [1997]; the Joint Action on the Oisin Programme, Joint Action 97/12/JHA of 20 December 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union providing for a common programme for the exchange and training of, and cooperation between, law enforcement authorities, OJ L 007/5 [1997]; the Joint Action on international organised crime, Joint Action 96/747 of 29 November 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, OJ L 342/2 [1996]; and the Joint Action concerning the exchange of information on the chemical profiling of drugs, Joint Action 96/699/JHA of 29 November 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning the exchange of information on the chemical profiling of drugs to facilitate improved cooperation between Member States in combatting illicit drug trafficking, OJ L 322/5 [1996].

Initiatives ranged from the creation of a framework for liaison officers with “*more rapid and effective cooperation between law enforcement agencies*” in mind,²⁸⁰ to frameworks of cooperation between contact points and exchange of information between national authorities in relation to terrorism and sexual exploitation of human beings, for example. This was the case of the Joint Action on the exchange of counter terrorism expertise²⁸¹ and of the Joint Action establishing incentives and exchange programmes for persons responsible for combating trade in human beings and the sexual exploitation of children.²⁸² The first envisaged the enhancement of cooperation between national counter-terrorist agencies, namely through the creation and availability of a directory of counter-terrorist competences, skills and expertise,²⁸³ whilst the second established a programme to develop and coordinate initiatives such as training, studies or exchange of actions on the combat of trafficking in human beings, on the sexual exploitation of children, on the disappearance of minors and on the use of telecommunications facilities.²⁸⁴

Subsequently, efforts for a better mutual knowledge were streamlined with the creation of EU’s own bodies in relation to police cooperation. The first of those bodies was the European Drug Unit (EDU) a non-operational team whose main objective was to provide support and assistance to national police and other agencies to combat criminal activities namely through the exchange and analysis of information and intelligence, created in 1993.²⁸⁵ Initially these exchanges were to be related to offences on drug trafficking and associated money laundering and organised crime but the remit was later on extended to the fight against illegal trade in radioactive and nuclear substances, illegal immigration networks, vehicle trafficking and associated money laundering operations.²⁸⁶ The EDU was composed of national liaison officers which acted according to their national legislation. Furthermore, the EDU also had four analysts whose task

²⁸⁰ Preamble of the Joint Action of 14 October 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union providing for a common framework for the initiatives of the Member States concerning liaison officers, OJ L 268/ 2 [1996]. See also Article 1 of the Joint Action.

²⁸¹ *Ibid.*.

²⁸² Joint Action 96/700/JHA of 29 November 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union establishing an incentive and exchange programme for persons responsible for combating trade in human beings and the sexual exploitation of children, OJ L 322/7 [1996].

²⁸³ Article 1 of the Joint Action, *ibid.*.

²⁸⁴ See Preamble and Article 1 of the Joint Action, *ibid.*.

²⁸⁵ Ministerial Agreement on the establishment of Europol Drugs Unit, Copenhagen, 2 June 1993, in Bunyan, Key Texys in Justice and Home Affairs, *supra* note 141.

²⁸⁶ Preamble and article 2 of the Joint Action 96/748/JHA of 16 December 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union extending the mandate given to the Europol Drugs Unit, OJ L 342/4 [1996].

was to develop a system for strategic and operational analysis, although there was yet no possibility of storing personal data in any central database.²⁸⁷

Towards the mid-nineties police cooperation was further streamlined, as EDU was quickly replaced by a European Police Office - Europol - whose Convention was approved in June 1995. Europol's remit was significantly larger than EDU's. Its objective was

*“to improve [...] the effectiveness and cooperation of competent authorities in the Member States in preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime where there are factual indications that an organised criminal structure is involved and two or more Member States are affected by the forms of crime in question in such a way as to require a common approach by the Member States owing to the scale, significance and consequences of the offences concerned.”*²⁸⁸

This broad remit was to be achieved progressively and initially Europol was to focus on a more limited number of offences, namely those of

*unlawful drug trafficking, trafficking in nuclear and radioactive substances, illegal immigrant smuggling, trade in human beings and motor vehicle crime*²⁸⁹

which corresponded largely to EDU's remit. Europol was to pursue these objectives by facilitating cooperation between Member States, namely by facilitating the exchange of information by obtaining, collating and analysing information and intelligence, by aiding national investigations, forwarding information to national units, maintaining an information system, and providing for strategic intelligence among other similar tasks.²⁹⁰

But the streamlining did not end here as, outside the framework of the TEU(M), police cooperation was also being agreed to and developed. This happened mostly with the signature of the Schengen Convention. As seen in chapter one, the Schengen Convention was signed in 1990 and laid down detailed rules on visas and asylum, cooperation

²⁸⁷ W. Bruggeman, “Europol: A Castle or a House of Cards?” in A. Pauly (ed) *De Schengen a Maastricht: voie royale et course d'obstacles* (Maastricht: European Institute of Public Administration, 1996) 17, 23. See same author, 24- 25, for specific examples of cases in which EDU intervened.

²⁸⁸ Article 2 (1) of the Convention on the establishment of a European Police Office (Europol Convention), OJ C316/02 [1995].

²⁸⁹ Article 2 (2) of the Convention, *ibid.*.

²⁹⁰ Article 3, *ibid.*.

between police forces in matters of hot pursuit and cross border observation, on mutual assistance in criminal matters, extradition, protection of personal data, transport and movement of goods, transfer and execution of criminal judgments, the fight against drugs, and the coordination of fire arms legislation. It also established the Schengen Information System (SIS). The Convention entered into force on 26 March 1995 among seven Member States of the EU – France, Germany, Belgium, the Netherlands, Luxembourg, Portugal and Spain - and was probably the measure which further pushed for a deepening in police cooperation between Member States. This was particularly so with the introduction of mechanisms of cross border observation²⁹¹ or pursuit of criminals across borders and into the territory of other signatory States (the so-called ‘hot pursuit’).²⁹² Adding to these two mechanisms the Convention also contained provisions on the facilitation of extradition²⁹³ or the transfer of the execution of judgements between the signatory States,²⁹⁴ among others.

2.2. Beyond the *letra legis* of the Treaty: harmonisation of national criminal law

The TEU(M) only made express reference to judicial and police cooperation. Yet, a significant bulk of measures was adopted with the intent of harmonising minimal elements of national criminal law and penalties. Swart, for example, argued that harmonisation could be derived from the TEU(M), as “*cooperation*” could be given a wider meaning including the coordination and accommodation of the differences between diverse national legislation and policies, which was to be addressed by different forms of cooperation, including harmonisation. Certainly, harmonisation had been mentioned and attempted in the past but such initiatives had always been unsuccessful for political reasons, as one or more countries found difficulties in engaging in such deep form of cooperation.²⁹⁵

According to Anderson and Den Boer, harmonisation was, at the time, felt to be necessary at least at two levels: first, to prevent so-called “jurisdiction shopping”, where

²⁹¹ Article 40, *ibid.*.

²⁹² Article 41, *ibid.*.

²⁹³ Article 59, *ibid.*.

²⁹⁴ Article 67, *ibid.*.

²⁹⁵ For example in the Palma document – “The Palma Document on free movement of persons”, *supra* note 175, Section III. To be sure, more attempts at harmonisation were made since the sixties. In 1962, a working party of government representatives was formed to analyse the possibility of harmonisation of national law mainly in relation to fraud caused by loopholes in legislation although an agreement was not possible as France did not agree with some extraterritorial options. In 1972, a new group was formed and two draft Treaties were submitted to the Council, one regarding the criminal liability of EC civil servants and the other one the protection of EC financial interests, but these two projects also fell through. See Sevenster, “Criminal Law and the European Community”, *supra* note 113, 36.

offenders can choose the country with the most lenient laws to commit a crime; and second, because different definitions of crime necessarily lead to different priorities and policy responses, namely from a policing point of view, which was no longer desirable in the European Union context. This was the case in the early nineties in relation to terrorism, organised crime or even drug trafficking.²⁹⁶

However, even if envisaged before and felt as necessary, harmonisation did not appear to be an easy task at first. This was due to significant differences between Member States' domestic legislation. Indeed, some studies into national laws suggested that differences among them could eventually be too significant to allow for harmonisation. An "Interim report on cooperation in the campaign against organised crime" by the Working Party on International Organised Crime in 1994 and by the K4's Steering Group on Judicial Cooperation in criminal matters, for example, analysed the possibility of common charges and increased judicial cooperation in relation to organised crime. The Group found at that point in time that it would be difficult to have a concept of common charges given the significant differences between the laws of the Member States suggesting instead that judicial cooperation should be made easier.²⁹⁷

Regardless of these difficulties, harmonisation did begin to take place. The focus of harmonisation was thus on minimum elements constituent of crimes (this entailed the EU's provision of a definition containing the basic elements that should be criminalised at the national level), on the call for the liability of legal persons in certain cases and on the conditions that national penalties should fulfil. Through harmonisation, the EU sought to ensure the criminalisation at the national level of a certain number of Euro-crimes in a relatively homogeneous fashion. The offences at stake related to EC financial interests, corruption of EC officials as well as private corruption, money laundering and related behaviours, racism and xenophobia, drug trafficking, trafficking in persons and human beings and organised crime.

More specifically, the Convention on the protection of EC financial interests, for instance, proposed a common definition of fraud affecting the European Communities' financial interests which covered fraud against both the EC's expenditure and

²⁹⁶ N. Walker, "European Integration and European Policing: A Complex Relationship", in M. Anderson and M. Den Boer (eds) *Policing across national boundaries* (London: Pinter Publications, 1994) 22, 26-36.

²⁹⁷ Working Party on International Organised Crime, "Draft interim report on cooperation in the campaign against international organised crime", Doc.10104/1/94, Brussels, 26 October 1994 and Steering Group III (Judicial Cooperation in Criminal Matters), "Interim Report on cooperation in the campaign against international organised crime", Brussels, 4 November 1994.

revenue.²⁹⁸ Along the same lines, the First Protocol to the Convention also called for the criminalisation of both passive and active corruption of officials of the European Union²⁹⁹ and the second Protocol to the Convention called for the adoption of a common definition of money laundering and related behaviours.³⁰⁰ Likewise, the Joint Action on racism and xenophobia attempted a common understanding of what should be considered as racist and xenophobic behaviours by proposing a common definition of this crime, which was to include, for example, any public incitement to discrimination, violence or racial hatred of persons or groups defined by reference to colour, race, religion or national or ethnic group, among other related behaviours.³⁰¹ Similarly, the Joint Action on drug trafficking called for the criminalisation of behaviours which publicly and intentionally

“incite or induce others, by any means, to commit offences of illicit use or production of narcotic drugs”,³⁰²

whilst the Joint Action on trafficking in persons and sexual exploitation also required the criminalisation of the sexual exploitation of children and others when coercion, deceit or abuse of authority was used.³⁰³ Along the same lines, the Joint Action on money laundering,³⁰⁴ the Joint Action on organised crime³⁰⁵ and the Joint Action on private corruption³⁰⁶ also required Member States to take the necessary measures to ensure that the provisions of the joint actions were implemented.³⁰⁷

²⁹⁸ See Article 1 of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities’ financial interests, OJ C 316/49 [1995].

²⁹⁹ First Protocol to the Convention on the protection of the European Communities’ Financial Interests, OJ C 313/1 [1996].

³⁰⁰ Second Protocol to the Convention on the protection of the European Communities’ financial interests, OJ C 221/12 [1997].

³⁰¹ Title I of the Joint Action 96/443/JHA, *supra* note 279.

³⁰² Article 9 of the Joint Action 96/699/JHA, *supra* note 279.

³⁰³ Title I of the Joint Action 97/154/JHA of 14 February 1997 adopted by the Council of the basis of Article K.3 of the Treaty on European Union concerning action to combat trafficking in human beings and sexual exploitation of children, OJ L 63/2 [1997].

³⁰⁴ Joint Action 98/669/JHA of 3 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and proceeds from crime, OJ L 333/1 [1998].

³⁰⁵ Joint Action 98/733/JHA of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation on the Member states of the European Union, OJ L 351/1 [1998].

³⁰⁶ Joint Action 98/742/JHA of 33 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on corruption in the private sector, OJ L 358/2 [1998].

³⁰⁷ These definitions are usually broad and on occasion broader than pre-existent national offences which echo an attempt at a high level of protection of the goods or interests in question. The Convention on the protection of the EC budget, for instance, defines *“fraud affecting the European Communities’ financial Interests as [...] (a) in respect of expenditure, any intentional*

Harmonisation was also attempted in relation to criminal liability of corporations and the conditions that the applicable penalties were to fulfil. Three main elements were usually required: those of the proportionality, deterrence and effectiveness of the offences applied at the national level - conditions which largely mirrored the formula already used by the CJEU in its case law as seen in the decision *Commission v. Greece*.³⁰⁸ Measures adopted, however, contrary to the CJEU in the latter case, began to refer specifically to *criminal penalties*. The Convention on the protection of EC budget, for instance, required Member States to punish by “*effective, proportional and dissuasive criminal penalties*” the offences the Convention sought to harmonise, including their instigation or attempt. Similarly, three other Joint Actions referred to the penalties that should be applied at the national level. The Joint Action on drug trafficking held that

*“Member States shall ensure that under their legal systems the penalties imposed for serious drug trafficking are among the most severe penalties available for crimes of comparable gravity.”*³⁰⁹

The Joint Action on trafficking in persons and sexual exploitation of children called for the application of effective, dissuasive and proportionate penalties (including criminal penalties) and, additionally, for the liability of legal persons and the application of appropriate administrative measures, such as the closure of establishments.³¹⁰ Finally, the Joint Action on corruption in the private sector required the introduction of effective, deterrent and proportional criminal penalties and the creation of provisions which would ensure the liability of legal persons at national level.³¹¹

Thus, the question emerges as to what type of interests, rationales or themes, if any, were driving the EU’s legislative intervention in these domains? Was there a coherent discourse underlying EU measures in criminal matters beyond what was clearly

act or omission relating to: - the use or presentation of false, incorrect or incomplete statements or documents, which has as its effects the misappropriation or wrongful retention of funds from the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities, - non disclosure of information in violation of a specific obligation, with the same effect, - the misapplication of such funds for purposes other than those for which they were originally granted; (b) in respect of revenue, any intentional act or omission relating to: - the use or preservation of false, incorrect or incomplete statements or documents, which has as its effects the illegal diminution of the resources of the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities; - non disclosure of information in violation of specific obligation, with the same effect, - misapplication of a legally obtained benefit, with the same effect [...]”, supra note 298.

³⁰⁸ Case 68/88 *Commission v Greece*, supra note 220; See chapter 1.

³⁰⁹ Article 4 of the Joint Action 96/750/JHA, supra note 279.

³¹⁰ Title II (a), (b), (c) and (d) of the Joint Action 97/154/JHA, supra note 303.

³¹¹ Article 4 and 5 of the Joint Action 98/742/JHA, supra note 250.

identified in the TEU(M)? It was seen in Chapter 1 how concerns over terrorism, illegal immigration, organised crime and related criminality were present throughout the main political initiatives aimed at cooperation in a rather entangled framework. The TEU(M) offered a clearer and more transparent framework for intervention in these domains and consequently discourses became clearer from a political as well as a legal point of view. In particular, Article K.1 TEU(M) mentioned cooperation in areas of common interest, namely judicial cooperation in criminal matters and police cooperation in relation to terrorism, drug trafficking and other forms of international crime. Yet this TEU(M) provision was vague and some previous concerns over transparency and clarity continued to be voiced. The most significant evidence of this ambiguity is the fact that organised crime, despite not being mentioned in Article K.1, became the all-encompassing rationale for the EU's intervention in criminal matters. This was seen throughout political declarations and preambles and bodies of joint actions. Furthermore, besides organised crime, the protection of EC interests and policies was of no negligible importance during the Maastricht era but there was also no clear mandate for intervention via criminal law in this domain. In fact, the ECT(M) did not contain any provision enabling the EC to adopt criminal law related measures and the TEU(M) did not make a particular reference in that regard either. Thus, the following section will further explore the narratives and rationales that were embedding the first seeds of criminal law in the EU from a political and legal perspective.

3. The scope of intervention: the emergence of Euro-rationales and Euro-offences

The lack of comprehensive guidance by the TEU(M) regarding criminal matters allowed for greater flexibility in the interpretation of EU's competencies by the Council. Indeed, as seen earlier, Article K.1 limited itself to defining "*areas of common interest*" to Member States, mentioning domains such as judicial cooperation in criminal matters and police cooperation in matters of terrorism, unlawful drug trafficking and other serious forms of international crime, giving no further details in relation to any of these areas nor in relation to the very general concepts of "internationality" and "seriousness". Furthermore, none of the concepts were explained by other provisions of the TEU(M) nor addressed in the measures adopted, making them difficult to pin down. The delimitation of these ideas became thus very difficult and the result was that such a broad wording of the law allowed for an ambitious understanding of the domains in which the EU could intervene in and of the forms that such an intervention could have, as was shown by the number of measures and domains in which intervention was sought.

This began to be seen immediately after the TEU(M) entered into force, in the number of working programmes or resolutions that addressed more topics than the ones referred to in the TEU(M). The “Work Programme for 1994 and structures to be set up in the field of Justice and Home Affairs”, where the Presidency of the Council laid down the main priorities for intervention, included domains of interest ranging from asylum and immigration, police co-operation, customs cooperation to cooperation on the fight against drugs and judicial cooperation. Regarding the latter two, the Presidency outlined the main priorities to include the establishment of EDU and Europol, the fight against organised crime (which was to include the fight against human trafficking, environmental crime, radioactive products, vehicles, works of art, forgery, illegal immigration and the laundering of the proceeds of crime), terrorism, xenophobic and racist violence, hooliganism and other questions related to cooperation between police forces (crime analysis, contacts with third countries or training of police officers), drugs, extradition, mutual legal assistance (mainly in relation to international organised crime), disqualifications from driving and the enforcement of confiscation orders from other Member States.³¹² In 1996, a Council Resolution laid down the ‘priorities for cooperation in the field of justice and home affairs for the period from 1 July 1996 to 30 June 1998’.³¹³ The areas of intervention did not differ much from the areas referred to by the 1994 working programme and focused mainly on terrorism, organised crime and drugs, improving judicial cooperation, immigration and asylum, corruption and fraud at the EC level and officials and magistrates training on crime prevention and trafficking in human beings. Finally, another Council Resolution laid down the priorities for the period from 1 January 1998 to the date of that the TEU(A) entered into force and reasserted intervention in the same broad range of areas.³¹⁴

Indeed, during those years, a large variety of subject matters was discussed, such as visas, immigration, drug trafficking, terrorism, trafficking in human beings, organised crime, laundering of profits, judicial cooperation in criminal matters, arms, explosives and other dangerous products, works of art, forged currency or theft of vehicles, for example.³¹⁵ The list coincides with many of the areas of initiative during the pre-Maastricht years yet it relates to a broad range of criminality varying from trafficking in human beings to theft of vehicles or works of art. In this sense, Maastricht was

³¹² Council of the European Union, Note from the Presidency to the K.4 Committee, Doc. 10684/93, JAI 12, Brussels, 2 December 1993.

³¹³ Council Resolution of 14 October 1996 laying down the priorities for cooperation in the field of justice and home affairs for the period from 1 July 1996 to 30 June 1998, OJ C 319/1 [1996].

³¹⁴ Council Resolution of 18 December 1997 laying down the priorities for cooperation in the field of justice and home affairs for the period from 1 January 1998 to the date of the entry into force of the Treaty of Amsterdam, OJ C 11/1 [1998].

³¹⁵ See chapter 1.

responsible for the formalisation of the EU's themes of interest whilst the roots of the conceptual framework of European Union criminal law go back far before the introduction of justice and home affairs into the realm of the Treaties.

Many of the measures that were adopted were responses to shocking crimes happening in Europe most of which had a transnational dimension. The focus on illegal immigration issues was arguably a reaction to the removal of internal borders, whilst the development of drug legislation was a response to increasing drug trafficking issues ravaging Europe since the 70s.³¹⁶ Furthermore, other specific events were clearly linked to the adoption of some measures, if not to their content as well. Chalmers pointed out this connection between crimes or political strains and legal reaction at EU level noting that

*“Spanish concern over the refusal of the Belgian court to extradite a suspected ETA terrorist led therefore to the La Gomera Declaration in 1995. Fights between the Dutch football fans in the Netherlands which resulted in the death of a Dutch national resulted in action on hooliganism. Belgian horror over the Marc Dutroux led to action on paedophilia and the exploitation of human beings.”*³¹⁷

Regardless of such almost-random or at least reactive sequences of events, there were common concerns underlying most of these measures. Thus, at this stage, it was possible to begin to grasp the defining features of EU criminal law. This is not to say there was a common EU penal policy – far from it, actually. Rather, what is suggested is that there were identifiable rationales embedded in the political and legal measures in European Union criminal matters. This can clearly be derived from the text of most political declarations such as resolutions, Council conclusions, and action plans; or from the text of most legal measures, namely joint actions and conventions. The most obvious evidence of these was the wording of these texts and their preambles, the most symbolic and teleological part of any legal instrument. It is thus argued that during the Maastricht decade, two central rationales were embedded in a large number of the measures adopted: the fight against organised crime and the protection of EC interests and policies.

These narratives do not come across in a clear-cut manner, as the EU did not give guidance on what type of programmatic or ideological line, if any, should drive the EU's

³¹⁶ V. Mitsilegas et al. *The European Union and Internal Security*, *supra* note 91, 24.

³¹⁷ D. Chalmers, “Bureaucratic Europe”, *supra* note 215, 9.

intervention in security matters.³¹⁸ This is not surprising. As the EU was a new actor in criminal matters, with different structures than those of the State yet with a complementary role to the latter, it is only expected that its motivating rationales were not in the shape of well developed criminal policies. It is under these constraints that the EU's own narratives of integration in criminal matters emerged as distinct from those of Member States and the discourses on the fight against organised crime and protection of EC interests began to take shape.

3.1. Organised crime

It was seen in chapter one how the idea of combating organised crime emerged in the late eighties and began tentatively to be used as a motto and umbrella-concept grouping several types of criminality. The discourse on the need to react against transnational threats such as organised crime was continued and intensified in the nineties. The culmination of this vision was spelled out and systematised in 1997 by the adoption of the Action Plan to combat organised crime.³¹⁹ This Action Plan portrayed a rather grim scenario stating that,

“Organised crime is increasingly becoming a threat to society as we know it and want to preserve it. [...] Crime is increasingly organising itself across national borders, also taking advantage of the free movement of goods, capital, services and persons. Technological innovations such as the internet and electronic banking turn out to be extremely convenient vehicles for committing crimes or for transferring the resulting profits into seemingly licit activities. Fraud and corruption take on massive proportions, defrauding citizens and civic institutions alike. In comparison, effective means of preventing and repressing these criminal activities are developing only at a slow pace, almost always a step behind. If Europe is to develop into an area of freedom, security and justice, it needs to organise itself better, and to provide strategic and tactical responses to the challenge facing it. This requires a political commitment at the highest level.”³²⁰

³¹⁸ In relation to police cooperation specifically, this is argued by M. Den Boer, “Europe and the art of international police cooperation: free fall or measured scenario?” in D. O’Keefe and T. Twomey (eds) *Legal Issues of the Maastricht Treaty* (London: Chancery Law Publishing, 1994) 279, 281.

³¹⁹ The Action Plan had its origins at the Dublin European Council where the need for a coherent approach to combat organised crime in the European Union was discussed and during which the Council decided to create a High Level Group in charge of drawing an Action Plan with specific recommendations in the field, see Title V of the Presidency Conclusions, Dublin European Council, 13 and 14 December 1996, Council Action Plan to combat organised crime, adopted by the Council on 28 April 1997, OJ C 251/1 [1997].

³²⁰ Para 1 of the Action Plan to combat organised crime, *ibid.*.

Indeed, already in 1996, organised crime had been elevated to a main priority in justice and home affairs, both by the Council Resolution laying down the priorities for cooperation in the field of justice and home affairs for the period from 1 July to 10 June 1998,³²¹ and from the Council Resolution laying down the priorities for cooperation from the period from 1 January 1998 to the date the TEU(A) entered into force.³²²

Politically, organised crime was being promoted as a transnational threat and, in consequence, upgraded to a policy priority. Mitsilegas et al. refer to this new status of organised crime as its “securitisation”, explaining this happened mainly for three reasons: first, it was perceived as a growing problem that threatened the well being of western countries and, as a consequence, European States began to envisage it as a ‘common security’ concern needing collective solutions; second, the paradigm of organised crime that was worrying the western world (such as the Italians and Americans) was generating considerable alarm even if it didn’t correspond entirely to the reality of the European model; finally, organised crime in Europe had been perceived as increasing after the Cold War, especially with the emergence of organised crime groups in eastern Europe, namely Russia and Albania.³²³

Not surprisingly, this political use of organised crime also deeply permeated the legal reality of criminal matters in the EU. Organised crime, besides having been made a political priority, also became a legal label, a narrative that guided many of the legal measures undertaken in criminal law related matters, emerging as one of the main justifications for the adoption of secondary legislation in criminal matters.

The Joint Action of 1998 which made it a criminal offence to participate in a criminal organisation in the Member States of the European Union (hereinafter Joint Action on organised crime) is the central example of this. Its preamble states:

“Whereas the Council considers that the seriousness and development of certain forms of organised crime require strengthening of cooperation between the Member States of the European Union, particularly as regards the following offences: drug trafficking, trafficking in human beings, terrorism, trafficking in works of art, money laundering, serious economic crime, extortion and other acts of violence against the life, physical

³²¹ Council Resolution of 26 October 1996, *supra* note 257.

³²² Council Resolution of 18 December 1997, *supra* note 258.

³²³ “Securitisation of an issue occurs when it is elevated from the level of routine political discussion to a special category status and in consequence a higher priority is attached to remedying the problem, and combating the risks justifies the allocation of increased resources.” Mitsilegas, Monar and Rees, *The European Union and Internal Security*, *supra* note 91, 46-49.

*integrity or liberty of a person, or creating a collective danger for persons; [...] in order to respond to the various threats with which Member states are confronted, a common approach to participation in the activities of criminal organisations is necessary”.*³²⁴

The Joint Action calls for intervention in a number of areas which may or may not be related to organised criminal activities, in order to face the “*seriousness and development of certain forms of organised crime*”.³²⁵

The list of offences mentioned in the former Joint Action was considerable. This view that organised crime was to be understood as including a wide range of criminality was confirmed in other measures such as the Joint Action establishing a programme of exchanges, training and cooperation for persons responsible for action in combating organised crime. This Joint Action led to the so-called “Falcone Programme” in which it was stated to be necessary

*“to adopt a broad approach to phenomena of organised crime, including economic crime, fraud, corruption and money-laundering.”*³²⁶

Subsequent measures took this approach into consideration, such as the 1998 Joint Action on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime. This Joint Action not only placed itself in the context of the two previously mentioned measures but also held in its preamble,

*“the potential for disrupting criminal activity in the field of organised crime, by more effective cooperation between Member States in identifying, tracing, freezing or seizing, and confiscating the assets deriving from crime is being improved ... [and whereas]*³²⁷
*the abovementioned action plan to combat organised crime emphasised the need to accelerate procedures for judicial cooperation in matters relating to organised crime, while considerably reducing delay in transmission and responses to requests”.*³²⁸

³²⁴ Preamble of the Joint Action 98/733/JHA, *supra* note 249.

³²⁵ *Ibid.*

³²⁶ Joint Action 98/245/JHA of 19 March 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a programme of exchanges, training and cooperation for persons responsible for action to combat organised crime (Falcone Programme), OJ L 99/8 [1998].

³²⁷ Our words.

³²⁸ Joint Action 98/669/JHA, *supra* note 248.

Finally, besides the political and legal influence, the discourse around organised crime was also embedded in the organisational structure of the EU framework for cooperation. This can be seen in the Joint Action on the “Falcone Programme”³²⁹, noted above, whose main objective was to monitor the implementation of the Action Plan to combat organised crime. This Joint Action noted that

“it is therefore necessary for the implementation of this programme to adopt a broad approach to the phenomena of organised crime, including economic crime, fraud, corruption and money laundering”.

The Joint Action on the exchange of liaison magistrates highlights how the creation of an exchange network would

*“...help in effectively combating all forms of transnational crime, particularly organised crime and terrorism as well as fraud affecting the interests of the Community”.*³³⁰

Similar connections appear in the preamble of the Joint Action on trafficking in human beings and sexual exploitation of children where it is stated that these

*“...may constitute an important form of international organised crime, the extent of which within the European Union is becoming increasingly worrying”.*³³¹

Likewise, the Joint Action concerning liaison magistrates also mentions their significance as they play a

*“...role of paramount importance in cooperation in preventing and combating all forms of international crime, pursuant to Article K.1 (9) of the Treaty, including organised crime”.*³³²

Furthermore, the EU’s newly created operational actors – EDU and later on Europol - were also to give a great deal of attention to organised crime. The Europol Convention, for example, states in Article 1 that the objective of Europol shall be

³²⁹ Joint Action 98/245/JHA, *supra* note 272.

³³⁰ Preamble of the Joint Action 96/277/ JHA of 22 April 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning a framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the European Union, OJ L 105/1 [1995].

³³¹ Preamble of the Joint Action 97/154/JHA, *supra* note 247.

³³² Preamble of the Joint Action 96/602/ JHA, *supra* note 224.

*“...to improve... the effectiveness and cooperation of the competent authorities in the Member States in preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime where there are factual indications that an organized criminal structure is involved and two or more Member States are affected by the forms of crime in question...”*³³³

Furthermore, the Outline of the Europol Drug Unit Working Programme for 1998 also states,

*“Special emphasis will be given to the implementation of the EU Action Plan Against Organised Crime as agreed by the Amsterdam Summit.”*³³⁴

In later years, Europol’s work began to place a great emphasis on understanding the reality of organised crime in the EU and border countries.³³⁵ Accordingly, in 1999 it reported that

“...although some traditional criminal activities, such as drug trafficking remain highly lucrative, there are indicators that many criminal groups are moving to more profitable but less risky criminal activities, such as large scale frauds, environmental crimes, smuggling of tobacco products and alcohol and illegal immigration.”

Furthermore, the same report continued by noting that

“...criminal groups are increasingly involved in illegal immigration and trafficking in human beings for the purposes of sexual exploitation; high tech crimes, involving the use of computers” and organised crime groups have a “greater involvement in committing frauds against the financial interests of the EU.”³³⁶

The political and legal visibility given to organised crime in the European Union, took place, once again, as in the 1980s, despite a lack of consensus about the reality of numbers in relation to this type of criminality. Hence, these initiatives were at the heart of several criticisms made of the discourse of ‘increase in criminality’ before 1993,

³³³ Europol Convention, *supra* note 232.

³³⁴ Europol Drugs Unit, ‘Outline of the Europol Drugs Unit Working Programme 1998’, Doc. 11796/97, Brussels, 31 October 1997, 1.

³³⁵ Europol, “EU Organised Crime Situation Report – 1998 – Open Version”, The Hague, 8 December 1998, File 2530-50.

³³⁶ *Ibid.*, 5.

particularly those initiatives that lacked sufficient research around the possible impact of border removal on criminality levels.³³⁷

As Mitsilegas, Monar and Rees point out, although some data, such as that found in Europol reports, suggested that organised crime did increase between 1985 and 1998, the fact that organised crime was viewed as such a threat raised suspicion in the minds of commentators.³³⁸ Anderson et al. also commented that there were conflicting views as to whether a border-free Europe Union would make crime control more difficult and whether crime in general would rise in consequence of the abolition of internal borders. Moreover, national statistics seldom included data beyond domestic borders.³³⁹ In-depth comparative analysis was also not possible during those years as data regarding transnational and organised crime during the eighties was scarce.³⁴⁰ The lack of such data in relation to organised crime is evident in a Note from the K.4 to the Permanent Representatives Committee of the Council on the ‘Situation report on organized crime in the European Union in 1993’.³⁴¹ The K.4 Committee notes that in some Member States it was not possible, at the time, to provide quantitative information on organised crime because of the lack of agreed national definitions and of criteria for the identification of such criminal phenomena (only Germany, Italy and the Netherlands were able to prepare reports on the extent and trends in organised crime).³⁴² The Committee further goes on to remark that reliable and valid results would not be obtained unless effective methods for collection and analysis of such information were introduced.³⁴³ It was only later, with the setting up of Europol and the data sharing and policing cooperation it generated, that a clearer picture of the threat of organised crime in the EU emerged.³⁴⁴

Difficulties measuring such criminality are often related to the nature of organised crime itself—a fluid phenomenon that takes different shapes in different societies and evolves with the times. Approaches to it have been diverse – and are bound to be so -- in different legal systems. In addition, because of its flexibility as a legal concept,

³³⁷ Council of the European Union, Note on “Scientific and Technical Research – Research projects on criminology and criminal matters”, Doc. 8740/94, Brussels, 26 July 1994.

³³⁸ Mitsilegas, Monar and Rees, *The European Union and Internal Security*, *supra* note 91, 62-63.

³³⁹ M. Anderson., et al., *Policing the European Union* (Oxford: Clarendon Press, 1995) 16-18.

³⁴⁰ See chapter 1.

³⁴¹ Council of the European Union, K.4 Committee, Note to the Permanent Representatives Committee/ Council on the Situation report on organized crime in the European Union in 1993, Document N° 10166/4/94, Brussels, 27 February 1995.

³⁴² *Ibid.*, 2, 6.

³⁴³ *Ibid.*, 4.

³⁴⁴ See, *inter alia*, Europol, “EU Organised Crime Situation Report – 1998 – Open Version”, The Hague, 8 December 1998, File 2530-50. Interestingly, during this period many countries continued to see a significant increase in crime at domestic level, namely in relation to property and violent crime, the latter being the greatly responsible for public and political anxieties; R. Reiner, *Law and Order*, *supra* note 122, 65-73.

“organised crime” has also itself shown to be adaptable to different policy priorities and hence suitable as a political-legal justification when needed. As Levi notes

*“Legal definitions of organized crime, like other social labels such as ‘anti-social behaviour’, are based around the measures that legislators want to take against evils, both activities and ‘sorts of people’, especially combinations of people.”*³⁴⁵

This was relevant especially as the competency of the EU to act in many of these domains was not clear-cut. Indeed, although many of the crimes in relation to which the EU sought to act upon could be potentially integrated under the very wide concept of “serious international crime” used by Article K.1 of the TEU(M), the link between the wording of the Treaty and many measures adopted was rather feeble and particularly where harmonisation measures were concerned, which clearly went beyond the level of cooperation envisaged by the TEU(M).

3.1.1. The ancillary use of organised crime as a legal concept

The use of organised crime as an umbrella legal concept to allow for intervention in domains in which the EU’s competence was not necessarily clear, was further perceived in drugs and drug trafficking matters in relation to which Article K.1 specifically recognised the EU’s competence. Drug trafficking is a traditional field of organised crime and the links between the two cannot be easily overlooked.³⁴⁶ Thus, one would expect that if the rationale of the fight against organised crime is as wide as previously described, drug trafficking would certainly be part of it. However this is not necessarily so – or at least – this is not acknowledged as such by the preambles of the legal measures in this regard. Indeed, the Joint Actions on drug trafficking,³⁴⁷ on new synthetic drugs and on chemical profiling of drugs,³⁴⁸ for example, did not mention organised crime in their preambles or bodies, in clear contrast with the large majority of measures described earlier. Article K.1 however particularly mentioned drug addiction

³⁴⁵ M. Levi, “Organized Crime and Terrorism”, in M. Maguire, R. Morgan and R. Reiner, *The Oxford Handbook of Criminology*, 4th Edition (Oxford:OUP, 2007) 771, 779-780.

³⁴⁶ M. Levi, “Organized Crime and Terrorism”, *ibid.*, 777; See also the UK Serious Organised Crime Agency who, in its website, points out that drug trafficking is the most damaging sector of organised crime in the UK, at <http://www.soca.gov.uk/threats/>, last visited on May 27, 2012.

³⁴⁷ Joint Action 96/750/JHA of 17 December 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the approximation of the laws and practices of the Member States of the European Union to combat drug and to prevent and combat illegal drug trafficking, OJ L 342/6 [1996].

³⁴⁸ Joint Action 96/699/JHA, *supra* note 302; Joint Action 97/396/JHA of 16 June 1997 adopted by the Council on the basis of Article K.3 of the Treaty on the European Union, concerning the information exchange, risk assessment and the control of new synthetic drugs, OJ L 167/1 [1997].

and drug trafficking, hence giving clear competence to the EU to intervene in this area. Likewise, this was the case with terrorism related cooperation as well. Although terrorism is not necessarily a phenomenon related to organised crime, the links between the two are often relevant and recent literature has become more aware of the increasing connections in today's world.³⁴⁹ Furthermore, during the pre-Maastricht period, organised crime, drug trafficking and terrorism were domains associated with each other in official documents.³⁵⁰

The fact that their link to organised crime was not mentioned or explored in preambles, especially when the approach to the former has been so broad, comes to emphasise the ancillary use of organised crime as a motto or justification for the adoption of measures outside the limited reach of the TEU(M). Hence, when the TEU(M) specifically gave competence to the EC and the EU to intervene in a specific domain – as it did to drug trafficking and terrorism – the preamble of these measures no longer makes a particular reference to organised crime. Hence, the non-use of the discourse of organised crime in drugs and terrorism related matters draws attention to the instrumental use of the discourse of the fight against organised crime made by the EU in other domains during the Maastricht period.

3.2. Protection of EC interests and policies

The use of criminal law to protect Community interests and policies was also further developed during the nineties although the ECT(M) continued to be silent in relation to criminal law, which had now been placed under the institutional framework of the third pillar (TEU(M)). Nonetheless, the EC did not remain completely alienated from criminal matters, seeking the protection of its policies and interests via criminal law through both judicial and legislative means.

The CJEU continued to be an important actor in this regard, either placing limits on national criminal law or obligations upon Member States. For instance, the Court continued to place limitations on the definition of criminal offences or on the level of penalties applicable at the national level when these would compromise an EC goal. In *Bordessa*, for example, the Court limited the scope of a national criminal offence, holding that a Spanish law prohibiting the export of coins, banknotes or bearer cheques in excess of PTA 5 million per person and per journey, unless subject to prior

³⁴⁹ See, for example, H. Abadinsky, *Organized Crime* (Belmont: Wadsworth, 2010, 9th Edition) 5-9.

³⁵⁰ See chapter 1.

authorisation, could hinder the free movement of capital in accordance with EC law, and hence ran contrary to the second paragraph of Article 4 of Directive 88/361.³⁵¹

In other cases, the Court looked at the intensity of penalties applied for certain crimes. In *Sknavi*, for example, the Court took the view that although Member States remained competent to impose penalties on individuals who breached their obligation to exchange driving licences within one year of taking up resident in another Member State, Member States were not entitled to impose a penalty so disproportionate to the gravity of the infringement that it became an obstacle to the freedom of movement.³⁵²

The fact that the CJEU evaluates the proportionality of an offence in relation only to the possibility of it affecting the Community's policy goals was clear in *Banchero*. Here, the Court, when assessing national criminal law and, in this particular case, national criminal penalties, noted that,

*“The penalties facing Mr Banchero do not hinder in any way the importation of tobacco products from other Member States, but merely tend to dissuade consumers from obtaining supplies of tobacco products”*³⁵³ (...) *“The severity of those penalties is thus not a matter for assessment under Community law.”*³⁵⁴

Furthermore, during this period, the Court expanded the scope of its case law in criminal matters, ruling on what can be called a ‘duty of positive action’ on the part of Member States. This was the case in *Commission v France* (the so-called ‘Spanish strawberries’ case), which concerned the action of French farmers who launched a campaign to stop the import of Spanish strawberries.³⁵⁵ The campaign was violent and involved repetitive road blockages, the burning of lorries carrying goods and threats against shops. At the time, despite numerous criminal offences committed by the French farmers, French authorities were very passive towards the events. In consequence, the European Commission sued France before the CJEU. In its decision, the Court noted that when a Member State abstains from taking action, or fails to adopt adequate measures to prevent obstacles to the free movement of goods that are created by the actions of private individuals in their territory, this abstention is likely to obstruct intra Community

³⁵¹ Joined Cases C-358/93 and C-416/93 *Aldo Bordessa v Vicente Mellado and Concepción Maestre* ECR I-376 [1995] para 25.

³⁵² Case C-193/94 *Criminal proceedings against Sofia Sknavi and Konstantin Chryssanthakopoulos* ECR I-929 [1996] para 36-38.

³⁵³ Case C-387/93 *Criminal proceedings against Giorgio Domingo Banchero* ECR I-4683 [1995] Para 60.

³⁵⁴ Para 61, *ibid.*

³⁵⁵ Case C-265/95 *Commission v France* ECR I-6959 [1997].

trade.³⁵⁶ The Court continued by noting that the ECT(M) required Member States to take all necessary and appropriate measures to ensure that the free movement of goods is respected within their territory.³⁵⁷ Thus, in relation to the behaviour of the French authorities, the Court held that,

*“Having regard to all the foregoing considerations, it must be concluded that in the present case the French Government has manifestly and persistently abstained from adopting appropriate and adequate measures to put an end to the acts of vandalism which jeopardize the free movement on its territory of certain agricultural products originating in other Member States and to prevent the recurrence of such acts.”*³⁵⁸

To be clear, the Court did not directly state that the French authorities should have taken measures of a criminal nature. This remains only implicit in its decision and contrasts with the Conclusions of Advocate General Lenz who explicitly referred to criminal measures. The Advocate General first noted that it was not clear why the national authorities did not at least do more to arrest the offenders and to secure sufficient evidence to have enabled a prosecution. He then noted that, in his opinion, the national authorities failed to prosecute the offences committed with the necessary vigour.³⁵⁹

Even if the Court did not specifically mention that measures of a criminal nature ought to be adopted by Member States in situations of this kind, it clearly imposed a strong duty of positive action on the part of Member States in order to ensure that the free movement of goods – one of the central goals of the internal market – was protected. As Chalmers et al. note, this is tantamount to a duty to actively police EU law.³⁶⁰ Thus, this decision brought more realms of national criminal law into the context of the EC as, under this ruling, Member States are clearly under obligation to adopt appropriate and adequate measures to put an end to acts which might jeopardise free movement within the European Community. At times, this obligation will certainly require measures of a criminal nature.

Furthermore, beyond the role of the Court--which dealt mainly with questions of how national criminal law should be adjusted to fulfil the EC’s goals--many EC legislative measures continued to influence national criminal law. The large majority of measures adopted before 1993 regarding agriculture, fisheries and transport were kept in force or

³⁵⁶ Para 31, *ibid.*.

³⁵⁷ Para 32, *ibid.*.

³⁵⁸ Para 65, *ibid.*.

³⁵⁹ Opinion of Advocate General Lenz of 9 July 1997, Case C-265/95 *Commission v France* ECR I-6959 [1997] para 75 and 76.

³⁶⁰ D. Chalmers, et al., *European Union Law*, supra note 268, 224 and 331.

replaced by newer instruments during the Maastricht era. Consequently, demands continued to be made at the national level in relation to EC policies, particularly regarding agriculture and structural funds.³⁶¹

Furthermore, the principle of assimilation, established by the Court in *Greek Maize*, was now incorporated in Article 209a of the ECT(M). This provision, similar to the Court's decision in the case, did not make particular reference to measures of a criminal nature but established a duty of similar diligence in the treatment of national or community offences. In particular it stated that

“Member States shall take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interest.”

More significant to the idea that EC interests and policies were increasingly being pursued via national criminal law, the creation of the third pillar opened new possibilities for EU action in criminal matters. Measures were thus not only adopted to fight organised crime, as seen in the previous section, but also to foster the protection of EC interests and policies. In particular, steps were taken to improve the protection of the EC budget, as fraud continued to increase.³⁶² Hence, under the third pillar, a Convention on fraud against the financial interests of the Community sought to harmonise national definitions of fraud against the EC budget, including both fraud against the revenue and the expenditure. The Convention also established penalties, the liability of business heads, as well as rules of jurisdiction, cooperation and extradition.³⁶³ The Convention was complemented by three protocols. The first regarding corruption by national or EC officials resulting in damage to the EC budget,³⁶⁴ the second in relation to the laundering of proceeds resulting from fraud or corruption against the community,³⁶⁵ and a third protocol regarding the preliminary rulings by the CJ in relation to the Convention as

³⁶¹ See, for example, Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, OJ L 312/1 [1995] and Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities, OJ L 392/2 [1996] which provided a framework for control, reporting and on the spot inspections in the agricultural sector and structural funds. See also chapter 1.

³⁶² For several specific examples and cases of fraud against the EC financial interests during this period see P. Van Duyne, “Implications of cross border crime risks in an open Europe” (1993) 20 *Crime, Law & Social Change* 99; and B. Quirke, “Fraud against European Public Funds” (1999) 31 *Crime, Law & Social Change* 173-192.

³⁶³ Convention on the protection of the European Communities' financial interests, *supra* note 298.

³⁶⁴ First Protocol to the Convention, *supra* note 299.

³⁶⁵ Second Protocol to the Convention *supra* note 300.

well as the first protocol.³⁶⁶ The Convention supplemented the 1995 Regulation on the Protection of the Financial Interests of the Communities adopted under the first pillar, and created a general administrative framework for investigating and repressing acts and omissions which could cause financial harm to the Community.³⁶⁷

Nonetheless, a slow ratification process considerably reduced the practical significance of the Convention. Indeed, by 18 May 1999 only two Member States had ratified the Convention. The direct protection of EC financial interests via criminal law thus remained limited. Despite significant ambition in this domain, results were politically and legally difficult to achieve. This was also perceived in the *Corpus Iuris* proposal released in 1997 in the context of the European Commission European Legal Area Project, launched by the Directorate General for Financial Control.³⁶⁸ The *Corpus Iuris* was an academic study that called for a uniform European code of criminal offences to deal particularly with fraud to the EC budget. Furthermore, it proposed the creation of a European Public Prosecutor (EPP) who would have investigatory powers, among others, and be responsible for bringing cases of fraud against the EC budget before the national courts. However, the *Corpus Iuris* was never adopted as questions of incompatibility with national criminal laws were raised.³⁶⁹

The limited number of legal measures aimed at the protection of EC interests and policies via criminal law and their slow ratification process suggested that the fight against organised crime – the main rationale underlying the measures adopted under the third pillar – remained the strongest narrative in the criminal law of the EU during the Maastricht period. In fact, the theme of fighting organised crime was approached in such a broad manner that even measures directly aimed at the protection of EC interests and policies continued to be linked with the fight against organised crime. This thematic link between these two narratives was mirrored specifically in the Action plan on organised crime, which called for the definite ratification of the Convention protecting EC

³⁶⁶ Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the fight against corruption involving officials of the European Communities or Officials of Member States of the European Union, OJ C 391/01 [1998].

³⁶⁷ Council Regulation (EC, Euratom) No 2988/95, *supra* note 361. For an analysis of the advantages and disadvantages in the creation of the two separate instruments see B. Swart, “From Rome to Maastricht and Beyond: The Problem of Enforcing Community Law”, in C. Harding and B. Swart (eds) *Enforcing European Community Rules, Criminal Proceedings, Administrative Procedures and Harmonization* (Aldershot: Dartmouth, 1996) 17-19.

³⁶⁸ M. Delmas-Marty et al., *Corpus Juris, introducing provisions for the purpose of the financial interests of the European Union* (Paris: Economica, 1997). See also for a later follow up on the project M. Delmas-Marty e J. Vervaele (eds) *The implementation of the Corpus Juris in the Member States* (Antwerpen-Groningen-Oxford: Intersentia, 2000-2001) vol. I.

³⁶⁹ House of Lords, Select Committee on the European Union, “Prosecuting Fraud on the Communities’ Finances – the Corpus Juris”, Ninth Report, 18 May 1999, Para 23. The Treaty of Lisbon envisages the creation of the EPP once again, Article 86 TFEU.

financial interests in order to guarantee an effective fight against organised crime across the European Union.³⁷⁰

This link, as portrayed in the Action Plan on organised crime, was also symbolic of the growing intertwine between financial criminality and organised crime. Indeed, authors had been drawing attention to the growing commonalities between business/financial and organised criminality. Ruggiero, for example, pointed out that white-collar criminals and organised crime have many commonalities: they use and need similar skills and share common values.³⁷¹ In a similar line of reasoning, Levi had observed a

*“growing involvement of professional and organized criminals in sophisticated fraud, and the increasing use of financial institutions to launder vast quantities of money from fraud.”*³⁷²

This intertwine was not only seen at national level but also at the EC level. In relation to the latter, Quirke noted that fraud against the EC budget could be perpetrated both by the ‘organised fraudster’ and entrepreneurs who resort to fraud as a means of supporting failing enterprises or companies in financial difficulties.³⁷³

4. The idea of Euro-crime

It has been argued thus far that the Council adopted legal measures in considerably more domains than the ones specifically mentioned in the TEU(M), hence taking a broad approach to the competencies stipulated by the Treaty, tending to read these in a fluid, loose manner which permitted its intervention in a diverse range of crimes. It was also seen though how the EU’s claim in criminal law related matters was complementary of national claims yet limited in its scope. In this sense, it will be further argued that the EU focused mostly on a specific type of criminality – Euro-crime.³⁷⁴ This idea of Euro-

³⁷⁰ Action Plan to combat organized crime adopted by the Council on 28 April 1997, OJ C 251/1 [1997].

³⁷¹ V. Ruggiero, *Organised and Corporate Crime in Europe: Offers that can’t be refused* (Aldershot: Dartmouth, 1996) 1-24.

³⁷² M. Levi, *Regulating Fraud - White-Collar Crime and the Criminal Process* (London: Tavistock, 1987) 15.

³⁷³ B. Quirke, “Fraud against European Public Funds”, *supra* note 362, 173.

³⁷⁴ Other authors have already referred to the concept of Euro-crime to describe crimes that the EU requires Member State to criminalise and intervene upon, although not developing it from a substantive perspective. Anderson et al., for example, refer to Euro-crime as a “*diverse range of criminal activities that have transnational characteristics and tendencies, but that are still defined in the terms of national criminal laws.*” At another point in the same book, the same authors argue that “*The term Euro-crime, occasionally used in law enforcement circles, is not yet*

crime is a fluid concept, with loose boundaries and an ever-expanding nature, yet specific and solid enough to be distinctive to the European Union. Euro-crime appears as a criminality of late modernity, of a Europe that becomes ever more supranational and a world that becomes ever more globalised (crimes such as money laundering or organised crime did not pose such a pervasive threat in the nineteenth century, if they even existed in certain forms at all³⁷⁵). As seen in the introductory chapter to this dissertation, at national level, the boundaries of the criminal law have shifted considerably ever since the nineteenth-century. This shift was initially driven by the emergence, followed by a significant increase, in regulatory offences. More recently, however, there was another wave of expansion of the criminal law which involved new or newly perceived threats, such as terrorism, for example.³⁷⁶ It is to this new wave of expansion of the criminal law that the EU primarily relates to. Euro-crime thus represents a criminality that emerged mainly out of the nature of modern societies where things became more volatile - from the movement of people between continents and within Europe itself, to the movement of money through financial systems across the world or the flow of information on the internet. These developments and common challenges created complexities and common perceived threats that the EU sought to criminalise. Euro-crime has thus an intrinsic relation to our times and to what Levi calls

*“tools of later modernity”, such as “transnational air travel and communications, internet and the spread of information about weapons construction, globalisation of financial services and commerce including the arms trade and covert networking.”*³⁷⁷

Indeed, the EU seemed to focus primarily on crimes such as money laundering, fraud, trafficking in human beings, drug trafficking, or organised crime. Article K.1 TEU(M) referred in particular to terrorism, drug trafficking and other forms on international

matured as a juridical concept, because it suggests there is a genuine European justice system.... The only appropriate application of the term ‘Euro-crime’ is to crimes committed against the EU itself, such as agricultural fraud or budgetary fraud.” M. Anderson et al., *Policing the European Union* (Oxford: Clarendon Press, 1995) 13- 15. On a more restrictive note Euro-crimes was used by D. Marty and J. Vervaele in the Corpus iuris project to define crimes affecting the financial interests of the European Union, see M. Delmas-Marty and J. Vervaele (eds) *The implementation of the Corpus Juris in the Member States*, note 368. Andre Klip also refers, on occasion, to the crimes in relation to which the EU adopts harmonisation measures – or rather EU’s special part criminal law wise - as Eurocrimes, A. Klip, *European Criminal Law*, *supra* note 15, 197. Offences in the new list of crimes in Article 83(2) TFEU have also been referred to as ‘Euro-crimes’.

³⁷⁵ For an account of the different and limited shapes of organised crime in the ‘pre-globalisation era’ see M. Galeotti (ed) *Organized Crime in History* (NY: Routledge, 2009).

³⁷⁶ J. Figueiredo Dias, *Direito Penal, Parte Geral II - As Consequências Jurídicas do Crime*, *supra* note 48, 66; L. Zedner, *Criminal Justice*, *supra* note 32, 63.

³⁷⁷ M. Levi, “Organized Crime and Terrorism”, in M. Maguire, R. Morgan and R. Reiner, *The Oxford Handbook of Criminology* (Oxford: OUP, 2007, Fourth Edition) 775.

crime. Furthermore, it was seen that measures on money laundering, fraud, trafficking in human beings or organised crime, *inter alia*, were also adopted. These offences are in clear contrast with others such as rape, robbery, murder or defamation in relation to which the EU did not directly intervene.³⁷⁸ It seemed that the first group of offences fell more within the realm of EU interests whilst the second one in that of the Member States. Hence, Euro-crime presents two general distinctive features: the first one being its focus on the protection of public goods or goods related to collective institutions or interests; the second being that the offences at stake appear to present a ‘complex’ structure in that they usually involve collective action and the use of infrastructure.

Hence, Euro-crime is distinctive regarding the nature of the goods protected.³⁷⁹ Many of these tend to be public goods or goods related to collective institutions and interests, such as the political and financial system or the security of the State and the efficiency of its policies.³⁸⁰ Crimes such as money laundering or fraud, for example, clearly are attempts against the financial system. Likewise, the criminalisation of corruption (private or public) aims primarily at the protection of political systems and institutions and of the principles which embed them; the fight against terrorism aims at the protection of those same democratic values but also at the security of the State itself and the infrastructures that sustain it; whilst the fight against human trafficking, for example, is well known to be, in the EU context at least, also suitable to protect immigration policies by keeping people out as it is at protecting the victims.³⁸¹

Finally, the specifics of Euro-crime can also be found in the structure of the offences endorsed. A significant number of offences that the EU legislated on were characterised by a certain “complexity” in that they required a degree of collective action and infrastructure. Indeed, the use of infrastructure in the sense of technology,

³⁷⁸ It will be seen later in this thesis that this criminality, even if not the direct target of EU norms, was not completely out of its reach. This is so because EU’s criminal law is a constantly expanding body of law and, moreover, has the potential to, indirectly reach deep and far within national legal systems.

³⁷⁹ A wide approach to the concept of “goods” is taken similarly to Geuss who notes “‘Goods’ can mean several things. First, it can designate concrete objects that have some use-value [...]. Second, it can be taken abstractly as meaning ‘that which is, or is considered to be, good.’ So the fact that the streets are secure and safe may be a public good; that I have spent an enjoyable evening in conversation with a friend might be an instance of a private good. In neither of these cases in the ‘good’ in question an object. Third, ‘goods’ can mean ‘conceptions of the good’ [...].” In R. Geuss, *Public Goods – Private Goods* (Princeton: Princeton University Press, 2001) 9.

³⁸⁰ Assuming that the personal sphere relates to personal and private matters of the individuals whilst the public sphere relates to the political and institutional domain of society shared spaces or institutions.

³⁸¹ See, for example, H. Askola, *Legal responses to trafficking in women for sexual exploitation in the European Union* (Oxford: Hart Publishing, 2007).

means of transport, telecommunications or a network which allows for the completion of the offence could be found in many of the offences at stake. Trafficking in human beings, for example, often requires the use of transport to move people, or the setting up of physical structures to keep them. Terrorist acts traditionally involve the use of materials, the construction of chemical or other type of weaponry able to cause severe bodily harm to others, and often the use sites for assembly and preparation. Likewise, the laundering of crime related profits involves infrastructures such as particular businesses or the use of financial systems in general through which money can be moved and laundered. Furthermore, the large majority of examples given also require a certain degree of organisation or at least of a certain collective action, if they are to be effective. Organised crime, terrorism, trafficking in human being, drugs or theft of works of art or money laundering, for example, are all offences that require usually more than one perpetrator and a certain degree of coordination (although not necessarily organisation). These two elements of the offences themselves bring us back to the first characteristic of Euro-crime - the link with modernity and its tools that allow for the easy flow of persons, money and goods.

Conclusion

This chapter focused on the evolution of European Union criminal law during the Maastricht period and sought to understand the nature of criminal matters in the EU that emerged during these years. It showed how the formal arrangements laid out by the TEU(M) envisaged a minimal scope and depth for European Union criminal law. It was then argued that legal and political discourses provided an ambitious reading of the *lettra legis* of the TEU(M), both regarding the mechanisms of development of European Union criminal law and the range of applicable legal measures. Hence, from a structural perspective, not only were judicial and police cooperation extensively developed but also the harmonisation of national criminal laws – not mentioned in the TEU(M) - was initiated; whilst from a substantive perspective, measures covered a substantially wider number of areas than those officially contemplated by the Treaty. These political and legal texts were driven by two main concerns and rationales, namely the fight against organised crime and the protection of EC interests. The former well suited the EU's desire for legislative expansion and justified the adoption of measures in areas ranging from corruption to human trafficking. It was also used at times to allow for the adoption of measures aimed at protecting EC interests, primarily financial in nature. Protecting the EC's interests also began to feature as a main rationale for the adoption of numerous conventions and several joint actions. These two rationales were often intertwined and, as was argued, led to the EU's focus on a particular sphere of criminality – Euro-crimes. This criminality was distinct from that which national or international systems had

traditionally focused on. Indeed, Euro-crimes tended to be considered as serious criminality, potentially transnational, often with elements of collective action and use of certain forms of infrastructure. In all, during this period, the EU laid down the groundwork for its own idea of criminal justice across the European Union. Some of the main features of ECL were thus shaped during these years regardless of EC's and EU's limited competence in criminal matters. It will be seen in the next chapter how the tendency to read the Treaties ambitiously, to follow an expansionist dynamic regardless of fragile institutional arrangements, and to make use of legal concepts such as organised crime allowed the EU to continue exploring and advancing its wide stance on criminal law related matters.

Chapter 3 The evolution of European Union criminal law from Amsterdam to Lisbon: an ever expanding dynamic (1999-2009)

Introduction

This chapter will shed light on the evolution of European Union Criminal Law (ECL) in its most recent period – the Amsterdam-Lisbon era³⁸² – and evaluate its patterns, focus and narratives. It will be shown that ECL continued to be driven by an expansionist dynamic that could be seen in different dimensions. First and foremost, expansion took place at an institutional level as the Treaties envisaged further empowerment of the role of the EU in criminal matters. More specifically, EU actors were empowered, decision making facilitated and stronger legal acts envisaged. Furthermore, expansion was also seen at a substantive level as the Treaties considerably enlarged the EU's competencies. However, the actual scope of ECL was significantly broader than the one directly envisaged by the Treaties. This was seen both in political and legal acts and texts, which tended to frequently extrapolate the scope of ECL as envisaged by primary law. Consequently, the range of topics addressed and legal measures adopted by the EU was considerably wider than what was stated in the Treaty of Amsterdam TEU(A). To be sure, the main focus of ECL continued to be Euro-crime, even if new offences such as cyber or environmental crime were added. With this expansion of 'Euro-crime' and the offences it encompassed, political and legal rationales underlying the adoption of legal acts also became increasingly solidified, broader and interlinked. The fight against organised crime, which already had strong historical roots in ECL, continued to run through most measures, especially those seeking to approximate the minimum elements of crime and penalties. Whilst organised crime now had a place in the Treaties, it continued to be used in a broader manner allowing for the adoption of several measures, some only indirectly related to organised criminality. Furthermore, the narrative of protection of EC interests and policies was also considerably enlarged as the focus moved from the exclusive protection of EC financial interests (and some policies indirectly via national criminal law) to the protection of other EC policies such as the environment or transport. Finally, as narratives of criminalisation around the former two themes developed, concerns over fundamental rights began to surface as an independent narrative. This focused mostly on the protection of victims' rights via the adoption of legislation on this matter which contrasted greatly with the absence of legislative

³⁸² This era covers the period from the entry into force of the Treaty of Amsterdam (ECT(A) and TEU(A)) until the entry into force of the Treaty of Lisbon (TEU(L) and TFEU). The Treaty of Amsterdam was signed on 2 October 1997 and entered into force on 1 May 1999, followed by the Treaty of Lisbon which was signed on 13 December 2007, and entered into force on 1 December 2009.

measures in relation to defendants' rights. Overall, these three narratives (fight against organised crime, protection of EC interests and policies and fundamental rights) found among political declarations, Actions Plans, Council Presidency Conclusions and preambles of framework decisions, aimed primarily at criminalisation and facilitation of prosecution of Euro-crime, which the Council and the Commission saw as endangering the EU's values and goals.

Moreover, the chapter will further suggest that as the EU's competencies developed, its main focus and narratives began to fade in order to facilitate national and transnational prosecution beyond merely Euro-crime. The introduction of the principle of mutual recognition in judicial cooperation in criminal matters continued to expand the EU's influence on national legal orders far beyond the forms of criminality and rationales encompassed in the concept of Euro-crime. This mutual recognition was not only about the EU's assertion of its own interests and the fight against criminality that it saw as endangering its legal order, but also about the facilitation of national prosecution and punishment across the EU. Indeed, the principle of mutual recognition ensured the recognition of Member States' judicial decisions in criminal matters by making national decisions effective *de facto* across the territory of the European Union. Whilst mutual recognition was facilitated *ad extremum* in relation to serious offences³⁸³ (specifically a list of 32 serious offence types including all Euro-crimes among other serious criminal offences), other non-serious criminality was also included in its scope. Consequently, the reach of ECL spread to the entire realm of national decisions and sentences in criminal matters, clearly expanding national enforcement capacity beyond the States' borders. This was tantamount to bringing a new dynamic to ECL, with different rationales, different *modus operandi* and different goals.

Finally, the chapter will argue that the structure of ECL as divided into two dynamics as well as its incremental remit were solidified with the Treaty of Lisbon (TEU(L) and TFEU). The TFEU explores Euro-crime as the centre of ECL, addressing it through a more integrated framework, further empowering EU actors and granting stronger legal instruments in the third pillar context. Furthermore, the Lisbon reforms bring mutual recognition to the core of ECL's development. Moreover, in general, these reforms reassert the expansionist trend vis-à-vis the two dynamics of ECL as it clearly legitimises, at least theoretically, the possibility of further growth of the field.

³⁸³ In rigour the list includes 'criminal behaviours' rather than criminal offences as definitions are not offered and some entries are set out in very generic terms such as for example 'computer related crime'. For the purposes of this dissertation however we will refer to the list of behaviours as 'types of offences' or 'offence types'. See, for instance, Council Framework Decision 2002/584/JHA on the European arrest warrant and surrender procedures between Member States, OJ L 190/1 [2002].

1. Treaty of Amsterdam: expansion and formalisation of the EU's role in criminal matters

With the entry into force of the TEU(A) in 1999, ECL entered a new period of development and expansion: EU actors were empowered and ECL's remit enlarged. These changes were inserted under Title VI of the TEU(A) which envisaged the creation of an area of freedom, security and justice in the EU, where

*“the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime”.*³⁸⁴

The association of criminal matters, with free movement of persons and market integration, was markedly still a ‘Maastricht trait’.³⁸⁵ The TEU(A), however, moved this idea forward and brought it into a context more closely linked to the European citizen in the area of freedom, security and justice. Article 29 TEU(A) lays down this new framework:

“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 and otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud, through:

- *closer cooperation between police forces, customs authorities and other competent authorities in the Member States, both directly or through the European Police Office (Europol), in accordance with the provisions of Articles 30 and 32;*

³⁸⁴ Article 2 TEU(A).

³⁸⁵ Jorg Monar notes how this new wording of the Treaty marks a clear step beyond the Schengen rationale and its focus on free movement; See J. Monar, “Justice and Home Affairs after Amsterdam: the Treaty reforms and the challenge of their implementation”, in J. Monar and W. Wessels (eds) *The European Union after the Treaty of Amsterdam* (London/NY: Continuum, 2001) 267, 287. See also chapter 2.

- *closer cooperation between judicial and other competent authorities of the Member States in accordance with the provisions of Articles 31 (a) to (d) and 32;*
- *approximation, where necessary, of rules on criminal matters in the Member States, in accordance with the provisions of Article 31 (e)."*

This movement towards an increased role of the EU in criminal matters was enhanced by the empowerment of the EU actors vis-à-vis the Member States, as the European Commission, the European Parliament (EP) and the CJEU acquired a more significant role with the TEU(A). The CJEU, for example, was given jurisdiction—subject to Member States’ acceptance—to deliver preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions and of measures implementing them. Member States could choose to limit jurisdiction to courts of last appeal or alternatively to allow any national court to refer a question.³⁸⁶ The EP was given compulsory consultation powers. Article 38 TEU(A) required the Council to consult with the EP before adopting decisions, framework decisions or conventions. The EP could also ask questions or make recommendations to the Council as well as hold a yearly debate on police and judicial cooperation in criminal matters.³⁸⁷ In turn, the Commission was once again to be “*fully associated with the work in the areas referred to in this Title*”,³⁸⁸ whilst also having power to initiate legislation (shared with the Council and any Member State).³⁸⁹ Indeed, Member States and the Council remained nonetheless at the centre of the decision-making process. Article 34 (2) TEU(A) clearly stated

“The Council shall take measures and promote cooperation, using 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 States or of the Commission the Council may”

adopt common positions, framework decisions, decisions or conventions.

Furthermore, the role of EU in criminal matters was enhanced by the introduction of new and more efficient legal instruments for intervention in criminal matters, namely common positions, decisions and framework decisions, whilst maintaining conventions as an instrument to legislate in this domain. Article 34 TEU(A) provided that common

³⁸⁶ Article 35 TEU(A).

³⁸⁷ Article 39 (3) TEU(A).

³⁸⁸ Article 36 (2) TEU(A).

³⁸⁹ Article 34 (2) TEU(A).

positions would be suited to define the EU's approach in a particular matter, framework decisions were to be used to approximate laws and regulations of Member States, whilst the purpose or use of conventions was left open without any guidance of when they should be preferred over another instrument.

In practice, framework decisions were the measures more frequently adopted by the EU and were at times used for other purposes besides the approximation of domestic laws. Article 34 (b) also clarified legal value of framework decisions, thus avoiding uncertainties like the ones surrounding joint actions during the Maastricht period:

“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 forms and methods. They shall not entail direct effect”.

Their legal nature was further clarified by the CJEU in 2005 when the Court extended the application of the principle of indirect effect to framework decisions, by holding that national courts must interpret national law in so far as possible in the light of the wording and purpose of the text of framework decisions.³⁹⁰

Finally, the TEU(A) provided for more efficient mechanisms of cooperation or for the reinvigoration of pre-existent ones. This was done in the axes of police cooperation, judicial cooperation and approximation of laws. In relation to police cooperation, for example, Article 30 stipulated that common action in this domain should include operational cooperation between law enforcement agencies; the collection, processing, analysis and exchange of information by law enforcement services, in particular through Europol; the continuation in the cooperation and joint initiatives in training, research and investigative techniques, in particular in relation to serious forms of organised crime; and a strengthening of the role of Europol.

In turn, regarding judicial cooperation, Article 31 TEU(A) held that collaboration should include further cooperation between national authorities in relation to proceedings and enforcement of decisions, a facilitation in the rules of extradition, the compatibility between national rules as well as the prevention of conflicts of jurisdiction and the

³⁹⁰ Case C-105/03 *Criminal Proceedings against Maria Pupino* [2005] ECR I-5285; The Court also noted that the Framework Decision must be interpreted in such a way that fundamental rights, including the right to a fair trial as set out in Article 6 of the ECHR are respected, para 59 of the Framework Decision. For more details on the judgement see, for example, S. Peers, “Salvation outside the Church: Judicial Protection in the Third Pillar after the Pupino and Segi judgements” (2007) 44 *Common Market Law Review* 5.

progressive harmonisation of the minimum elements constituent of crimes and penalties in the fields of organised crime, terrorism and illicit drug trafficking:

“Common action on judicial cooperation in criminal matters shall include:

- (a) facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States in relation to proceedings and enforcement of decisions;*
- (b) facilitating extradition between Member States;*
- (c) ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation;*
- (d) preventing conflicts of jurisdiction between Member States;*
- (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 drug trafficking.”*

Whilst the TEU(A) article mentions judicial cooperation in general, in 1999, the Tampere European Council introduced the principle of mutual recognition as the cornerstone of judicial cooperation in criminal matters.³⁹¹

1.2. A timid empowerment: limitations to the framework created

Despite its great dimensions, the role of the EU in criminal matters had significant limitations. As the TEU(A) itself stated, Member States remained responsible for the *“maintenance of law and order and safeguarding of internal security.”*³⁹² Indeed, mechanisms were envisaged to facilitate cooperation among Member States but not as an absolute transfer of competencies and responsibilities in criminal law.

Therefore, the new institutional arrangements were limited and conveyed a multifaceted criminal matters reality within the EU. Decision-making arrangements, for example, continued to raise accountability and transparency concerns similar to those during the Maastricht period. On the one hand, the secrecy of some negotiations and the lack of proper debate around important measures continued to be an issue. Douglas-Scott commented on this in relation to the adoption of the Framework Decision on the EAW.

³⁹¹ Presidency Conclusions, Tampere European Council, *supra* note 54. Tampere also envisaged the creation of Eurojust, a body aimed at improving the fight against serious organised crime through a more efficient judicial cooperation between Member States; Eurojust was officially established in 2002 by the Council Decision of 28 February 2002 which set up Eurojust with a view to reinforce the fight against serious crime, OJ L 63/1 [2002].

³⁹² Article 33 TEU(A).

The author noted how it was adopted swiftly and left national parliaments very little time to evaluate the draft of the proposal.³⁹³ On the other hand, accountability around the EU's actions remained weak, given the limitations on the role of institutions able to provide checks and balances - such as the CJEU, the EP or national parliaments. Indeed, regardless of the empowerment of various EU actors, as shown above, their role remained rather narrow. The Court, for example, was merely given an optional competence in order to accommodate the interests of some countries less willing to cooperate in this domain, such as the UK.³⁹⁴ Hence, Article 35 (1) TEU(A) held that the Court had jurisdiction to give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions adopted under Title VI TEU(A) and on the validity and interpretation of the measures implementing them. However, this jurisdiction was dependent on Member States' acceptance. Hence, paragraph 2 and 3 held that Member States could accept the jurisdiction of the Court by a declaration in which they should specify whether any court or tribunal against whose decision there would be no judicial remedy under national law could request the CJEU to give a preliminary ruling; or whether any court or tribunal, even against whose decision there would be judicial remedy, could do so. Paragraph 5 clarified that the CJEU had no jurisdiction to review the validity or proportionality of operations carried by the police or other law enforcement agencies with regard to the maintenance of law and order and the safeguarding of internal security. These limitations of competence on the Court were further exacerbated by the slowness of some Member States and the refusal of others in accepting the former's jurisdiction. In 2001, only six countries had made such declarations of acceptance,³⁹⁵ whilst in total only 19 Member States accepted the Court's jurisdiction (all except the UK, Ireland, Denmark, Estonia, Poland, Slovakia, Bulgaria and Malta).³⁹⁶ Moreover, regarding the EP, a similarly weak framework existed. Indeed, although it was to be consulted before the adoption of measures, such a consultation was merely advice-giving and the Council could act when no opinion was

³⁹³ S. Douglas-Scott, "The Rule of Law in the European Union – Putting the Security into the Area of Freedom, Security and Justice" (2004) 29 *European Law Review* 219, 221, 228.

³⁹⁴ B. Smith and W. Wallace point out how the UK's stance during the negotiations of the Treaty affected this outcome, for example, in "Constitutional Deficits of EU Justice and Home Affairs: Transparency, Accountability and Judicial Control", J. Monar and W. Wessels (eds) *The European Union after the Treaty of Amsterdam* (London/NY: Continuum, 2001) 125, 141.

³⁹⁵ Austria, Germany, Greece, Luxembourg, Belgium and The Netherlands were the only countries to have opted in the Court's jurisdiction at the date of the signing of the Treaty of Amsterdam. Smith and Wallace, *ibid.* at 141. See also House of Lords – European Union Committee, *The Treaty of Lisbon: an impact assessment*, Volume 1 – Report, HL Paper 62-I, 13 March 2008, 125.

³⁹⁶ For a summary of the *status quo* in December 2009, before the entry into force of the Treaty of Lisbon, see information concerning the Declaration by the Republic of Cyprus and Romania on their acceptance of the Jurisdiction of the Court of Justice of the European Union to give preliminary rulings on the acts referred to in Article 35 of the Treaty on European Union, OJ L 56/14 [2010].

given within three months.³⁹⁷ The same could be said about the European Commission. As Monar notes, although the Commission was given a shared right of initiative, it was to assert it in

“the ‘climate’ of the intergovernmental framework which tends to limit its actual possibilities of influencing decision making” at least in the earlier stages of its new role.³⁹⁸

Furthermore, the primary instrument of ECL introduced by Amsterdam – the framework decision – was of limited strength. Article 34 (2) (b) TEU(A) held that framework decisions were binding upon the Member States as to the result to be achieved, leaving national authorities the choice of form and methods. The Article further noted that framework decisions were not to have direct effect. This exclusion was a clear differentiation from directives, the equivalent instrument in the context of the first pillar. The fact that framework decisions could not entail direct effect was highly limiting in legal force, even more so in a domain where individual fundamental rights are often at stake, such as in criminal law.³⁹⁹ Furthermore, the TEU(A) did not provide for any mechanism of enforcement or control of Member States’ implementation of framework decisions. This, once again, was in sharp contrast with the first pillar, under which the Commission could lodge infringement actions under Article 226 ECT(A) if it found a Member State had not implemented a directive correctly or had not implemented it at all and it had failed to follow the Commission’s advice to do so. Likewise, conventions remained weak as legal instruments mainly because they depended on the political goodwill of Member States to be ratified and this process was not always expedited. This difficulty was felt strongly - to the point that some mechanisms to compensate for these limitations were created. Den Boer notes how the introduction of the ‘rolling ratification’ procedure aimed precisely at avoiding the paralyses of a draft convention, as it allowed their entry into force once adopted by at least half of the Member States (in their territory only).⁴⁰⁰

³⁹⁷ Article 38 TEU (A).

³⁹⁸ J. Monar, “Justice and Home Affairs after Amsterdam: The Treaty Reforms and the Challenge of their Implementation”, *supra* note 385, 267, 283.

³⁹⁹ The principle of direct effect, briefly, allows individuals to invoke EU law provisions before a national court against the State (vertical direct effect) or against another individual (horizontal direct effect) when certain conditions are met; See for more details D. Chalmers et al., *European Union Law*, *supra* note 268, 268-300.

⁴⁰⁰ M. den Boer, “An Area of Freedom, Security and Justice: Bogged Down by Compromise”, in D. O’Keefe and P. Twomey (eds) *Legal Issues After the Treaty of Amsterdam* (Oxford/Portland: Hart Publishing, 1999) 279, 317.

2. The new scope of European Union criminal law: Euro-crime and narratives

How did these changing structures reflect themselves upon the material body of ECL? What themes, rationales or narratives derived from it? It will be suggested that an expanding dynamic continued in this field as the EU formalised intervention in areas not mentioned by the TEU(M) but in relation to which the legislator had used the ‘umbrella’ of the fight against organised crime to intervene. This formalisation occurred, for example, in relation to organised crime, trafficking in persons, offences against children and corruption. The concept of organised crime also made its way into Article 29 TEU(A). Hence, Article 29 TEU(A) as mentioned earlier in this chapter held that the Union’s objective was 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 as well as in combating racism and xenophobia. More specifically, in relation to the domains of criminality in which intervention was to take place, Article 29 TEU(A) mentioned crime - organised or otherwise - such as terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud. In relation to harmonisation of national criminal law this provision was complemented by Article 31(1)(e) TEU(A) which noted that common action should include progressively adopting measures establishing minimum rules on the constituent elements of criminal acts and penalties in the fields of organised crime, terrorism and drug trafficking. Nevertheless, as it will be seen below, measures were adopted in domains not directly mentioned in the TEU(A), such as cyber crime, money laundering, victims’ rights and environmental crime. These were all areas of harmonisation not mentioned in Article 29 TEU, let alone in the short list of Article 31 (1)(e) (which mentioned organised crime, terrorism and illicit drug trafficking only).

It will be contended that ECL continued to have, as its focal point, a specific type of criminality: Euro-offences.⁴⁰¹ Hence, whilst Euro-crime continued to rest on ideas around the fight against organised crime (for which there was, at this stage, a clear legal basis), the narrative of protection of EC interests and policies via criminal law was further enhanced, whereas concerns with fundamental rights (mostly in the form of procedural victims’ rights) became more visible, albeit very limited. The latter two themes however, were in a realm of uncertain competence for the EU to enact legislation. This was so, given that the TEU(A) did not directly attribute competence for the EU to adopt criminal law measures that aimed at the protection of EC interests and policies or relating to criminal procedure.

⁴⁰¹ See chapter 2.

This was first seen at a political level as several action plans, which laid down guidelines for intervention, and mentioned further areas for intervention than those mentioned in the TEU(A). This was the case of the Vienna Action Plan,⁴⁰² which placed a great emphasis on police cooperation, calling for the strengthening of Europol's role in relation to the counterfeiting of the Euro, illegal immigrant networks and terrorism, and to judicial cooperation, namely regarding money laundering as well as the harmonisation of criminal law.

Similarly, the Tampere Conclusions,⁴⁰³ adopted in 1999, were a benchmark during the Amsterdam years. The document separately endorsed objectives in the domains of freedom, security, justice and external policy. In the specific context of the EU-wide fight against crime, Tampere placed the focus on Euro-offences setting as specific objectives: the improvement in prevention and cooperation between judicial and police authorities, particularly in the domains of money laundering, and it called for action against trafficking in drugs, human trafficking, terrorism, serious organised crime, high tech crime, environmental crime, financial crime and victims' rights.⁴⁰⁴ Money laundering, high tech crime, environmental crime and financial crime were all domains outside the narrow scope of Amsterdam. Furthermore, Tampere endorsed the principle of mutual recognition as the cornerstone for cooperation in judicial criminal matters despite the fact that this principle had no presence in the TEU(A).

Likewise, the Hague programme in 2005, continued the work and focus of the Tampere Conclusions further developing the AFSJ and called for the deepening of cooperation and action in ECL matters, particularly in the domains of cross-border organised crime, serious crime, drugs, corruption and terrorism.⁴⁰⁵ Finally, the Stockholm programme, which lays down the political priorities for the period 2010-2014, focuses its attention from a criminal law point of view on specific criminality such as terrorism, organised crime, trafficking in human beings, sexual exploitation of children and child pornography, cyber-crime, economic crime, corruption and drugs.⁴⁰⁶ The political mandate for the EU to legislate in criminal law related matters was being shaped by

⁴⁰² Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam in the area of freedom, security and justice of 3 December 1998, OJ C 19/1 [1999].

⁴⁰³ Tampere European Council, *supra* note 54.

⁴⁰⁴ See para 6, 40, 43, 44, 46 and 48 of the Tampere Conclusions, *ibid.*

⁴⁰⁵ Council of the European Union, *The Hague Programme: strengthening freedom, security and justice in the European Union*, OJ C 53/1 [2005], see in particular sections 2.2, 2.3, 2.7, 2.8 or 3.3.2.

⁴⁰⁶ Council of the European Union, *The Stockholm Programme – An open and secure Europe serving and protecting the citizens*, OJ C 115/1 [2010], see in particular sections 4.1 and 4.4..

these political declarations, which gave it a wider scope of intervention than that envisaged by the Treaties. In particular, these programmes mentioned more topics of intervention than those mentioned in the Treaties.⁴⁰⁷

Furthermore, in practice, a wide range of measures implementing these programmes and working plans was adopted, namely framework decisions on attacks against information systems,⁴⁰⁸ trafficking in human beings,⁴⁰⁹ money laundering,⁴¹⁰ fraud and counterfeiting of non-cash means of payment,⁴¹¹ victims' rights,⁴¹² terrorism,⁴¹³ sexual exploitation of children and child pornography,⁴¹⁴ illicit drug trafficking,⁴¹⁵ organised crime,⁴¹⁶ corruption.⁴¹⁷

⁴⁰⁷ For an analysis and comparison of the different programmes and mainly so of Tampere and Hague Programmes see, for example, E. Baker, "The European Union's 'Area of Freedom, Security and (Criminal) Justice' ten years on" (2009) 12 *Criminal Law Review* 833. For a review of the Stockholm Programme and an argument that it got much closer to the hard core of States' sovereignty in a broader context see Editorial Comment, "The EU as an Area of Freedom, Security and Justice: Implementing the Stockholm programme" (2010) 47 *Common Market Law Review* 1307.

⁴⁰⁸ Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems, OJ L 69/67 [2005], an initiative by the Commission, COM (2002) 173, OJ C203 E/109 (2002).

⁴⁰⁹ Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings, OJ L 203/1 [2002] an initiative by the Commission, COM(2000)854final/2.

⁴¹⁰ Council Framework Decision 2001/500/JHA of 26 June 2001 relating to money laundering, identification, tracing, freezing or seizing and confiscation of instrumentalities and proceeds from crime, OJ L 182/1 [2001], a proposal by France, Council doc 9930/00 and 11305/00, 23 September 2000.

⁴¹¹ Council Framework Decision 2001/413/JHA of 28 May on combatting fraud and counterfeiting of non-cash means of payment, OJ L 149/1 [2001], an initiative from the Commission COM(1999)438, 14 September 1999, OJ C 376 E/20 (1999).

⁴¹² Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, OJ L 82/1 [2001], a Portuguese proposal, OJ C 243/4 (2000).

⁴¹³ Council Framework Decision 2002/475/JHA on combating terrorism OJ L 164/3 [2002]; and Council Framework Decision 2008/919/JHA amending Framework Decision on combating terrorism OJ L 330/21 [2008], a Commission's proposal, COM(2001) 521, 19 September 2001, OJ C 332 E/300 (2001) and COM (2007) 650 final Brussels, 6 November 2007.

⁴¹⁴ Council Framework Decision 2004/68/JHA of 22 December 2003 on combating sexual exploitation of children and child pornography, OJ L 13/44 [2004], an initiative by the Commission, COM (2000) 854, Brussels, 21 December 2000.

⁴¹⁵ Council Framework Decision 2004/757/JHA of 15 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, OJ L 335/8 [2004], another Commission's initiative, COM (2001)259, Brussels, 23 May 2001.

⁴¹⁶ Council Framework Decision 2008/841/JHA of 24 October on the fight against organised crime, OJ L 300/42 [2008], a proposal by the European Commission, COM(2005)6, Brussels, 19 January 2005.

⁴¹⁷ Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, OJ L 192/54 [2003], an initiative from Denmark, Council Doc 9953/02, 14 June 2002.

The large majority of framework decisions in these topics were harmonisation measures – aimed at approximating minimum elements constituent of crimes and penalties. Other measures aimed mostly at facilitating judicial cooperation, also kept Euro-offences as their focal point, such as framework decisions on EAW,⁴¹⁸ illegal entry and residence,⁴¹⁹ financial penalties,⁴²⁰ probation decisions,⁴²¹ among other related matters.⁴²²

The types of offences at the centre of these measures were clearly those of Euro-criminality - crimes primarily related to late modernity, to globalisation and to the volatility of today's societies. People today move more between regions, countries and continents; capital is also increasingly more mobile between different financial systems as the world is financially and economically ever more interdependent; similarly, information flows without geographical restrictions as the Internet accelerates globalisation.⁴²³ Newer offences harmonised after the TEU(A) continued to fit the sphere of Euro-crime. The criminalisation of cyber crime, for example, clearly relates to the late modern age, to the widespread use of the Internet and the privacy and security issues it raises. Likewise, concerns with the environment and the criminalisation of environmentally damaging actions have been increasing in the last decades as has related legislation around pollution and global warming-related issues.⁴²⁴ Criminality such as cyber crime simply did not exist until the later years of the twentieth century. Furthermore, the connection with crimes of late modernity is further seen in new measures that were more rights-oriented such as the Framework Decision on the standing of victims in criminal proceedings.⁴²⁵ In fact, the promotion of the victim has been one of the most important currents of change in the crime control sphere in the last

⁴¹⁸ Council Framework Decision of 13 June 2002 on the European arrest warrant, *supra* note 383.

⁴¹⁹ 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 328/1 [2002], a French initiative, OJ C 2000 C 253/6.

⁴²⁰ Council Framework Decision 2005/214/JHA of 23 October 2009 on the application of the principle of mutual recognition to financial penalties, OJ L 76/16 [2005], a joint initiative by Sweden, UK and France, OJ C 278/4 (2001).

⁴²¹ Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgements and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ L 337/102 [2008], a Joint French and German initiative, OJ C 147/1 (2007).

⁴²² Mitsilegas refers to many of these instruments as a 'third wave' of third pillar law which extends to most criminal law integration and reinforces the idea that ECL is a flourishing field, V. Mitsilegas, "The Third wave of third pillar law: which direction for EU criminal justice?", Queen Mary University of London, School of Law, Legal Studies Research Paper No 33/2009, 523-560.

⁴²³ See Chapter 2. See, for example, A. Giddens, *Runaway World: How Globalisation is Reshaping our Lives* (London: Profile, 2002).

⁴²⁴ Advocate General Ruiz-Jarabo Colomer speak in this regard of the 'globalisation of environmental policy' with the emergence of numerous international pacts and agreements since the 1970s, See AG Opinion delivered on 26 May 2005, Case C-176/03, *Commission v Council*, ECR I-7881 [2005] para 61-65.

⁴²⁵ Council Framework Decision 2001/220/JHA, *supra* note 412.

thirty years and epitomises an important shift in the focus of criminal justice systems. For much of the twentieth century the victim remained in the background of the criminal process whilst the offender was the key determinant of action.⁴²⁶ This has now changed and ECL, it will be seen, is representative of such a shift. Procedural rights of the victim, their role as an active part of the prosecution, the taking into account of the impact that such participation might have in their lives and development are elements accounted for in ECL.⁴²⁷

2.1. Narratives in European Union criminal law: developing old themes, creating new ones

What drove this expanding scope? What concerns and rationales led to this enlarged focus? Surely, many developments came to upgrade or replace previous measures adopted. Hence, the fight against organised crime continued to be the paramount concern during this period. The broad nature of the term continued to allow for the EU's intervention in a very wide range of criminality even if only indirectly related to "organised crime". Moreover, the protection of EC policies and interests via criminal law continued to be pursued and enlarged as additional concerns over budgetary or financial issues arose, as well as with transport or environmental policies. Finally, the protection of fundamental rights, namely through protection of the victim and the need for certain procedural rights began to emerge.

2.1.1. The fight against organised crime

The fight against organised crime continued to be the central narrative of ECL. The knowledge of this type of criminality was by now well developed via national and European police information sharing and was disseminated to the public and law enforcement authorities via Europol's annual reports on organised crime. The reliability of this data is however still disputable. In fact, once significant institutional structures and law enforcement means are set in place to tackle, identify and report on a certain type of criminality, the amount of information available may suggest an increase and therefore present a bleak picture of that form criminality. Moreover, some authors have voiced fierce criticisms of the methods and type of data used by Europol to put together its 'Organised Crime Situation Reports' arguing that the information provided in these reports is altogether unreliable. They suggest that the data collection system is defective and entirely dependent on what Member States decide to report to Europol (and in turn

⁴²⁶ D. Garland *The Culture of Control*, *supra* note 42, 11-12.

⁴²⁷ It will be seen in chapter 6 how this has also been one of the domains of development in the post-Lisbon framework.

they do not always use reliable methods themselves), that the definition and criteria used are flawed and conclusions are of a very general nature.⁴²⁸

Nonetheless, whilst the dimension of the actual threat of organised crime across the European Union continued to be controversial, legal and political narratives were in fact strengthened. Article 29 TEU(A) finally made express reference to organised crime particularly in domains of terrorism, trafficking in persons and offences against children, drug trafficking, arms trafficking, corruption and fraud. Yet, organised crime continued to provide a useful political justification for legal intervention in a wide range of topics, which could be directly or indirectly related to organised crime, including areas of criminality not necessarily mentioned by the TEU(A). Once again, this emerges from the legal and political message being conveyed in action plans, Council conclusions and preambles of secondary legislation adopted (mostly through framework decisions).

In 1999, in the Tampere European Council Conclusions set the agenda in the area of freedom, security and justice. For example, the Presidency used a particularly symbolic tone when it held:

*“People have the right to expect the Union to address the threat to their freedom and legal rights posed by serious crime. To counter these threats a common effort is needed to prevent and fight crime and criminal organisations throughout the Union. The joint mobilisation of police and judicial resources is needed to guarantee that there is no hiding place for criminals or the proceeds of crime within the Union.”*⁴²⁹

A year later, an Action Plan to combat organised crime – the so-called Millennium Plan on Organised Crime - was agreed to at the Amsterdam European Council. The document aimed at strategizing initiatives to be taken in the field in the light of the entry into force of the TEU(A), whilst noting the changing nature of the phenomenon and the links to other forms of criminality, namely economic crime:

“The level of organised crime in the EU is increasing. The contributions of Member States to the annual organised crime situation report provide evidence of this

⁴²⁸ Van Duyne and Beken suggest that data on organised crime in the EU, namely in relation to Europol’s threat assessment levels is not based on clear concepts, definitions and methods whilst excessively dependant on Member States. For an overall analysis on collection, analysis and reporting methods on organised crime since the 1990s, see P. van Duyne and T.V. Beken, “The incantations of the EU organised crime policy making” (2009) 51 *Crime, Law and Social Change* 261, 261-281.

⁴²⁹ Tampere European Council, *supra* note 54, para 6.

phenomenon and of the multifaceted way in which organised crime is infiltrating into many aspects of society throughout Europe.

(...)

Although the threat from organised crime groups outside the territory of the European Union appears to be increasing, it is the groups that originate and operate throughout Europe, composed predominantly of EU nationals and residents, that appear to pose the significantly greater threat. These groups are strengthening their international criminal contacts and targeting the social and business structure of European society for example through money laundering, drug trafficking and economic crime. They appear to be able to operate easily and effectively both within the European arena and in other parts of the world, responding to illegal demand by acquiring and supplying commodities and services ranging from drugs and arms to stolen vehicles and money laundering. Their concerted efforts to seek to influence and hamper the work of law enforcement and the judicial system illustrate the extent and professional capability of these criminal organisations.

This calls for a dynamic and coordinated response by all Member States, a response that not only takes into account national strategies but also seeks to become an integrated and multidisciplinary European strategy. Addressing the ever-changing face of organised crime requires that this response and strategy remain flexible.

The threat of national and international organised crime requires concerted actions by the Member States of the European Union, and by the European Union itself, under the first, second and third pillars...⁴³⁰

The Millennium Action Plan portrayed a bleak reality in relation to organised crime within the EU. It noted first that it was on the rise and increasingly infiltrating many aspects of society throughout Europe. Interestingly, it noted that groups originating from and operating within the EU itself posed a major threat. The solution proposed was one that called for a dynamic and coordinated response and, mainly, for a strategy that remains flexible enough to combat the ever-changing face of organised crime. This, it will be shown in chapter 4, was a goal achieved partly by the adoption of a very broad and vague definition of a criminal organisation.

Likewise, in 2005, the Hague Programme further elaborated the approach given to the fight against organised crime, focusing on methods and means to achieve such a goal.⁴³¹

⁴³⁰ European Council, “The Prevention and Control of Organised Crime: A European Union Strategy for the Beginning of the New Millennium” (2000/C 124/01) OJ C 124/1 [2000] 3.

⁴³¹ Hague Programme, *supra* note 405, section 2.7.

Moreover, secondary legislation adopted after Amsterdam approached organised crime in a rather comprehensive manner. It did so, first, by legislating directly on organised crime, seeking the criminalisation of the membership of a criminal organisation or of the agreement to commit such offences in the context of a criminal organisation.⁴³² Second, more generally, by adopting several framework decisions criminalising offences which often are or can be related to organised crime, such as money laundering, etc.⁴³³ This link to organised crime is usually made directly in the preambles of the majority of measures adopted in domains which ranged from trafficking in human beings,⁴³⁴ sexual exploitation of children or crimes against information systems,⁴³⁵ to illicit drug trafficking.⁴³⁶

The Framework Decision on the trafficking of human beings, for example, stated in its Preamble that it aims to complement existing measures such as the UN Convention against transnational organised crimes and the Joint Action on making it a criminal offence to participate in a criminal organisation, now replaced by a Framework Decision.⁴³⁷ Along the same lines, the Framework Decision on sexual exploitation of children and child pornography is also contextualised within the realm of organised crime, requiring that

“Penalties must be introduced against the perpetrators of such offences which are sufficiently stringent to bring sexual exploitation of children and child pornography

⁴³² Council Framework Decision 2008/841/JHA, *supra* note 416; The framework decision was an initiative by the Commission (COM(2005)6 final, Brussels, 19.1.2005) and came to replace the Joint Action making it a criminal offence to participate in a criminal organisation. For a detailed analysis of the Joint Action see V. Mitsilegas, “Defining organised crime in the European Union: the limits of European criminal law in an area of ‘freedom, security and justice’” *European Law Review* 26 (2001); and for an analysis of the Framework Decision see F. Calderoni, “A Definition that Could not Work”, *supra* note 270. See also chapter 4.

⁴³³ Van Duyne identifies four main areas of legal intervention which tend to be deeply connected to organised crime, namely human misery and trafficking; economic crime; corruption and money laundering; and prohibited goods, P. Van Duyne, “Cross-border crime: a relative concept and broad phenomenon” in P. Van Duyne et al. (eds) *Cross-border crime in a changing Europe* (Prague: Tilburg University, Institute of Criminology and Social Prevention, 2000) 1, 4-12. Terrorism is also increasingly being brought into the context of organised crime, W. Laqueur, *The new terrorism: Fanaticism and the Arms of Mass Destruction* (Oxford: OUP, 1999) 217. In a more comprehensive approach, the United Nations identifies eighteen activities that are regarded as endemic in transnational organised crime, in a non exhaustive list, see A. Wright, *Organised Crime* (Devon/ Portland: Willan Publishing, 2006) 49.

⁴³⁴ Council Framework Decision 2002/629/JHA, *supra* note 409.

⁴³⁵ Council Framework Decision 2004/68/JHA and Council Framework Decision 2005/222/JHA, *supra* note 414 and note 408.

⁴³⁶ Council Framework Decision 2004/757/JHA, *supra* note 415.

⁴³⁷ Recitals (4) (8) and (9) of the Preamble of Framework Decision 2002/629/JHA, *supra* note 409.

*within the scope of instruments already adopted for the purpose of combating organised crime ...*⁴³⁸

The use of such a rationale was further expanded to new domains, such as cyber crime. Indeed, in the preamble of the Council Framework Decision on attacks against information systems it is noted how

*“...threats from organised crime and increasing concern at the potential of terrorist attacks against information systems ... form part of the critical infrastructure of the Member States. This constitutes a threat to the achievement of a safer information society and of an area of freedom, security and justice.”*⁴³⁹

Furthermore, the fight against organised crime continues to focus greatly on the protection of the stability of the EU’s financial system. The Council adopted a Framework Decision on money laundering; as well as on the identification, tracing, freezing and confiscation of the instruments and the proceeds from crime.⁴⁴⁰ Accordingly, the Framework Decision’s preamble declares,

*“money laundering is at the very heart of organised crime and should be rooted out wherever it occurs.”*⁴⁴¹

The emphasis in relation to financial crime is also seen in other measures, namely the Framework Decision on combating fraud and counterfeiting of non-cash means of payment.⁴⁴² The preamble of the Framework Decision justifies its adoption with a call for action via the Action Plan to combat organised crime adopted in 1997 and the Vienna Action Plan of 1998.⁴⁴³ Likewise, the Framework Decision on confiscation of crime related proceeds, instrumentalities and property⁴⁴⁴ is deeply related to the fight against organised crime and is seen throughout its preamble, whose intent (1) states,

“The main motive for cross-border organised crime is financial gain. In order to be effective, therefore, any attempt to prevent and combat such crime must focus on tracing, freezing, seizing and confiscating the proceeds from crime.”

⁴³⁸ Para (9) of the preamble of the Framework Decision 2004/68/JHA, *supra* note 414.

⁴³⁹ Recital (2) and (3) of the Framework Decision 2005/222/JHA, *supra* note 408.

⁴⁴⁰ Council Framework Decision 2001/500/JHA, *supra* note 410.

⁴⁴¹ Recital (6), *ibid.*.

⁴⁴² Council Framework Decision 2001/413/JHA, *supra* note 411.

⁴⁴³ Intent (3) of the Preamble, *ibid.*.

⁴⁴⁴ Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, OJ L 68/49 [2005].

The preamble then moves on to contextualise the adoption of the Framework Decision within the framework of the Vienna Action Plan, of the Tampere Conclusion of 1999 and of the UN Convention of 12 December 2000 against Transnational Organised Crime.⁴⁴⁵

All these measures are clearly contextualised under the umbrella framework of the fight against organised criminality which stands out as the main goal and underlying rationale of the EU's intervention in criminal matters. The expansive approach taken to the idea of organised crime is also seen also in the link made to financial criminality. Many of these measures adopted in the context of organised crime were concerned with financial criminality. Hence, boundaries between financial, business crime and organised crime remained fluid. This thematic intertwine reflects the fact that, as seen in earlier in this dissertation, the concept of organised crime, as observed by the EU, has developed in a particularly wide ranging, broad and fluid manner. Consequently, goals of the single market are also pursued via the fight against organised crime. Although the EC had no competence under the first pillar to adopt criminal law measures to protect its interests and policies, this protection was sought under the third pillar. Hence, third pillar measures were adopted with the aim of directly protecting EC interests or policies or with the aim of complementing existing first pillar instruments. Examples are the protection of immigration and labour markets with the Framework Decision on trafficking of human beings, or the protection of the financial system, through the Framework Decisions on money laundering, fraud, etc. In fact, measures to fight human trafficking or money laundering in the context of the third pillar, for example, were adopted mainly to complement and render efficacy to a vast bulk of legislation on the topic already existent in the realm of the first pillar. Money laundering, for example, was the object of several measures adopted in the realm of the first pillar in the nineties, directed at the single market. EU legislation has been adopted since 1991 to protect the financial system and financial activities from being misused for money laundering.⁴⁴⁶

⁴⁴⁵ See intents (2), (4) and (6), *ibid.*.

⁴⁴⁶ The first measure adopted in the context of the fight against money laundering was the 1991 Directive on the prevention of use of the financial system for the purpose of money laundering, *supra* note 164. The Directive was adopted in the context of the freedom of establishment and single market provisions, based on a threat posed to the financial system, although its scope went well beyond a strictly financial rationale and established a comprehensive framework of repression and prevention of money laundering. The Commission then replaced the Directive of 1991 by a Directive in 2001 and by another in 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, OJ L 309/15 [2005]. The Directive now covers the laundering of drug trafficking, organised crime and fraud as defined in the EU instruments, corruption in general, and of offences that generate considerable proceeds and which are punishable by severe sentences of imprisonment, in accordance with the law of the Member State.

Furthermore, the criminalisation of trafficking of human beings came to complement a broad range of measures to fight irregular immigration, namely the Directive on facilitation of unauthorised entry, transit and residence⁴⁴⁷ and the Framework Decision on strengthening the penal framework to prevent the facilitation on unauthorised entry, transit and residence.⁴⁴⁸ Nonetheless, besides the importance of the narrative of the fight against organised crime, the rationale of protecting EC interests and policies via the criminal law was also expanded and solidified during the Amsterdam years. This will be explored in the following section.

2.1.2. Protection of EC/EU interests and policies

The idea that criminal law had a role to play in the furtherance of EC interests and policies was bolstered during the Amsterdam years. This took place even if the Treaties remained either silent or unclear regarding the relationship between criminal law and Community law. On the one hand, in Article 29 of the TEU(A), express reference was made to intervention in crime—organised or otherwise—and, in particular, to terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud. Similarly, Article 31 (e) referred specifically to the harmonisation of national criminal law—particularly in regard to organised crime, terrorism and illicit drug trafficking. On the other hand, the ECT(A) continued to be mostly silent regarding criminal law. If anything, it made clear in two different provisions that certain elements were to remain within the sphere of Member States. Both Articles 135 and 280(4) of the ECT(A)—on the adoption of Community measures on customs cooperation and on the prevention and fight against fraud respectively—clarified that Community initiatives should not concern the application of national criminal law or the national administration of justice.

Regardless, criminal law, continued to be used as a tool to protect EC interests and policies at various levels in order to promote the effectiveness of Community law. Hence, measures aimed at the protection of EC interests and policies via criminal law were adopted under the third pillar. This was the case, for instance, in the Framework Decision on combating corruption in the private sector⁴⁴⁹ aiming *prima facie* at the protection of the single market—particularly its competitiveness and economic

⁴⁴⁷ Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 328/17 [2002].

⁴⁴⁸ *Ibid.*

⁴⁴⁹ Council Framework Decision 2003/568/JHA, *supra* note 417.

development,⁴⁵⁰ thus requiring Member States to criminalise both intentional active and passive corruption.⁴⁵¹ Furthermore, other measures aiming primarily at strengthening the penal framework of first pillar policies were also put forward. This was the case of the Framework Decision, adopted in 2000, which required Member States to criminalise the counterfeiting of the Euro. The importance of this measure was noted in the Preamble:

*“The worldwide importance of the euro means it will be particularly open to the risk of counterfeiting. Account should be taken of the fact that there is already evidence of fraudulent activity with regard to the euro.”*⁴⁵²

A Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence was also adopted in 2002. Its preamble held that the Framework Decision

*“supplements other instruments adopted in order to combat illegal immigration, illegal employment, trafficking in human beings and the sexual exploitation of children.”*⁴⁵³

But the adoption of these measures—even under the legal framework of the third pillar—was not necessarily clear-cut as the TEU(A) provisions did not directly attribute competence to the EU to adopt measures protecting EC policies via criminal law (as seen in the first section of this chapter). Article 29 TEU(A) made no reference to the smuggling of human beings, corruption or the counterfeiting of the Euro, whilst Article 31 (e) TEU(A), the legal basis under which these measures were adopted, only made reference to the approximation of minimum elements of crimes and penalties in relation to organised crime, terrorism and drug trafficking. Clearly, the article was being read in a broad way and the list of criminal domains mentioned was taken as non-exhaustive. The lack of controversy in relation to the adoption of measures under the third pillar was a clear sign of the EU’s political will to strengthen the protection of EC policies and

⁴⁵⁰ See page 2 of the *Report based on Article 9 of the Council Framework Decision on combating corruption in the private sector*, COM (2007)328 final, Brussels, 18.6.2007.

⁴⁵¹ Article 1 (a) and (b) of the Framework Decision, *supra* note 417. The Framework Decision also establishes that inchoate offences shall be punishable (Article 3) and that legal persons can be held liable (Article 5). The offences shall be punishable by a penalty of a maximum of at least one to three years of imprisonment (Article 4). This Framework Decision is one of the rare cases to add other penalties, beyond imprisonment, to be applicable to natural persons. There is also the possibility of prohibiting a person convicted, at least in the cases where he or she occupied a leading position in the company, from carrying with that particular or a comparable business activity (Article 4(3)), *ibid.*

⁴⁵² Intent (7) and (8) of the Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting the euro, OJ L 140/1 [2000], as amended by Council Framework Decision 2001/888/JHA of 6 December 2001, OJ L329/3 [2001].

⁴⁵³ Council Framework Decision 2002/946/JHA, see *supra* note 419.

interests (in this case the single currency, immigration policies and the sound functioning of the single market) via criminal law.

This choice of the third pillar as the legal base for the adoption of these measures appeared to be, at times, a functional choice. Indeed, it was not so much that the third pillar was perceived by all actors as the ideal legal basis for the adoption of these measures but rather—as Mitsilegas notes, in relation to the Framework Decision on the facilitation of unauthorised entry, transit and residence—the third pillar allowed for a compromise to be reached in light of Member States’ reluctance to confer competence in criminal matters to the Community. Accordingly, the solution was the adoption of ‘parallel’ and interlinked measures: a first pillar measure describing the conduct and a third pillar measure determining that such conduct should be deemed a criminal offence and therefore stipulating criminal sanctions.⁴⁵⁴ With these measures aiming at the furtherance of EC policies or interests via the criminal law of the third pillar, the division between the pillars became ever more intertwined from a thematic point of view.

Moreover, the idea that criminal law had an important role to play in the attainment of EC goals was also boosted under the first pillar. To be sure, as seen thus far, criminal law and criminal law related matters had been clearly placed in the realm of the TEU(A) (third pillar) and remained outside the scope of the ECT(A) (first pillar). Nonetheless, this formal separation between the two Treaties was not as clear-cut in practice. First of all, as just seen, third pillar measures were being adopted specifically with the aim of protecting policies and goals placed under the first pillar. Second, the existence and extent of an EC competence in the domain of criminal law was an on-going debate. One of the important expressions of this possibility had thus far been the case law of the CJEU defining that, in principle, matters of criminal law and criminal procedure did not fall within Community competence; nonetheless, Members were under obligation to ensure the enforcement and effectiveness of EC law through the principle of assimilation and by imposing effective, proportionate and dissuasive sanctions for breaches of EC law. It was seen earlier in the thesis that this case law and some secondary legislation had led, *de facto*, to the use and transformation of some national criminal law.⁴⁵⁵

Thus, as Mitsilegas summarises, the debate remained divided between, on the one hand, those who thought of criminal law as a special field of law, close to the core of State sovereignty and touching upon sensitive areas such as the relationship between the

⁴⁵⁴ V. Mitsilegas, “Constitutional Principles of the EC and European Criminal Law” (2007) Vol VIII *European Journal of Law Reform* 303.

⁴⁵⁵ See sections 1.1. and 2.2. chapter 1 and section 3.2. chapter 2.

individual and the State and which, in consequence, should remain within the sphere of the State; and, on the other hand, those who thought about criminal law as any other field of law and therefore saw no particular reason why the EC should not be able to call upon criminal law to attain its own goals and to safeguard the integrity of its own legal order.⁴⁵⁶

Indeed, a role for criminal law in the protection of EC interests and policies was becoming more established even in the context of the first pillar. The CJEU was, once again, a fundamental actor in this regard, reaffirming its long established case law on the relationship between Community and national criminal law. The assimilation principle, for example, was further elaborated in *Nunes and de Matos*, in which the Court held that,

*“Article 5 of the Treaty requires the Member States to take all effective measures to penalise conduct harmful to the financial interests of the Community. Such measures may include criminal penalties even where the Community legislation only provides for civil ones. The penalty provided for must be analogous to those applicable to infringements of national law of similar nature and importance, and must be effective, proportionate and dissuasive.”*⁴⁵⁷

Moreover, the Court further elaborated on the limits of the influence of Community law on national criminal law, restating that a Directive cannot, of itself and independently of a national implementing act, determine or aggravate the criminal liability of persons who act in contravention of a directive.⁴⁵⁸ The Court also incorporated general principles of national criminal law into its own interpretation, such as the principle of retroactive application of a more lenient penalty. This was clear in *Berlusconi*, in which the Court asserted that the principle, being part of the constitutional traditions common to Member States, also forms part of the general principles of Community law which must be followed by courts when applying legislation implementing Community law.⁴⁵⁹

⁴⁵⁶ V. Mitsilegas, “Constitutional Principles of the EC and European Criminal Law”, *supra* note 454, 302-303; see also S. White, “Harmonization of Criminal Law under the First Pillar” (2006) 31 *European Law Review* 81; and M. Wasmeier and N. Thwaites, “The Battle of the Pillars: Does the EC have the power to approximate national criminal laws?” (2004) 29 *European Law Review* 613.

⁴⁵⁷ Case C-186/98 *Criminal proceedings against Maria Amélia Nunes and Evangelina de Matos* ECR I-4890 [1999] para 14.

⁴⁵⁸ Case C-457/02 *Criminal proceedings against Antonio Nisselli* ECR I-10853 [2004] para 29. This limitation had already been elaborated upon in the earlier stages of the development of ECL, see Cases C-80/86 *Criminal proceedings against Kolpinghuis Nijmegen* ECR 3969 [1987] para 13; and C-168/95 *Criminal proceedings against Luciano Arcaro* ECR I-4705 [1996] para 37.

⁴⁵⁹ Joint Cases C-387/02, C-391/02, C-403/02 *Criminal proceedings against Silvio Berlusconi and others* ECR I-3565 [2005] para 68-69.

More notably, the most significant development towards the protection of EC interests and policies via the criminal law was made by the CJEU when adjudicating on a dispute regarding the competence of the EC (not the EU) to directly adopt measures of a criminal nature. Indeed, despite the silence of the ECT(A) in relation to Community competence on criminal matters as well as the existence of the third pillar, the furtherance of EC goals via criminal law, in the context of the first pillar, was becoming a pressing point in the Commission's agenda. As Borgers and Kooijmans point out, the importance of the legal basis for adopting criminal measures had everything to do with the characteristics of Community law and EU law relating to police and judicial cooperation in criminal matters. Under the first pillar, measures would be adopted within the Community's competences and by means of a directive and not of a framework decision. This would imply that

“(...) the legislative procedure designated in the EC Treaty has to be followed – usually the co-decision procedure in which decisions can be taken ‘only’ by qualified majority – and the Court of Justice can rule in an infringement action on the way in which the relevant directive is to be implemented, as well as give interpretation of the rules of that directive in a preliminary ruling procedure.”⁴⁶⁰

As the authors go on to argue, and as seen earlier in this chapter, under the third pillar framework decisions were adopted by unanimity and the role of the CJEU was limited. This suggested that, in principle, legal acts to protect EC interests and policies could be more easily adopted under the first pillar than under the third and that they would further benefit from the role of the Court syndicating the enforcement of these measures in national legal orders.

In this context, the Commission made several attempts during the Amsterdam era to deal with issues of criminal law within the first pillar itself. This was the case, for example, of a proposal for a Directive on fraud against the Community Financial Interests⁴⁶¹ as well as a proposal for a Directive on the protection of the environment via criminal law, both made in 2001.⁴⁶² The Council opposed the Commission's view that criminal measures could be adopted under the first pillar and rejected the Commission's proposals. Furthermore, the Council went ahead and followed through on an initiative by

⁴⁶⁰ M. J. Borgers and T. Kooijmans, “The Scope of the Communities Competence in the Field of Criminal Law” (2008) 16 *European Journal of Crime, Criminal Law and Criminal Justice* 380.

⁴⁶¹ European Commission, ‘Proposal for a Directive of the European Parliament and of the Council on the criminal law protection of the Communities’ financial interests’, COM(2001)272final, Brussels, 23 May 2001.

⁴⁶² *Ibid.*.

Denmark to adopt a Framework Decision on the protection of the environment.⁴⁶³ This reflected the Council's view that a framework decision, in the context of the third pillar, was the correct instrument to impose on Member States any obligation to provide for criminal sanctions. The Commission strongly disagreed with this view and lodged an action before the CJEU seeking the annulment of the Framework Decision.⁴⁶⁴ The Commission essentially argued that the Framework Decision had been adopted under the wrong legal basis and that, although in principle the Community did not have a general competence in criminal matters, it did have competence under Article 175 ECT(A) to prescribe criminal penalties for infringements of Community environmental protection legislation, if such means were necessary to ensure the effectiveness of the legislation at stake. The Commission further noted that the harmonisation of national criminal laws is designed to be an aid to the EC's environmental policy.⁴⁶⁵ Although recognising that there was no precedent in this area, the Commission submitted that it relied on the case law regarding the duty of loyal cooperation as well as on the principles of effectiveness and equivalence to support its opinion.⁴⁶⁶ The Council opposed this view and argued that as the law stood, the Community had no power to require Member States to impose criminal penalties regarding the conduct covered by the Framework Decision.⁴⁶⁷ It noted that there was no express conferral of power in that regard and, given the significance of criminal law for the sovereignty of Member States, there were no grounds for accepting that this power could have been implicitly transferred to the Community at the time when specific substantive competences were conferred (such as those exercised under Article 175 ECT(A)).⁴⁶⁸ The Council also noted that both Articles 135 and 280(4) of the ECT(A) confirm this interpretation by reserving to the Member States the application of national criminal law and the administration of justice.⁴⁶⁹ Furthermore, according to the Council, the conferral of a competence in criminal matters to the European Union contradicted the Commission's argument that the authors of the ECT(A) intended to confer such competence implicitly to the Community.⁴⁷⁰ Finally, the Council noted that the CJEU, having decided in several cases pertaining to the criminal law of Member States, had never required them to adopt criminal penalties.⁴⁷¹

⁴⁶³ Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law, OJ L 29/55 [2003].

⁴⁶⁴ Case C-176/03 *Commission v. Council* ECR I- 07879 [2005], para 18.

⁴⁶⁵ *Ibid.*, para 19.

⁴⁶⁶ *Ibid.*, para 20.

⁴⁶⁷ *Ibid.*, para 26.

⁴⁶⁸ *Ibid.*, para 27.

⁴⁶⁹ *Ibid.*, para 28.

⁴⁷⁰ *Ibid.*, para 29.

⁴⁷¹ *Ibid.*, para 31.

The Court decided with the Commission in this dispute and annulled the Framework Decision.⁴⁷² It based its reasoning on Article 47 TEU(A) which provided that nothing in the TEU(A) should affect the ECT(A).⁴⁷³ It noted that the protection of the environment constitutes one of the essential objectives of the Community. This was derived from Article 2 of the ECT(A), which stated that the Community was tasked to promote a high level of protection and improvement of the quality of the environment; and from Article 3 of the ECT(A) which provided for the establishment of a policy in the sphere of the environment.⁴⁷⁴ The Court further observed that in proposing a Framework Decision on the subject, the Council was concerned with the rise in environmental crime and its impact, which was increasingly extending beyond the border of State in which the offences are committed. Thus, it concluded that a ‘*though response*’ and a ‘*concerted action to protect the environment under criminal law*’ were necessary.⁴⁷⁵

This led the Court to revisit its ‘formula’, according to which, as a general rule, criminal law and the rules of criminal procedure do not fall within the Community’s competence.⁴⁷⁶ Nonetheless, the Court further elaborated that

“ (...) *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.*”⁴⁷⁷

Accordingly, the Court found that the Articles of the Framework Decision, which determined that a certain conduct particularly detrimental to the environment ought to be criminal, could have been properly adopted under Article 175 EC (which defines the basis of the Community environmental policy).⁴⁷⁸

With this decision, the Court departed considerably from its previous case law and deeply reshaped previous understandings about the role of criminal law within the entire EC/EU context. It suggested that, although, in general, criminal law and criminal procedure continue to fall outside the realm of the EC’s competence, exceptions could

⁴⁷² For details on the facts see, for instance, S. White, “Harmonization of Criminal Law under the First Pillar” *supra* note 454, 81-83.

⁴⁷³ Case C-176/03, *supra* note 464, para 38.

⁴⁷⁴ *Ibid.*, para 41.

⁴⁷⁵ *Ibid.*, para 46.

⁴⁷⁶ *Ibid.*, para 47.

⁴⁷⁷ *Ibid.*, para 48.

⁴⁷⁸ *Ibid.*, para 49-51.

exist (which were beyond the use of effective, dissuasive and proportional penalties by Member States or their duty to treat EC interests with the same diligence as they treat national ones, as the Court had established in previous case law). In fact, the Court held that, in the context of serious environmental crime, the Community itself could now take measures relating to the criminal law of Member States and, in particular, it could require the application of effective, proportionate and dissuasive *criminal* penalties.

The decision can be read in both a broad and a narrow sense. In a broad sense, for the first time, the Court *de facto* expanded the Community's competence to now adopt measures directly relating to the criminal law of Member States. In a narrow sense, however, the Court was careful in its reasoning and delimited EC competence to the domain of environmental policy only - an essential objective of the Community - and to situations when the application of criminal penalties is an 'essential' measure for combating serious criminal offences. In these cases, the EC can take measures that relate to the criminal law of the Member States, when it considers them necessary to ensure the effectiveness of the Community rules on environmental policy.

The Court's ruling was significant not only from a 'competence' and 'legal basis' point of view; it also raised questions in relation to the justification for this criminalisation. As seen, the attribution of competence for the Community to adopt criminal law-related acts is directly associated with the effectiveness of EC objectives. As Herlin-Karnell notes, the Court assumes that criminal law *per se* is effective.⁴⁷⁹ This assumption is however open to challenge. Faure, for example, argues that the idea that criminal law is the most effective weapon to combat environmental crime is naïve and that administrative sanctions are often more effective.⁴⁸⁰ Earlier on, Lange had also voiced a similar opinion in light of the German experience regarding the enforcement of EC environmental policies.⁴⁸¹ The recourse to criminal law by the EC, without a detailed assessment and justification of this choice,⁴⁸² deviates from traditional views of criminal law as *ultima ratio* and, as Mitsilegas notes, clearly portrays criminal law as a 'means to an end',⁴⁸³ i.e. in this case as a means to guarantee the effectiveness of EC environmental law.

⁴⁷⁹ E. Herlin-Karnell, "Commission v. Council: Some Reflections on Criminal Law in the First Pillar" (2007) 13 *European Public Law* 74.

⁴⁸⁰ M. Faure, "European Environmental Criminal Law: Do we really need it?" (2004) Jan. *European Environmental Law Review* 18-29.

⁴⁸¹ Lange explores the limitations of criminalisation in the success of the control of environmental crime at the national level. See, B. Lange, "Environmental Criminal Law in a European Context: Europeanization or Localization of Law? A German Case Study", in C. Harding and B. Swart (eds) *Enforcing European Community Rules, Criminal Proceedings, Administrative Procedures and Harmonization* (Aldershot: Dartmouth, 1996) 173-199.

⁴⁸² See Case C-176/03, *supra* note 464, in particular para 48.

⁴⁸³ V. Mitsilegas, "Constitutional Principles of the EC and European Criminal Law", *supra* note 454, 307.

Regardless of the Court having placed the measures at stake in the narrow context of environmental crime, the European Commission, perhaps not surprisingly, issued a communication on its own interpretation of the Court's decision, noting that, in its opinion, the reasoning of the Court could be extended to other policy areas.⁴⁸⁴ In particular, the Commission noted that,

*“The provisions of criminal law required for the effective implementation of Community law are a matter for the TEC. This system brings to an end the double-text mechanism (directive or regulation and framework decision) which has been used on several occasions in the past. In other words, either a criminal law provision specific to the matter in hand is needed to ensure the effectiveness of Community law, and it is adopted under the first pillar only, or there does not appear to be a need to resort to the criminal law at Union level – or there are already adequate horizontal provisions – and specific legislation is not included at European level.”*⁴⁸⁵

Following this Communication, the Commission sought the annulment of yet another Council Framework Decision: the Council Framework Decision to strengthen the criminal law framework for the enforcement of the law against ship-source pollution.⁴⁸⁶ The Court annulled this Framework Decision as well and took the opportunity to clarify the scope of EC competence in criminal matters.⁴⁸⁷ To develop its reasoning, the Court relied once again on Article 47 TEU(A), which laid down that none of the provisions of the ECT(A) were to be affected by provisions of the TEU(A). It reiterated the formula that, in principle, criminal law and rules of criminal procedure do not fall within the EC's competence, but found that the case was again exceptional:

*“(…) the fact remains that when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, the Community legislature may require the Member States to introduce such penalties in order to ensure that the rules which it lays down in that field are fully effective”.*⁴⁸⁸

The Court went on to note that the provisions laid down in the Framework Decision related to conduct likely to cause particular environmental damage as a result of the

⁴⁸⁴ Communication from the Commission to the European Parliament and the Council on the implications of the Court's judgement of 13 September 2005 (Case C-176/03 *Commission v Council*), COM(2005)0583final.

⁴⁸⁵ Point 11, *ibid.*

⁴⁸⁶ Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution, OJ L 255/164 [2005].

⁴⁸⁷ Case C-440/05 *Commission v Council* ECR I-9097 [2007].

⁴⁸⁸ Para 66, *ibid.*

infringement of Community rules on maritime safety. It then ascertained that the necessity of criminal penalties to ensure compliance with such rules had been recognised by the preambles of both Directive 2005/667 and Framework Decision 2005/667. Accordingly, as Articles 2, 3 and 5 of the Framework Decision were designed to ensure the efficacy of the rules adopted in the field of maritime safety, they were regarded as being aimed at improving maritime safety as well as environmental protection and thus could be adopted under the ECT(A) (Article 80(2)). The Court then turned to note that, in contrast, the determination of the level and type of penalty to be applied did not fall within the Community's sphere of competence (hence, the provisions of the Framework Decision which related to the type and level of penalties were not in infringement of Article 47TEU(A)). However, the Court considered that these provisions were inextricably linked with those relating to conduct; hence, the Framework Decision ought to be annulled in its entirety.⁴⁸⁹

The Court thus extended the Community's competence in criminal matters to the field of ship-source pollution and further emphasised the need for the effectiveness of EC law as a central justification for criminalisation. However, the Court also set limits to this competence, namely by clarifying that the imposition of precise sanctions (the choice of type and level of penalties) still fell within the realm of the third pillar and repeatedly reaffirmed that the objectives at stake were 'essential Community' objectives.

Nonetheless, according to Symeonidou-Kastanidou, the Court left three important questions unanswered: when is the enforcement of criminal sanctions a 'necessary' measure; when can the threat of criminal penalties be justified as 'effective' (in particular, when criminal law still hosts an intense debate as to whether penal sanctions actually bear dissuasive powers); and, finally, which are the so-called 'severe' or 'grave' offences against the environment and how can they be distinguished from less severe ones.⁴⁹⁰

Certainly, this judicial "opening of the door" for the protection of EC interests and policies via criminal law represented a very ambitious leap in the relationship between the EC and criminal law and further expanded the boundaries of the former's influence on the latter. It certainly left many questions unanswered. However, it established beyond any doubt the Community's competence to adopt measures of a criminal nature

⁴⁸⁹ Para 74-74, *ibid.*.

⁴⁹⁰ E. Symeonidou-Kastanidou, "Ship-Source Marine Pollution: the ECJ Judgements and their Impact on Criminal Law" (2009) 17 *European Journal of Crime, Criminal Law and Criminal Justice* 345. For an opinion of how the Court also left many questions unanswered particularly relating to the scope of EC competence and the meaning of effectiveness see E. Herlin-Karnell, "The Ship-Source Pollution Case C-440/05, *Commission v Council*, Judgment of 23 October 2007 (Grand Chamber)" (2008) 14 *European Public Law* 533-544.

in particular fields, thus solidifying the rationale around the adoption of criminal matters for the protection of EC interests and expanding the previous remit of this narrative.⁴⁹¹

2.1.3. Fundamental rights and the victim on the rise

As EU competences broadened into further areas of criminalisation, new narratives began to emerge in the third pillar, including the protection of fundamental rights via criminal procedure.⁴⁹² To be sure, the CJEU had developed a significant body of fundamental rights law based on national constitutional traditions and on the ECHR. In a number of cases along the years, the Court recognised, for example, the right to effective judicial remedy,⁴⁹³ the right to be heard in one's own defence before any measures are imposed,⁴⁹⁴ the right to presumption of innocence,⁴⁹⁵ the right to a fair trial,⁴⁹⁶ the right to be informed of the nature and cause of accusation in a criminal trial,⁴⁹⁷ the right to protection from self-incrimination,⁴⁹⁸ as well as non-retroactivity of penal liability.⁴⁹⁹ However, as Craig and de Búrca note, despite the Court's increasing engagement with human rights, the number of cases in which the Court actually annulled the challenged legislation is low, a dramatic exception being cases in the anti-terrorism field.⁵⁰⁰

In the specific context of the third pillar, the protection of fundamental rights was acknowledged in Article 6 TEU:

⁴⁹¹ As will be shown below, the debate on the existence and scope of EC competence in criminal matters was finally put to rest with the entry into force of the Lisbon reforms, which not only created the conditions for the merging of the pillars into a single and common structure but also specifically mentioned the possibility of using criminal law to protect and pursue EC policies and interests, thus codifying the idea already developed by the EC over the years and spelled out by the CJEU.

⁴⁹² In the context of the first pillar the CJEU had already decided on some cases where it set conditions on national procedural law in order to guarantee the effectiveness of EC policies and objectives. This was the case in, for example, *Ian Willian Cowen*, the Court stated that the award of State compensation for harm caused in that State to the victim of an assault could not be condition on the victim's holding of a residence permit or nationality, Case 186/87 ECR 195 [1989] para 19-20.

⁴⁹³ Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* ECR 1651 [1986].

⁴⁹⁴ Case 12/74 *Transocean Marine Paint v Commission* ECR 1063 [1974].

⁴⁹⁵ Case C-45/08 *Specter Photo Group NV v CBFA* ECR I-12073 [2009] and Case C-344/08 *Rubach* ECR I-7033 [2009].

⁴⁹⁶ Case C-305/05 *Ordre des barreaux francophones et al v Council* ECR I-5305 [2009].

⁴⁹⁷ Case C-14/07 *Weiss v Industrie – und Handelskammer Berlin* ECR I-3367 [2007].

⁴⁹⁸ Joint Cases 374/87 and 27/88 *Orkem et Solvay v Commission* ECR 3283 [1989].

⁴⁹⁹ Case 63/83 *R v Kent Kirk* ECR 2629 [1984].

⁵⁰⁰ P. Craig and G. de Búrca, *EU Law* (Oxford: OUP, 2011) 372. The reference case in the anti-terrorism field in which the Court annulled EU law is *Kadi I*, Cases C-402 and 415/05 *P Kadi & Al Barakaat International Foundation v Council and Commission* ECR I-6351 [2008].

“1. The Union is founded on principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.”

The commitment to human rights was also to be found symbolically in several preambles. The Framework Decision on the trafficking of human beings, for instance, states how the protection of such values is at the centre of the rationale for criminalisation:

*“Trafficking in human beings comprises serious violations of fundamental human rights and human dignity and involves ruthless practices such as the abuse and deception of vulnerable persons, as well as the use of violence, threats, debt, bondage and coercion.”*⁵⁰¹

Similarly, the preamble of the Framework Decision on sexual exploitation of children states,

*“Sexual exploitation of children and child pornography constitute serious violations of human rights and of the fundamental right of a child to harmonious upbringing and development.”*⁵⁰²

Whereas the preamble of the Framework Decision on combating terrorism declares:

*“The European Union is founded on the Universal values of human dignity, liberty, equality and solidarity, respect for human rights and fundamental freedoms. It is based on the principle of democracy and the principle of rule of law, principles which are common to the Member States.”*⁵⁰³

The reference to fundamental rights in the preamble of these framework decisions sent a symbolic message of the importance of the protection of fundamental rights in the framework of ECL.

⁵⁰¹ Recital (3) of the Framework Decision 2002/629/JHA, *supra* note 409.

⁵⁰² Recital (4) of the Framework Decision 2004/68/JHA, *supra* 414.

⁵⁰³ Recital (1) Council Framework Decision 2002/475/JHA, *supra* note 413.

However, competence to enact legislation in this realm – and mostly so in procedural criminal law – was highly contentious. Title VI TEU(A) did not make any particular reference to human rights, fundamental freedoms or criminal procedural rights and there was no legally binding measure on procedural rights of the defendant at EU level at that stage.⁵⁰⁴ The emphasis on pro-criminalisation and pro-prosecution measures brought further to light the lack of action on defence rights.

In fact, during the Amsterdam years, only one measure relating to criminal procedure was agreed to, namely the Framework Decision on the standing of victims in criminal proceedings.⁵⁰⁵ The latter was adopted in 2001 and listed a number of procedural rights that victims, namely,

*“the right to be treated with respect for their dignity, the right to provide and receive information, the right to understand and to be understood, the right to be protected at the various stages of procedure and the right to have allowance made for the disadvantage of living in a different Member State from the one in which the crime was committed.”*⁵⁰⁶

The importance of the Framework Decision was reinforced by the CJEU in the case *Pupino*.⁵⁰⁷ Maria Pupino was a nursery school teacher in Italy, where criminal proceedings were initiated against her for maltreatment of children. During the criminal proceedings the prosecutor requested the children not be heard in court given their young age and vulnerability. The Italian Code of criminal procedure only contemplated such possibility in cases of charges for sexual offences. The Framework Decision on the standing of victims requires “*vulnerable victims*” to be protected “*from the effects of giving evidence in open court*”, in which case the court itself may decide to enable them to testify in a less pressurised setting.⁵⁰⁸ The CJEU was asked whether the Framework Decision entailed indirect effect, and thus whether the national court was under an obligation to interpret national law in the light of the Framework Decision. The CJEU confirmed that the ‘interpretative obligation’ of national courts was also extended to the third pillar and hence the Italian Court was under the obligation to

⁵⁰⁴ As it will be seen later in this chapter and in chapter 6 the Lisbon reforms significantly altered the text of the TEU(A). Furthermore, measures regarding the right of victims and defendants in criminal procedure were further adopted under the Lisbon framework.

⁵⁰⁵ Framework Decision 2001/220/JHA, *supra* note 412. In the context of the first pillar the CJEU had already decided on some cases where it set conditions on national procedural law in order to guarantee the effectiveness of EC policies and objectives. This was the case in, for example, *Ian William Cowen*, the Court stated that the award of State compensation for harm caused in that State to the victim of an assault could not be condition on the victim’s holding of a residence permit or nationality, Case 186/87, *supra* note 492, para 19-20.

⁵⁰⁶ Recital (8), *ibid.*.

⁵⁰⁷ Case C-105/03, *Pupino*, *supra* note 390.

⁵⁰⁸ Article 8 (4) of the Framework Decision 2001/220/JHA, *supra* note 412.

interpret the national norms of criminal procedure in light of the EU Framework Decision. Consequently, those young children, victims of maltreatment, were to be authorised to give their testimony in accordance with arrangements that guaranteed them an appropriate level of protection. This decision was controversial - not least because it increased the scope of national law.⁵⁰⁹

To be sure, the role of the victim is also acknowledged in the text of many framework decisions. The Framework Decision on terrorism, for instance, provides that investigations and prosecutions shall not be dependent upon a complaint by a victim and that Member States must provide support to victims' families.⁵¹⁰ The Framework Decision on trafficking in human beings and the Framework Decision on sexual exploitation of children contain similar provisions with the additional condition that children should be considered as 'particularly vulnerable' (interpretation also confirmed by the CJEU in the *Pupino* case).⁵¹¹ The Framework Decision on organised crime also mentions that investigation and prosecution shall not be dependent on the complaint of the victim.⁵¹²

The idea of protection of the victim at EU level appeared to have at this stage at least two particular features. The first relates to the type of victim in question. EU law focuses more on the protection of particularly vulnerable victims than on any other victim (along the lines of the *Pupino* case and other framework decisions). Second, the protection of the victim often suits prosecutorial goals as it focuses largely on the procedural conditions for the victim to provide evidence and be a part of the investigation and judicial process and for the latter not to be dependant on the victims' will to initiate or pursue criminal proceedings. The fine line between the protection of the victim and its prosecutorial benefits is clearly seen in relation to third country nationals, victims of trafficking in human beings. The Council Directive on the residence permit issued to third-country nationals who are victims of trafficking in human beings who cooperate with the competent authorities, for example, defines the conditions for national authorities to grant short term residence permits (generally 6

⁵⁰⁹ The principle of indirect effect had only been recognised thus far in relation to first pillar instruments and this obligation appeared as conflictual to some degree given the 'weak' legal nature that that framework decision had been imbued with. Para 43 and 61 of the judgement, Case C-105/03, *Pupino*, *supra* note 390. Recently the Court further clarified that the same Framework Decision aimed at ensuring the victims' rights of participation in the criminal procedure; whilst this did not preclude a Member State to impose mandatory penalties of a minimal duration even against the victim's wishes, Joined cases C-483/09 and C-1/10, *Gueye and Salmeron Sanchez*, 15 September 2011, decision not yet published.

⁵¹⁰ Council Framework Decision 2002/475/JHA, Article 10, *supra* note 413.

⁵¹¹ Council Framework Decision 2004/68/JHA, Article 7, *supra* note 414.

⁵¹² Council Framework Decision 2008/841/JHA, Article 8, *supra* note 416.

months) to third-country national victims of trafficking or to facilitate illegal immigration for those who cooperate in the fight against trafficking in human beings.⁵¹³ Such victims can be entitled to a short-term residence permit as long as they are cooperating with police investigations or judicial proceedings, manifest a clear intention to cooperate and have severed all relations with those suspected of crimes.⁵¹⁴ If these conditions are not fulfilled – hence when the victim no longer is able or willing to cooperate with the authorities or in case it re-enacts or does not break ties with hers or his traffickers – he or she shall be expelled from the European Union.⁵¹⁵ Although these measures speak directly to the intertwining of criminal law and EU/ EC policies, and the indirect implications that measures such as the framework decision on trafficking in human beings have on immigration policies, it is a clear example of the use of the victim for prosecutorial benefits to their possible detriment and with disregard of their other fundamental rights.⁵¹⁶

Whilst the protection of victims' rights was settled comfortably in EU legal narratives, the rights of suspects were not yet, at the time, directly acknowledged by a third pillar instrument.⁵¹⁷ Vogel, for instance, noted how in the system of EU criminal law

*“the interest of the prosecuted person and their defence was clearly neglected. Indeed, the defence is simply missing from the integrated European criminal justice system as it stands now.”*⁵¹⁸

Kaiafa-Gbandi remarked that

“...characteristic are not only the divergence from basic criminal law principles but also the lack of fundamental rights institutional protection within the EU framework,

⁵¹³ Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, OJ L261/19 [2004].

⁵¹⁴ Article 8 (1), *ibid.*.

⁵¹⁵ Articles 13 and 14, *ibid.*.

⁵¹⁶ For more details see H. Askola, *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union*, *supra* note 381, 92-95.

⁵¹⁷ To be sure, the rights of the defendant remained acknowledged and protected at national level according to Member State's own rules on criminal procedure. Furthermore, For an overview of defence rights in a broader European context (EU, Council of Europe – ECHR and 9 different national jurisdictions) see E. Cape et al., *Effective Criminal Defence in Europe* (Antwerp/Oxford/Portland: Intersentia, 2010) or for a practical perspective, see E. Cape et al., *Suspects in Europe, Procedural Rights at the Investigative Stage of the Criminal Process in the European Union* (Antwerp/ Oxford/ Portland: Intersentia, 2007).

⁵¹⁸ J. Vogel, “The European Integrated Criminal Justice System and its Constitutional Framework” (2005) 12 *Maastricht Journal of European and Comparative Law* 125, 136.

although the EU has already organs whose action may infringe people's rights (i.e. Europol)"

whilst showing concern with the

"...additional plus of deficits of the liberal element that in parallel [to prosecution and punishment]⁵¹⁹ accompanies criminal law as a measures of people's freedom".⁵²⁰

To be sure, the European Commission had put forward a Green Paper on Procedural Safeguards for suspects and defendants in criminal proceedings⁵²¹ and subsequently a Proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union.⁵²² However, agreement in relation to the latter failed despite only five basic rights being covered:

*"access to legal advice, both before the trial and at the trial; access to free interpretation and translation; ensuring that persons who are not capable of understanding or following the proceedings receive appropriate attention; the rights to communicate, inter alias, with consular authorities in the case of foreign suspects; and notifying suspected persons of their rights (by giving them a written "Letter of Rights")."*⁵²³

Disagreements were many:⁵²⁴ some Member States asked for derogations and limitations of some provisions, for example, in cases where there is suspicion of involvement of the suspect in terrorist activities (the main provisions affected would be the right to legal advice and of communication; the Commission was opposed to these

⁵¹⁹ Our parenthesis.

⁵²⁰ M. Kaiafa-Gbandi, "The Treaty establishing a Constitution for Europe and challenges for criminal law at the commencement of the 21st Century" (2005) 13 *European Journal of Crime, Criminal Law and Criminal Justice* 483, 484-485. Some authors further develop such matters, namely by proposing possible solutions and paths forward. See, for instance A. Klip, "The Constitution for Europe and Criminal Law: a step not far Enough" (2005) 12 *Maastricht Journal of European and Comparative Law* 115-123; B. Schünemann, "Alternative project for a European criminal law and procedure" (2007) 18 *Criminal Law Forum* 227.

⁵²¹ *Green Paper on Procedural Safeguards for suspects and defendants in criminal proceedings*, COM (2003) 75 final, 19.2.2003.

⁵²² Proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM (2004) 328, 28 April 2004.

⁵²³ Para 24, page 7, *ibid.*.

⁵²⁴ Peers mentions the UK as the main opponent of the measure, having led several Member States in opposing the measure, de facto blocking any possibility of its approval under the Amsterdam framework, S. Peers, *EU Lisbon Treaty Analysis no 4: UK and Irish opt-outs from EU Justice and Home Affairs (JHA) law*, Version 3, 26 June 2009, Statewatch, 9.

derogations);⁵²⁵ others proposed further rights to be added, such as a right to silence as well as to the inclusion of ‘suspected persons’ and not only defendants. They found the existent rights to be “*too vague and set at too low a threshold*”,⁵²⁶ whilst in general the question of whether the EU had competence to legislate in procedural matters was in itself highly controversial.⁵²⁷

The difficulties in the adoption of this latter instrument epitomise the greater emphasis that was being given to the discourse of criminalisation namely in relation to organised crime and serious forms of criminality (and related ideas such as that of victimhood). The latter had been favoured to the detriment of more procedural and defendant-related approaches to criminal law. Indeed, even if the argument was to be accepted that the TEU(A) did not provide a legal basis for the EU to enact measures regarding procedural guarantees, such an argument could have been equally valid vis-à-vis the adoption of some harmonisation measures which sought the criminalisation of behaviours of organised crime or EC interests and policies related, let alone victims’ rights on criminal procedure. However, as seen, the silence of the TEU(A) on these matters suited diverse goals differently. On the one hand, the provisions of the TEU(A) were interpreted broadly regarding criminalisation (and also victims’ rights), thus allowing for the enactment of framework decisions in domains not directly mentioned in Article 29 or 31 (e) TEU(A); on the other hand, however, they were interpreted narrowly in relation to rights of suspects and defendants as some actors argued for EU’s lack of competence.⁵²⁸

2.2. Beyond Euro-crime and narratives: the ever-expanding scope of ECL

Whilst the hub of ECL continued to be Euro-criminality and these three justificatory themes continued to play a central role in the preambles and texts of most legal acts, other discrete themes were also present. The most important of these was the fight against terrorism which after 2001 became quite visible in the EU’s political discourse

⁵²⁵ C. Morgan, “Proposal for a Framework Decision on certain procedural rights applying in proceedings in criminal matters throughout the European Union”, in M. Leaf *Cross-Border Crime: Defence rights in a new era of international judicial co-operation* (Justice, 2006) 93, 100.

⁵²⁶ House of Lords, European Union Committee, 9th Report of Session 2008-09, “Procedural Rights in EU criminal proceedings – an update”, Authority of House of Lords, London, 11 May 2009, 5-6.

⁵²⁷ Löff, for example, was of opinion that the EU could already legislate in areas of procedural safeguards to the extent in which it was strictly necessary for the operation of the principle of mutual recognition, R. Löff, “Shooting from the Hip: Proposed Minimum Rights in Criminal Proceedings throughout the EU” (2006) 12 *European Law Journal* 421, 428.

⁵²⁸ This scenario is now changing in the post Lisbon framework. See below in this chapter and chapter 6.

and, to some extent, in its legal one as well.⁵²⁹ Regardless of its salience, it did not permeate the legal texture of the EU as deeply and to the same extent as the other three narratives.⁵³⁰

Furthermore, it will be suggested that the main rationales of development of ECL thus far were pertinent mostly in relation to harmonisation measures and operational bodies. This was no longer the case in some domains of judicial cooperation where the use of such themes was dropped by the legislator. Indeed, with the introduction of the principle of mutual recognition as the cornerstone of judicial cooperation in criminal matters by the Tampere European Council in 1999, the potential reach of ECL was expanded far beyond the core of Euro-crime and the narratives developed up to that time. Hence, mutual recognition brought about a major conceptual shift in criminal matters in the EU by expanding its influence beyond Euro-crimes and criminality related to organised crime or EU interests and policies to potentially any criminality.⁵³¹

The principle of mutual recognition helped in the realisation of the idea of an area of freedom, security and justice in which domestic judicial decisions in criminal matters are recognised and implemented across the whole territory of the European Union. The principle thus engaged the State as a penal actor and was no longer engaged with Euro-crime alone, but rather with a more varied type of criminality.

Mutual recognition was thus developed via several framework decisions, namely on the European arrest warrant,⁵³² financial penalties,⁵³³ decisions on supervision measures⁵³⁴ or decisions rendered in absentia,⁵³⁵ among others. Their core seeks to facilitate the

⁵²⁹ For more details see, for example, B. Saul, “International Terrorism as a European Crime: The Policy Rationale for Criminalization” (2003) 11 *European Journal of Crime, Criminal Law and Criminal Justice* 323 and B. Gilmore, “The Twin Towers and the Third Pillar: Some Security Agenda Developments”, EUI Working Paper 7 /2003, Florence.

⁵³⁰ Terrorism had particular relevance in the adoption of the Framework Decision on the EAW (see *supra* note 316 and chapter 5) and on the creation or expansion some EU agencies such as Europol (whose remit was augmented after 9/11) and Eurojust whose creation had already been envisaged but which was only set in motion also after 9/11. See on this matter S. Douglas-Scott, “The Rules of Law in the European Union”, see *supra* note 393, 234-238.

⁵³¹ Chapter 5.

⁵³² Council Framework Decision 2002/584/JHA, *supra* note 383.

⁵³³ Council Framework Decision 2005/214/JHA, *supra* 420.

⁵³⁴ Council Framework Decision 2009/829/JHA of 23 October 2009 on the application between Member States of the European Union of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, OJ L 294/20 [2009].

⁵³⁵ Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L 81/24 [2009].

recognition of national sentences, penalties and national requests (surrender, evidence, etc.) in relation to different groups of crimes. First and foremost, in relation to serious criminality, namely almost all Euro-crimes but also other offences in relation to which harmonisation has not been attempted, such as rape, murder, arson, genocide, etc. (serious criminality left in the domain of national or international legal systems). Indeed, framework decisions implementing the principle of mutual recognition set a particular regime for 32 serious criminal offence types (39 in the case of the Framework Decision on the mutual recognition of financial penalties).⁵³⁶ In relation to those offences, Member States cannot make recognition of other Member States' sentences or decisions in criminal matters dependent on the verification of the principle of dual criminality – which requires that a certain act be considered a criminal offence in both states for the recognition to take place. This means that for those specific offences Member States have to recognise the decision or penalty at stake even if it refers to a conduct which is not deemed as criminal by their own domestic law. Finally, the remaining criminality, which does not fall under the previous category, is also under the reach of the principle of mutual recognition, although Member States can still control for dual criminality in relation to these offences. This means that Member States are not required to execute requests for recognition and cooperation if these relates to acts not deemed as criminal offences by their domestic criminal law.

⁵³⁶ The list provided for, for example, by the Framework Decision on the EAW, on the supervision of probation measures and alternative sanctions, on decisions on supervision measures as alternatives to provisional detention and confiscation orders, among others, is the following: participation in a criminal organisation; terrorism; trafficking in human beings; sexual exploitation of children and child pornography; illicit trafficking in narcotic drugs and psychotropic substances; illicit trafficking in weapons, munitions and explosives; corruption; fraud, including that affecting the financial interests of the European communities within the meaning of the Convention of 26 July 1995 on the protection of EC interests; laundering the proceeds of crime, counterfeiting currency, including the Euro; computer-related crime; environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties; facilitation of unauthorised residence and entry; murder, grievous bodily injury; illicit trade in human organs and tissue; kidnapping, illegal restraint and hostage-taking; racism and xenophobia; organised and armed robbery, illicit trafficking in cultural goods, including antiques and works of art; swindling; racketeering and extortion; counterfeiting and piracy of products; forgery of administrative documents and trafficking therein; forgery of means of payment; illicit trafficking in hormonal substances and other growth promoters; illicit trafficking in nuclear and radioactive materials; trafficking in stolen vehicles; rape; arson; crimes within the jurisdiction of the International Criminal Court; unlawful seizure of aircrafts/ships; and sabotage. In turn, the Framework Decision of recognition of financial penalties lists 39 offence types and to the ones already mentioned it adds: conduct which infringes road traffic regulations, including breaches of regulations pertaining to driving hours and rest periods and regulations on hazardous goods; smuggling of goods; infringement of intellectual property rights; threats and acts of violence against persons, including violence during sport events; criminal damage; theft; offences established by the issuing State serving the purpose of implementing obligations arising from instruments adopted under the EC Treaty or under Title VI of the EU Treaty. For the extended list see Article 5 (1) of the Framework Decision, *supra* note 383.

Ultimately, the entire range of national judicial decisions in criminal matters can thus be affected by the general application of mutual recognition and – even if Member States can introduce exceptions⁵³⁷ – these decisions (and hence a broader realm of criminality) are still under the influence of ECL. This is so as they are still within the scope of mutual recognition instruments and hence national authorities can still make use of these ECL tools for cooperation by sending requests, for example, for the recognition of sentences or cooperation in investigation in relation to other types of offences beyond the 32 types listed. This indicates that ECL’s influence potentially stretches to the entire range of decisions that the framework decisions make reference to (i.e. financial penalties, supervision measures, decisions in absentia and the decisions referred to by the Framework Decision on the EAW). These are no longer decisions regarding Euro-crime or even any of the offences included in the list of 32 or 39 serious crime types in relation to which double criminality cannot be exerted. In fact, these potentially cover the whole range of judicial decisions in criminal matters that national courts can deliver.⁵³⁸

Hence, the application of the principle of mutual recognition through these framework decisions created, beyond Euro-crime, a second dynamic of ECL. This dynamic can be nuanced in two further spheres of focus of ECL and of its influence upon national systems – one still related to serious criminality whilst another related to any type of offence included by those EU measures aimed at facilitating mutual recognition. It did so by expanding the previous boundaries of ECL that had been primarily confined mostly to Euro-crime as seen in previous chapters and earlier in this chapter. Preambles of these measures rarely make reference to any particular type of criminality or concrete goal beyond the general objective of completion of an area of freedom, security and justice and the occasional general statement of respect for fundamental rights.⁵³⁹

⁵³⁷ See chapter 5.

⁵³⁸ As it will be seen in chapter 5 of the thesis this broad application of the principle raised complex questions of compatibility and trust between Member States.

⁵³⁹ The decay of strong language against organised crime in preambles is also noted in policing as the new EU Council Decision on Europol incorporates what Dorn argues to be a ‘vocabulary shift’ from ‘organised crime’ to ‘serious crime’. Indeed, Europol’s first mandate was mostly fixed on the idea of organised crime as developed in this dissertation, covering most examples (but not all) of what we here call ‘Euro-crimes’. However, the new Decision broadens Europol’s scope to an even more ambiguous and flexible concept of serious criminality. See N. Dorn, “The end of organised crime in the European Union” (2009) 51 *Crime, Law and Social Change* 283.

2. The features of the new supranationalisation: Lisbon and after

The pattern of expansion of ECL is most likely to be continued and facilitated under the new institutional framework set in place by the Treaty of Lisbon. Indeed, the TEU(L) and TFEU entered into force on 1 December 2009 and significantly changed the institutional framework under which ECL has operated since the 1990s.⁵⁴⁰ Some of these changes were considerable, such as the creation of conditions for the merger of first and third pillar, whereas others were limited to a formalisation and solidification of many developments taking place over the previous years. In general, the TFEU further supranationalised the field by empowering EU actors, facilitating decision-making and creating further possibilities of expansion of ECL's scope.

Changes were envisaged both at an institutional and material level. In relation to the former, the post-Lisbon Treaties brought about a clearer and more dynamic framework. They created the conditions for the elimination of the "pillar structure" which kept criminal law outside the EC framework. Hence, the former third pillar, institutional home to criminal law matters, was moved to the realm of the previous first pillar – the 'Community legal order' merging the different frameworks into a single one (this is an ongoing process). This brought about a number of formal changes.

Criminal law matters rest now on Chapter 4 of Title V,⁵⁴¹ which contains five Articles on criminal law (Articles 82-86 TFEU) and chapter 5, which contains three Articles on policing (Article 87-89 TFEU). Rights of initiative now belongs to the Commission or to a quarter of Member States.⁵⁴² This full association of the Commission and EP with criminal matters is further complemented by the general jurisdiction of the CJEU.⁵⁴³ Furthermore, measures in police and judicial cooperation matters are no longer to be adopted by unanimity in the Council. Instead they will now be adopted by qualified majority voting and co-decision between Council and EP (ordinary legislative

⁵⁴⁰ OJ C 306/1 (2007). See also Protocol on Transitional Provisions, Article 10 for the stipulation of a five year transition period, OJ C 306/163 (2007).

⁵⁴¹ Title V contains provisions on border checks, asylum and immigration, judicial cooperation in civil matters, judicial cooperation in criminal matters and police cooperation.

⁵⁴² Article 76 TFEU.

⁵⁴³ Article 267 TFEU. However, the provisional arrangements determined that the exercise of new enforcement procedures by the Commission and generalised preliminary competences of the CJEU shall not apply during the first five years to the instruments already adopted which also retain their former status (unless they are amended). For more details on the jurisdiction of the Court after the Treaty of Lisbon see, for example, V. Hatzopoulos, "Casual but Smart: The Court's new clothes in the Area of Freedom, Security and Justice (AFSJ) after the Lisbon Treaty", Research Papers in Law, 2/2008 (European Legal Studies, College of Europe).

procedure).⁵⁴⁴ This will imply *de facto* that Member States will have to accept measures in criminal matters to which they do not necessarily agree to (although an ‘emergency brake’ mechanism was introduced).

Indeed, the veto power did not disappear completely as the TFEU creates an ‘emergency brake mechanism’. The emergency brake is not a veto in the strict sense but it balances the use of ordinary legislative procedure (pre-QMV) in a domain of political sensitivity:

*“Where a member of the Council considers a draft directive referred to (...) would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, and in the case of consensus, the European Council shall, within four months of this suspension, refer back to the Council, which shall terminate the suspension of the ordinary legislative procedure.”*⁵⁴⁵

In the TFEU the role of domestic criminal justice systems and their interaction with ECL is particularly acknowledged. This is seen in Article 67 TFEU, which replaced the former Article 29 TEU(A) and provides the general goals for the entire Title V. As Noted by Herlin-Karnell Article 67 “sets the scene and tells us what values the Union seeks to enforce: freedom, security and justice and respect for fundamental rights”.⁵⁴⁶ Article 67 TFEU, contrary to the former Article 29 TEU, places Member States’ traditions and legal systems (together with fundamental rights) at the centre of its concerns:

“1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.

2. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals.

3. The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in

⁵⁴⁴ See Articles 82 (1) and 83 (1) TFEU.

⁵⁴⁵ See both Article 82 (3) where the part in brackets in our quotation reads ‘paragraph 2’; and Article 83 (3) in which it refers to ‘paragraph 1 or 2’.

⁵⁴⁶ E. Herlin-Karnell, “Waiting for Lisbon... Constitutional Reflections on the Embryonic General Part of EU Criminal Law” (2009) 17 *European Journal of Crime, Criminal Law and Criminal Justice* 234.

criminal matters and, if necessary, through the approximation of criminal laws.

4. The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.”

Immigration, security and access to justice take the spotlight in Article 67 TFEU. The contrast with former Article 29 TEU(A), besides the already mentioned recognition of national systems and traditions, appears at a general level, as the wording used is slightly looser and details are left for later sections of Title V.⁵⁴⁷ No particular areas of crime are mentioned in the formula “*prevent and combat crime*” (Article 29 TEU(A) made particular reference to the crimes where intervention should occur), whereas the main endeavour is now the provision of a “*high level of security*” (and not *safety* as mentioned in the TEU(A)). This can potentially represent a broad mandate.⁵⁴⁸

Specific provisions on mutual recognition and harmonisation complement Article 67 TFEU and should be read as *lex specialis*.⁵⁴⁹ These reinstate competences in all areas mentioned by the TEU(A) and others not mentioned but in which the EU intervened regardless. On judicial cooperation, Article 82 TFEU finally incorporated the principle of mutual recognition in the realm of the Treaties thus formalising its already central role in this domain:

“1. Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgements and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and Article 83.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to:

- (a) lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgements and judicial decisions;*
- (b) prevent and settle conflicts of jurisdiction between Member States;*
- (c) support the training of the judiciary and judicial staff;*
- (d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.*

⁵⁴⁷ See above in this chapter.

⁵⁴⁸ For an argument on the possible dangers of use of Article 67 TFEU as a legal basis for legislating instead of Articles 82 and 83 TFEU (respectively on mutual recognition and harmonisation) see E. Herlin-Karnell, “Waiting for Lisbon... Constitutional Reflections on the Embryonic General Part of EU Criminal Law”, *supra* note 546, 227, 234-236.

⁵⁴⁹ E. Herlin-Karnell, *ibid.*, 235.

2. *To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters, having a cross border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of Member States.*

They shall concern:

- (a) mutual admissibility of evidence between Member States;*
- (b) the rights of individuals in criminal procedure;*
- (c) the rights of victims of crime;*
- (d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.*

Adoption of minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.”

The first paragraph introduces the principle of mutual recognition in the realm of the Treaties for the first time even if, in practice, the principle was already endorsed as the cornerstone of judicial cooperation in criminal matters in 1999 by the Tampere Conclusions.⁵⁵⁰

The second paragraph gives the EU competence to harmonise minimum rules of criminal procedure regarding the mutual admissibility of evidence, rights of individuals and of victims of crime and eventually other specific aspects of criminal procedure, identified in advance by the Council and provided they fulfil the conditions of the Article. These conditions are tight as the TFEU requires the procedure to adopt “*minimum rules*” to be “*necessary to facilitate mutual recognition and police cooperation*”, to have a “*cross border dimension*”, and “*to take into account*” differences between legal systems and traditions.

Besides harmonisation of varying aspects of criminal procedure (when necessary to facilitate mutual recognition), Article 83 (1) holds that minimal harmonisation (independently of mutual recognition) should take place in relation to serious offences

⁵⁵⁰ The paragraph replaces the former Article 31 (1) (a) TEU(A). Although some measures which clearly involved judicial cooperation, such as the EAW, also draw their legal base from other paragraphs of Article 31, namely 31 (1) (b) TEU(A). See Tampere Conclusion, *supra* note 54.

with a cross border dimension. There are ten different offences in relation to which the EU had already intervened (either via the first or the third pillar):

“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 sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature and 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 children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

(...)

2. If the approximation of criminal law 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 (...).”⁵⁵¹

The TFEU now offers an exhaustive list of themes in relation to which approximation of laws may take place. Given the often less rigorous and non exhaustive nature of the wording of the Treaties, such a shift towards an exhaustive list implies that the *letra legis* of the TFEU refers to more domains than the TEU(A) did. In fact, the introduction of some of these topics merely formalises intervention in many measures previously adopted which relied on a broad interpretation of the TEU(A), or whose legal basis (or lack of) was disputed. The more precise wording of Article 83 (1) in relation to the domains to harmonise was thus welcomed by many.⁵⁵²

3.1. An open door to more criminal law

However, regardless of this added clarity, both Articles referring to harmonisation (Articles 82 (2) and 83 TFEU) leave an open door to further integration in domains not listed. First and foremost, adoption of criminal measures to ensure the effective implementation of any EU policy is now a possibility. To be sure, the CJEU had

⁵⁵¹ Article 83 (1) (2) TFEU.

⁵⁵² See, for example, M. Fletcher, S. Peers, V. Mitsilegas, D. de la Rochele and J. Straw, among others, in House of Lords, *The Treaty of Lisbon: an Impact Assessment*, *supra* note 330, 139-143.

previously initiated ‘depillarisation’ with the case *Commission v. Council*,⁵⁵³ recognising the EC’s competence for the adoption of criminal law measures in relation to environmental policy. This decision, however, was not without controversy, and further stirred the discussion regarding the EC’s competence to adopt criminal law measures to protect its own policies and interests. Potentially, the new TFEU provision allows for the use of criminal law to ensure the implementation of any EU policy (in areas where harmonisation had taken place) as long as this proved essential to ensure the effectiveness of their implementation:

“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.”

This provision allows for an expansion of criminal law as a regulatory tool to the large majority of EU policies to guarantee their effectiveness. This raises a number of difficult questions from a policy perspective. As Mitsilegas notes, this approach portrays the use of criminal law by the EU as a “*means to an end*”:

*“Criminal law is thus treated not as a separate Community policy or objective, but rather merely as yet another field of law (along with civil law, administrative law, etc.) which is there to serve the achievement of Community policies.”*⁵⁵⁴

Such provision clearly raises questions about the role, limits and impact of the use of criminal law in and by the European Union. The idea of criminal law as *ultima ratio* seems alienated from these arrangements whilst efficiency of EU policies becomes the *prima facie* goal to be pursued. As the author further argues:

“This approach towards criminal law may be of concern to the extent it disregards the special place of criminal law in domestic legal systems and the extensive safeguards surrounding criminal law at the national level. (...) In this constitutional game, the

⁵⁵³ See *supra* note 464.

⁵⁵⁴ V. Mitsilegas, *EU Criminal Law*, *supra* note 14,110-111. For an argument that the Article does not attribute a general power to regulate the single market via criminal sanctions, namely because most criminal sanctions would not be ‘essential’ for the effective implementation of Union policies, see J. Oberg, “Union Regulatory Criminal Law Competence after the Treaty of Lisbon” (2011) 19 *European Journal of Crime, Criminal Law and Criminal Justice* 289.

question of ‘why criminal law’, or whether criminal law is actually necessary in specific EC instruments appears to be sidelined.”⁵⁵⁵

Furthermore, the opportunities for expansion of ECL do not end in the effectiveness of EU policies. Indeed, the last paragraph of Article 83 (1) mentions the possibility of further harmonisation beyond the list of the ten Euro-crimes mentioned. The door for the adoption of further measures harmonising minimum elements of crimes and sanctions is thus left open, subject to the criteria of the seriousness of the offence and its cross-border dimension (both loose concepts):

“On the basis of developments of crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified (...). It shall act unanimously after obtaining the consent of the European Parliament.”

In addition, Article 82(2) on harmonisation of criminal procedure rules to support mutual recognition, also allows for the possibility of adoption of further measures than those referred to directly in the Treaties as long as these are adopted by unanimity and with the consent of the EP. Indeed, competence is clearly granted to establish “*minimum rules*”, which take “*into account the differences between the legal traditions and systems of the Member States*”, when “*necessary*” to facilitate mutual recognition, in criminal matters with a cross-border dimension, in matters of admissibility of evidence, rights of individuals in criminal procedure and rights of victims of crime and:

“any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.”⁵⁵⁶

The provisions of the TFEU seem to follow a pattern of providing a sense of limitation of competence and then immediately providing for the possibility to surpass such restrictions. This pattern is considered to be compensated by the emergency brake clause. However, a closer look at this mechanism shows how the same pattern is repeated. Indeed, in the case a Member State makes use of this safeguard and an agreement is not reached in the European Council after four months, the TFEU opens the possibility for a limited number of Member States to adopt the measure among themselves only – an enhanced cooperation mechanism:

⁵⁵⁵ *Ibid.*, 111.

⁵⁵⁶ Article 82 (1) (d) TFEU.

“(…) in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.”⁵⁵⁷

This can lead to fragmentation.⁵⁵⁸ Indeed, having a number of States harmonising minimum rules concerning the definition of criminal offences and sanctions whilst the other group (or one Member State alone) does not do so, hardly creates ‘harmony’ between different definitions and penalties.⁵⁵⁹ Furthermore, the possibility of further dissonance is accentuated by country specificities such as the UK and Ireland. The two countries will have to decide whether they wish to opt in for every single measure to be adopted. Some opt outs to specific measures have in fact already been decided by the two countries.⁵⁶⁰ Furthermore, the UK will be able to decide by the end of the 5 year transitional period (the latest by 1 June 2014) if it wishes to opt out of all third pillar measures adopted thus far. Finally, Denmark chose a general opt-out in criminal matters altogether.⁵⁶¹

Not surprisingly, these wide and expansionist provisions raised concerns amongst some Member States, who felt the core principles of their criminal justice systems could be endangered by the potential implications of this new ECL framework. Both the German and the Czech Constitutional Courts, for example, assessed the Lisbon Treaties seeking to determine whether the new institutional framework could encroach upon national sovereignty or not. More specifically, the German Constitutional Court made important qualifications to further integration in European Union criminal matters, noting how it would not be acceptable if the core of the German constitutional identity (whose criminal law is based on the States’ social values and upon individual freedoms) would

⁵⁵⁷ Article 82(2) and 83(3) TFEU.

⁵⁵⁸ In general, Fletcher suggests that the degree according to which the Treaty of Lisbon “*panders to Member States interests*” by introducing brake clauses, allowing for enhanced cooperation, etc. increases the potential for fragmentation of the wider agenda in ECL, M. Fletcher, “EU Criminal Justice: Beyond Lisbon” in C. Eckes and T. Konstadinides (eds) *Crime within the Area of Freedom, Security and Justice* (Cambridge: Cambridge University Press, 2011) 10, 42.

⁵⁵⁹ For more on how harmonisation of national criminal law often does not lead to consonance see chapter 4.

⁵⁶⁰ See chapter 6 for more details.

⁵⁶¹ If the UK chooses to opt out of all third pillar measures, the Council by QMV or the Commission without the UK’s participation will decide on the transitional arrangements and the UK will have to bear the financial consequences of ceasing its participation. Article 10(4) of the Transitional Protocol, *supra* note 540.

be affected by ECL law.⁵⁶² This decision speaks to the core of the imbalances of ECL, which were voiced at the end of the previous section.

Conclusion

This chapter explored the evolution of ECL since the entry into force of the TEU(A) in 1999 until today. It showed how its evolution shifted from being minimal during the 1990s, to having the potential to influence a large part of national criminal law in the post-Amsterdam era. This influence was brought about by institutional and substantive changes. Institutionally, there was a process of supranationalisation which developed EU's institutional structures, empowered its actors, and strengthened the nature of the legal instruments and mechanisms available, among other elements. It was noted how this process was not without limitations and shortcomings but also how, regardless of those, the outcome was a significant one. In that regard, it was shown how the scope of ECL increased significantly, bypassing its initial focus on Euro-criminality (and its inherent rationales) to now also be concerned with many other forms of criminality previously considered to be in the domestic or international domains alone.

The chapter has also shown how the entry into force of the TEU(L) and TFEU altered the Amsterdam *acquis*. Much remains unknown at this level. Lisbon was only recently adopted and it will take at least five years to be fully in force. Yet, the wording of the TFEU makes it very likely that the existing dynamics and framework will be reinforced. This is so as, on the one hand, it formalises and legitimises many of the 'loose ends' of ECL in particular those domains which were not clearly covered by the scope of the TEU(A) but in relation to which action was taking (such as the measures on environment or victims right for example). On the other hand, the new TFEU leaves the door open for a continuous dynamic of growth in ECL.

Yet, as ECL appears as a field of continuous expansion, its features – mainly as solidified by Amsterdam – were somehow biased. This is so as ECL remained clearly focused on criminalisation and furtherance of the States capacity to prosecute and punish in an increasing number of areas of criminality.⁵⁶³ To be sure, the emergence of a narrative of protection of the victim brought in an element of individual rights in criminal procedure. Yet it was seen how the protection afforded to the victim was often dependant on the prosecutorial benefits of such protection. To a great extent, this shape

⁵⁶² Judgment of the Second Senate of the Federal Constitutional Court of Germany on the Treaty of Lisbon, 30 June 2009, Zitierung: BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. (1 - 421), para 253 and 355.

⁵⁶³ A great deal of of measures were also adopted in relation to police cooperation although those developments were largely left outside this chapter.

of ECL was conditioned by the limitations of the EU institutional framework in this domain.⁵⁶⁴ Hence, the Amsterdam framework clearly brought to light the fact that the consensus in penal matters across EU countries was thin and biased towards further criminalisation. Generally speaking, agreement was reached in relation to certain themes and goals only: the provision of ‘high level’ of ‘safety’ within an area of freedom, security and justice; the enactment of criminalisation measures to fight new threats such as organised crime in relation to which policy documents were portraying a distressing picture, the enactment of more criminal law also for regulatory goals such as the completion of the single market; the facilitation of States’ *ius puniendi* beyond national boundaries; and the figure of the victim. Not surprisingly, some of these themes echo emergent features of criminal justice in some western legal systems. The use of criminal law into an increasing number of policy domains,⁵⁶⁵ a politicised tone in discourses around criminal justice,⁵⁶⁶ a focus on criminalisation and less so on procedural rights or issues of rehabilitation and resocialisation of defendants,⁵⁶⁷ the salience of the figure of the victim⁵⁶⁸ among other traits.⁵⁶⁹ However, the chapter has also shown that the Lisbon reforms brought about important changes to this framework. The TFEU introduced new domains of competence in relation to criminal procedure for example and brought in a more balanced institutional framework with the full participation of the EP and the CJEU. Furthermore, it will also be seen in chapter 6 how measures in the domain of criminal procedure have already been proposed or adopted. Nonetheless, the identification and mapping of the themes, rationales, focus and institutional patterns of ECL, however useful, still says little about the qualities of ECL. The next two chapters will thus engage with those issues by analysing harmonisation of national criminal law and mutual recognition in criminal matters, the two central legal mechanisms of ECL.

⁵⁶⁴ The most striking example of this was the failure of the adoption of measures on basic procedural rights which was halted mostly due to the demanding decision making criteria.

⁵⁶⁵ N. Lacey and L. Zedner, “Legal Constructions of Crime”, *supra* note 32, 184-185. See also chapter 2 for more details on this point.

⁵⁶⁶ D. Garland, *The Culture of Control*, *supra* note 42, 10.

⁵⁶⁷ *Ibid.*, 1-26.

⁵⁶⁸ J. Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford/ New York: OUP, 2007) 75-110; E. Baker, “Governing Through Crime – the case of the European Union” (2010) 7 *European Journal of Criminology* 187.

⁵⁶⁹ See chapter 6.

Chapter 4 Harmonisation of national criminal law: increasing penal severity across the European Union

Introduction

Having set the main dynamics of European Union criminal law (ECL), this dissertation will now turn to the mechanisms or principles through which ECL is developed. Hence, chapter 4 will focus on the harmonisation of national criminal law. It will be suggested that harmonisation of Euro-crimes is potentially bringing about a harsher penalty across the European Union by increasing levels of formal criminalisation.

Harmonisation aims at approximating national criminal laws by creating common standards which allow for a certain degree of harmony between different systems. In criminal matters, it was envisaged by the TEU(A) in a narrow fashion, namely in relation to the minimum elements constituent of crimes and penalties in fields of drug trafficking, terrorism and organised crime. However, secondary legislation has been adopted that places a broad interpretation on the TEU(A) provisions and, in practice, harmonisation measures were adopted in a significantly wider range of topics than the ones mentioned by the TEU(A), covering most examples of Euro-crimes.⁵⁷⁰ Furthermore, it will be suggested that the fashion according to which the legislator developed the ‘minimum elements of crime’ was all but minimal. In fact, it will be shown how definitions of crimes adopted tended to be very wide, how liability was extended to legal persons and how punishment envisaged was mostly focused on custodial sentences namely its minimum maximum. The focus on these features led to an increase in criminalisation at national level, either by requiring Member States to introduce new crimes or extend the scope of pre existent offences; by requiring them to extend liability to legal persons; and by establishing minimum maximum sentences for criminal offences harmonised. The chapter will further outline how the nature of minimal harmonisation placed more pressure on more lenient Member States vis-à-vis more severe ones as the former are more likely to have to amend their national provisions more significantly in order to meet the EU standard imposed by the framework decisions.

⁵⁷⁰ This chapter will focus on the Treaty of Amsterdam (TEU(A)) and measures enacted previously to the entry into force of the Treaty of Lisbon as most measures currently in force were adopted under the pre - Lisbon framework. See also chapter 3. Chapter 6 will provide an analysis of the post-Lisbon reforms.

The first section of the chapter will lay out the framework for harmonisation as determined by the Treaties and then give an overall picture of the measures adopted. Section 2 will look particularly at the example of organised crime – on the main rationales through which ECL has developed – to explain how the EU tends to adopt very wide definitions of the conduct to be criminalised. Section 2.1 will bring the argument forward and show how the adoption of broad definitions of crime across the large majority of framework decisions led to an increase in the scope of national legal orders, thus increasing criminalisation by expanding the number of behaviours punishable at national level. Section 3 will show how this increase in criminalisation was complemented by an expansion in liable subjects, namely by establishing liability of legal persons which many Member States did not provide for beforehand. In turn, section 3 will also flesh out how EU's focus is primarily on minimum maximum sentences. Finally, section 4 will analyse the limitations to harmonisation and to the effects of increase in criminalisation. It will point out how, on the one hand, the measures in force often fall short of actually harmonising Member States' domestic legislation for they are too broad and vague; and, on the other hand, how they cannot account for the execution of national implementing norms by domestic criminal justice systems, being thus unable to control the actual levels of criminalisation and punishment at national level.

1. The legal framework for harmonisation: the narrow approach of the Treaties

The harmonisation of national criminal law attempts to create common standards in order to allow for a certain degree of harmony between different domestic legal systems. Harmonisation is a mechanism 'borrowed' from the context of the single market where it became one of the central tools for integration. In European Union criminal matters, it was first developed during the Maastricht years, despite there being no clear mandate for the EU to do so at the time, and became central after the adoption of the TEU(A).⁵⁷¹

⁵⁷¹ It has been debated whether 'approximation of laws' as mentioned in the Treaties in the context of criminal law and 'harmonisation' are different or similar concepts. This purity in the distinction of the two terms however disregards the fact that Article 100a EC introduced by the Single European Act (SEA) in 1987 - the first provision to introduce the concept of harmonisation in the context of the Treaties - referred to 'approximation of provisions' and not harmonisation; similarly so did Article 94 and 95EC and the current Article 114TFEU). In any case, some authors suggest that approximation as used in relation to criminal law is less than harmonisation, hence demanding less of national legal orders. In this dissertation we will use both terms interchangeably. For more details on the particular use of the two concepts in European criminal law see, for example F. Calderoni, *Organized Crime Legislation in the European Union, Harmonization and Approximation of Criminal Law, National Legislation and the EU Framework Decision on the Fight Against Organized Crime* (Heidelberg/ Dordrecht/ London/ New York: Springer, 2010) 1-6, who makes a clear distinction between the two concepts; or, for a different opinion on the same subject, namely that the two concepts can have the same

Harmonisation was felt to be necessary to avoid criminals exploiting loopholes and heterogeneity in different legal systems, by taking advantage of less severe laws in some Member States, or by making use of new technical and communication means more readily available today.⁵⁷² All this was of course made easier in an EU without internal borders. However, the actual impact and manipulation of differences between legal systems by criminals remains largely unknown. In fact, it has at times been voiced as a mere theoretical or academic hypothesis by authors or the European Commission itself.⁵⁷³

Regardless, the EU sought harmonisation of most Euro-crimes. The official architecture of harmonisation was laid out by the TEU(A) under VI of the TEU.⁵⁷⁴ Article 29 TEU(A) held:

“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).”

scope, see A. Weyembergh, *L'Harmonisation des législations: condition de l'espace penal européen et révélateur de ses tensions* (Éditions de l'Université de Bruxelles, 2004) 33.

⁵⁷² A.F. Bernardi, “L’opportunité de l’harmonisation”, in M. Delmas-Marty, G. Giudicelli-Delage and E. Lambert-Abdelgawad (eds) *L’harmonisation des sanctions pénales en Europe* (Paris: Societe de Legislation Compare, 2003) 451, 461; A. Weyembergh, “The Functions of Approximation of Penal Legislation within the European Union” (2005) 12 *Maastricht Journal of European and Comparative Law* 149, 164.

⁵⁷³ The European Commission for instance voiced these doubts in 2005 noting that: “*There is also the question of whether there is a risk that certain criminals might relocate to a Member State where their nefarious activity is not classified as an offence or attract lighter penalties. It would be interesting to consider whether this is a purely academic hypothesis or corresponds to reality in the event, for example, of financial, business or computer crime*”, European Commission, *Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union*, COM(2004)334final, Brussels, 30.04.2004, 47. K. Nuotio in fact considers the idea that offenders will learn to exploit the heterogeneity of national legal orders a ‘problematic assumption’, based on common sense rather than on criminological evidence (the author argues that criminal activities rarely follow such strategic cost/benefit calculations), “Harmonization of Criminal Sanctions in the European Union – Criminal Law Science Fiction” in E. J. Husabo and A. Strandbakken (eds) *Harmonization of Criminal Law in Europe* (Antwerpen/ Oxford: Intersentia, 2005) 79, 92.

⁵⁷⁴ Previously the Treaty of Maastricht (TEU(M)) had introduced Article K.1, a more general provision on Justice and Home Affairs matters, see chapter 2.

Subsequently, Article 31 (3) TEU referred to harmonisation only and provided:

“Common action on judicial cooperation in criminal matters shall include: 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.”

The approach to harmonisation of national criminal law taken by the TEU(A) was clearly a contained one. First, Article 29 TEU made it the exception rather than the rule, stating it should be pursued only “*where necessary*”, therefore conveying the idea that it was not always needed and it should not be pursued when that is not the case. Second, the TEU(A) noted that common action on judicial cooperation in criminal matters shall include progressively adopting measures establishing minimum rules relating to the limited the domains for harmonisation to three areas of substantive criminal law, namely organised crime, terrorism and illicit drug trafficking. Finally, it limited its depth to the minimum elements constituent of crimes and penalties, as stated in Article 31 (e) TEU(A).

Its scope nevertheless has always been contentious. Indeed, on the one hand, Article 31(e) TEU(A), although seemingly choosing a narrow approach to EU’s competence to seek harmonisation in this field, were not cristal clear on the exact extent of EU’s mandate to pursue such harmonisation. On the other hand, there was a clear propensity, also shown in the previous chapters, for EU’s secondary law and political initiatives to interpret the the TEU(A) (namely Article 29 and Article 31 TEU(A)) ambitiously, thus harmonising in a wider range of domains than those clearly mentioned. However, whilst it is unclear whether the Treaty’s list was exhaustive or merely indicative,⁵⁷⁵ clearly, there was an attempt to circumscribe narrowly the domains of harmonisation of national criminal law. Furthermore, unmistakably, no attempt was made to attribute a comprehensive and overarching competence for the European Union to harmonise national criminal law.⁵⁷⁶

However, the minimal approach suggested by the Treaties (even if interpreted broadly) contrasts greatly with the amount and wide scope of secondary legislation in these

⁵⁷⁵ Peers for example was of opinion that competence to harmonise was not limited to the ‘listed offences’, in *EU Justice and Home Affairs Law*, *supra* note 250, 387.

⁵⁷⁶ In particular, the level of harmonisation attempted at is far from the creation of a common ‘general part of criminal law’, see, for example, K. Ambos, “Is the Development of a Common Substantive Criminal Law Possible? Some Preliminary Reflections” (2005) 12 *Maastricht Journal of European and Comparative Law* 173.

matters. Indeed, the European Union adopted a wide range of framework decisions aiming at harmonising the minimum elements of criminal offences and penalties at national level, many of which were under the umbrella of the fight against organised crime.⁵⁷⁷ The range of areas involved went considerably beyond the domains referred to in Article 29 TEU, let alone Article 31 TEU. Hence, framework decisions harmonising elements of national criminal law were adopted in areas as diverse as illicit drug trafficking,⁵⁷⁸ sexual exploitation of children and child pornography,⁵⁷⁹ terrorism,⁵⁸⁰ fraud and counterfeiting of non-cash means of payment,⁵⁸¹ money laundering,⁵⁸² trafficking in human beings,⁵⁸³ corruption in the private sector,⁵⁸⁴ crime against information system,⁵⁸⁵ and environment,⁵⁸⁶ among others.

Furthermore, the fashion according to which the EU legislator set the scope of minimum harmonisation in place was all but minimal. This, it will be contended, can be perceived in several elements, namely in the choice of wide definitions of crimes, in the widening of criminal liability to legal persons, in the establishment of common minimum maximum penalties, and generally on the impact those elements have on national legal orders. Ultimately, it will be seen that the attempt to establish a minimum common denominator resulted in the setting of a higher intensity of criminalisation namely through more and wider criminal law across the European Union.

2. Broad definitions of criminal offences

The EU, in seeking to harmonise minimum elements constituent of crimes and penalties, focused first and foremost on the definition of criminal offences. In this regard, ECL has showed a tendency to adopt broad definitions of crimes hence potentially criminalising a wider range of behaviours than before across the EU. This is clearly seen in the approach to the harmonisation of organised crime. It was seen in previous chapters how organised crime was often used as an umbrella concept to allow for intervention in areas not directly mentioned in the TEU(A) and which could be related to organised crime in a more direct or indirect way. The wide approach to organised crime was further

⁵⁷⁷ A significant majority of these measures came to replace pre-existent joint actions on the same topics. For an overall view on these see chapter 2.

⁵⁷⁸ Council Framework Decision 2004/757/JHA, *supra* note 415.

⁵⁷⁹ Council Framework Decision 2004/68/JHA, *supra* note 414.

⁵⁸⁰ Council Framework Decision 2002/475/JHA, *supra* note 413.

⁵⁸¹ Council Framework Decision 2001/413/JHA, *supra* note 411.

⁵⁸² Council Framework Decision 2001/500/JHA, *supra* note 410.

⁵⁸³ Council Framework Decision 2002/629/JHA, *supra* note 409.

⁵⁸⁴ Council Framework Decision 2003/568/JHA, *supra* note 417.

⁵⁸⁵ Council Framework Decision 2005/222/JHA, *supra* note 408.

⁵⁸⁶ Council Framework Decision 2003/80/JHA, *supra* note 463.

continued by the Framework Decision on fighting organised crime.⁵⁸⁷ The Framework Decision adopts an extensive interpretation of organised crime and on the definition of a criminal organisation. This reflects a contemporary approach to the phenomenon but also an impetus to criminalise extensively.

First, the 2008 Framework Decision requires Member States to criminalise one or both offences of, broadly speaking, membership of a criminal organisation (even if no actual offence is committed) or the agreement to actively take part in the execution of offences related to the activities of the criminal organisation:

*“ Each Member State shall take the necessary measures to ensure that one or both of the following types of conduct related to a criminal organisation are regarded as offences: (a) conduct by any person who, with intent and with the knowledge of either the aim and general activity of the criminal organisation or its intention to commit the offences in question, actively takes part in the organisation of criminal activities, including the provision of information or material means, the recruitment of new members and all forms of financing of its activities, knowing that such a participation will contribute to the achievement of the organisation’s criminal activities; (b) conduct by any person consisting in an agreement with one or more persons that an activity should be pursued, which if carried out, would amount to the commission of offences referred to in Article 1, even if that person does not take part in the actual execution of the activity.”*⁵⁸⁸

Furthermore, the Framework Decision defines a criminal organisation as a:

“structured association, established over a period of time, of more than two persons acting in concert with a view of committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit;” whilst structured association means *“an association that is not randomly formed for the immediate commission of an offence, nor does it need to have formally defined roles for its members, continuity of its membership, or a developed structure.”*⁵⁸⁹

⁵⁸⁷ Framework Decision 2008/841/JHA, *supra* note 416, which came to replace the Joint Action making it a criminal offence to participate in a criminal organisation, Joint Action 98/733/JHA, see note 305. For a detailed analysis of the Joint Action see V. Mitsilegas, “Defining organised crime in the European Union”, *supra* note 432; and for an analysis of the Framework Decision see F. Calderoni, “A Definition that Could not Work”, *supra* note 270.

⁵⁸⁸ Article 2 of the Framework Decision 2008/841/JHA, note 416.

⁵⁸⁹ Article 1, *ibid.*.

This provision portrays a criminal organisation in a wide fashion. The first striking element of the definition is the requirement of only three members for an association to be considered a criminal organisation. Indeed, the idea that one has of a criminal organisation is usually not one association with only three members. Other elements are also left open for interpretation as, for example, the notion of ‘financial or material benefits.’ Is a material benefit of £100 or £200 enough to be included in the range of the concept of organised crime? And what can be considered a material benefit? Furthermore, no specification is given to what is to be considered ‘a period of time’ (hence how long does a group need to be existent and operational to be considered a criminal association) besides the exclusion of groups formed for the immediate formation of offences. Moreover, the structure of the group can also be rather loose, its members do not need to have a defined role nor particular continuity in their membership. The most solid element of the definition seems indeed to be the seriousness of the crime which needs to be punishable by a maximum sentence of at least 4 years. No reference to specific crimes is made, which raises some uncertainty as different legal orders might punish similar crimes in a diverse manner.

This wide scope contrasts with definitions proposed by many authors along the past decades which have tended to be more detailed and narrower.⁵⁹⁰ Abadinsky, for example, mentions eight attributes of an organised crime group, namely the lack of political goals (the aims of an organised crime group are money and power), hierarchy, limited or exclusive membership, has a unique subculture, perpetuates itself (hence it shall survive beyond the life of current memberships), exhibits willingness to use illegal violence, is monopolistic and is governed by explicit rules and regulations.⁵⁹¹ Maltz identifies four main characteristics, namely varieties of the crimes committed, an organised structure, the use of violence and corruption.⁵⁹² Likewise, Calderoni emphasises four essential elements to define a criminal organisation, namely continuity, violence, enterprise and immunity, and notes how these characteristics have allowed for a distinction between mere ‘crimes that are organised’ and ‘organised crime’.⁵⁹³

⁵⁹⁰ For an overview and comparison of literature on the definition of organised crime see it definitely F.E. Hagan, “‘Organized Crime’ and ‘Organized Crime’: Indeterminate Problems of Definition” (2006) 9 *Trends in Organized Crime* 127.

⁵⁹¹ H. Abadinsky, *Organized Crime*, *supra* note 349, 3-5. See also W. Laqueur, *The new terrorism*, *supra* note 433, 210-211.

⁵⁹² M. D. Maltz, “On defining organised crime: the development of a definition and a typology” (1976) 22 *Crime and Delinquency* 338, 338-340.

⁵⁹³ F. Calderoni, “A definition that could not work”, note 270 *supra*, 272-273. For a general overview of the evolution of the concept of organised crime in the literature see A. Wright, *Organised Crime*, *supra* note 433, 1-26.

Similarly, beyond academic comment, definitions of criminal organisations used by law enforcement agencies – ‘working definitions’ - also tended to be narrower than the one proposed by the Framework Decision. More significantly, in some cases, legal attempts to define criminal organisations failed as political compromise on such topics foundered. The solution was often a compromise via the adoption of working definitions, used mostly by law enforcement agencies. This is the case of Germany, for example, where attempts to conceptualise organised crime took place for the first time in the 1970s, when a definition was agreed to by a joint working party of law enforcement and judicial officials and used in 1998 by the BundesKriminalAmt (Germany's Federal Criminal Police Office):

*“Organised crime is the planned violation of the law for profit or to acquire power, which offences are each, or together, of a major significance, and are carried out by more than two participants who co-operate within a division of labour for a long or undetermined time span using (a) commercial or commercial like structures, or (b) violence or other means of intimidation, or (c) influence on politics, media, public administration, justice and the legitimate economy.”*⁵⁹⁴

Whilst this definition was thought of as being “vague and a catch-all definition that can cover any criminal offence”⁵⁹⁵ it was nonetheless more specific than the EU’s one. Indeed, even if, for example, only a small number of members is required, such relaxed criteria were compensated for by other more clear and objective characteristics the criminal organisation ought to fulfil to be considered as such, namely the use of violence and intimidation, the impact of such criminality in society, etc..⁵⁹⁶

Similarly, international instruments, although broader than national definitions still managed to be marginally narrower than EU’s one. The UN Convention for example defines organised crime as:

⁵⁹⁴ In A. Leong, *The disruption of International Organised Crime: an analysis of legal and non legal strategies* (Aldershot, Burlington, VT: Ashgate, 2007) 17 or in M. Levi, “Perspectives on ‘Organised Crime’: An Overview” (1998) 37 *The Howard Journal of Criminal Justice* 335.

⁵⁹⁵ For an overview of literature on this matter see V. Mitsilegas, “From National to Global, from Empirical to Legal: The Ambivalent Concept of Transnational Organized Crime”, in M. Beare (ed) *Critical Reflections on Transnational Organized Crime, Money Laundering and Corruption* (Toronto/ Buffalo/ London: University of Toronto Press, 2003) 55, 64-65.

⁵⁹⁶ Generally legal approaches to organised crime began to emerge at national level since the 1970s. In Italy with the adoption of Law 646 (the ‘Rognoni-La Torre Law’); in the UK in the 1980 initially with the adoption of the 1986 Drug Trafficking Offences Act; or even in the USA in 1968 with Public Law 90-351 – the Omnibus Crime Control and Safe Streets Act. See Mitsilegas, “The Ambivalent Concept of Transnational Organized Crime”, *ibid.*, 56-70; and J. Finckenauer, “Problems of Definition: What is Organized Crime?” (2005) 8 *Trends in Organized Crime* 8 (2005) 63, particularly at 69; see also Leong, *The disruption of International Organised Crime*, *supra* note 594, 91-93.

*“a structured group of three or more person existing for a period of time and acting in concert with the aim of committing one of the more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.”*⁵⁹⁷

It refers exclusively to the crimes mentioned in the text of the Convention, thus providing more legal certainty than open-ended formula of the Framework Decision which seems to refer to serious criminality in general:

*“...offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty.”*⁵⁹⁸

Such a broad definition of organised crime and of a criminal association has the potential to cover a broad range of conducts under its umbrella of what is to be understood as organised crime. Indeed, some authors have argued that too narrow a definition does not capture the reality of organised crime as an unclear and undefined phenomenon. Van Duyne, for example, points out how many of the definitions used do not match the empirical evidence which shows a

*“...less well-organized, very diversified landscape of organizing criminals [whose] economic activities can better be described from the viewpoint of ‘crime enterprises’ than from a conceptually unclear framework such as organized crime.”*⁵⁹⁹

This more diversified landscape in crime is exacerbated by the new traits of a globalised world where people, goods, services, capital, information, etc move much more freely between different countries than decades ago. Ruggiero emphasises the difficulties in distinguishing clearly between organised crime and some legal enterprises in this context. The author provides a number of examples related to human trafficking, illegal immigration, money laundering, drug trafficking and illegal arms transfers – crimes with a potential transnational element. He argues,

“...it is appropriate to identify transnational organized crime as the result of partnerships between illegitimate and legitimate actors. In other words (...) criminal

⁵⁹⁷ Article 2 (a) of the United Nations Convention against Transnational Organised Crime, 15 November 2000; A/RES/55/25.

⁵⁹⁸ See Article 1 of the Framework Decision, *supra* note 416.

⁵⁹⁹ P. Van Duyne, *Organized Crime in Europe* (New York: Nova Science Publishers, 1996) 53.

activity conducted by ‘aliens’ needs a range of indigenous partners and agents, along with a receptive environment in which that activity is carried out.”

The author is specifically referring to official employment agencies that can help recruit illegal immigration, transport companies or travel and tourist agencies which might help with the transport of illegal immigrants, among many other examples.⁶⁰⁰

In fact, Europol’s reports reflect this reality in European organised crime, first in relation to the looseness of the structure of criminal groups and second in relation to the interrelationship between illegitimate and legitimate business structures:

*“The trend towards more loose network structure with regard to the set-up of OC groups continues. The roles of facilitators and professionals are becoming increasingly important. These are individuals with specific skills that are required to conduct complex or difficult elements of a criminal enterprise.”*⁶⁰¹

The report notes further below:

*“OC groups are increasingly taking advantage of the benefits of legitimate company structures to conduct or hide their criminal. These legal structures are often abused to launder profits or reinvest profits. Alternatively they commit economic crimes such as VAT fraud as a primary activity.”*⁶⁰²

Yet Europol goes beyond this view of organised crime as interlinked with a ‘crime enterprise’ and with legitimate activities. It suggests that organised criminality is not always related to the commission of serious offences. Indeed, it suggests it is becoming an issue of petty crime as well:

“Organised crime seems to be moving more and more into areas of ‘petty crime’ like pick-pocketing and shop-lifting but also burglaries and theft by deception of individuals often tourists. Members of OC groups, who often originate from Eastern Europe work in small groups and are moved around quickly but never stay long in one location... This

⁶⁰⁰ V. Ruggiero, “Global Markets and Crime”, in M. E. Beare (ed) *Critical Reflections on Transnational Organized Crime, Money Laundering and Corruption* (Toronto, Buffalo, London: University of Toronto Press Incorporated, 2003) 171, 174-77.

⁶⁰¹ Europol, *European Union Organised Crime Report, Open Version*, December 2004, The Hague, 7.

⁶⁰² *Ibid.*

*development is in line with the realised trend towards the 'high profit- low risk' crime areas.*⁶⁰³

The EU's definition of organised crime has thus the potential to cover all the conducts mentioned by Europol and potentially others. It is indeed broad and flexible enough to cover Mafia-like associations, business related criminal groups, small groups of pick-pocketers, large illegal drug and human trafficking networks, among many other formations one could think of. They can also be large or small groups, national or transnational, more or less structured, exist for shorter or longer periods of time, make use of corruption of officials or not, use commercial structures or not, make use of violence and intimidation or not, and so on. This suggests that, in fact, the EU's definition of a criminal organisation is closer to that of a criminal network than of a criminal organisation in its more traditional sense (such as the Mafia-like model for example). The former can or cannot take the shape of a criminal organisation but does not always have to do so. In fact, many networks of criminals are likely to commit crimes that are organised rather than crimes within the context of a criminal organisation.⁶⁰⁴

Furthermore, the EU's approach to organised crime has strong prosecutorial benefits due to its catch all characteristics. Indeed, organised crime has the potential to give rise to public fears; to empower police forces with more stringent policing means (which can often end up being used against less serious forms of criminality);⁶⁰⁵ and to open doors to harsher frameworks for punishment. In the European Union, this means bringing criminal investigation under Europol's competence, criminalising more behaviours than before under the umbrella of organised crime,⁶⁰⁶ whilst ensuring a more severe penal framework to the crimes in question as the Framework Decision requires Member States

⁶⁰³ *Ibid.*

⁶⁰⁴ For details and examples on how to distinguish organised crime from crime that is organised see for example J. Finckenauer, "Problems of Definition", *supra* note 596, 76-78 or A.K. Cohen, "The Concept of a Criminal Organisation" (1977) 17 *The British Journal of Criminology* 97.

⁶⁰⁵ D. Nelken, "The Globalization of Crime and Justice" (1997) 50 *Current Legal Problems* 251, 255. An example of this can be found, for instance, in Portugal. Law 5/2002 of 11 January on covert means of surveillance as lawful means to obtain evidence was adopted in context of the fight against violent and organised criminality and it aimed at allowing police forces to make use of particular covert investigation techniques in relation to serious criminality only. However, it is now being discussed whether evidence related to other crimes obtained under these investigation operations could be used and under which conditions, J.F. Araújo, "Conhecimentos Fortuitos no Âmbito do Registo de Voz e de Imagem", Dissertação de Mestrado em Ciências Policiais, Instituto Superior de Ciências Policiais e Segurança Interna, Mimeo, Lisboa, 26 April de 2012.

⁶⁰⁶ See for examples before Greek courts E. Symeonidou-Kastanidou, "Towards a New Definition of Organised Crime in the European Union" (2007) 15 *European Journal of Crime, Criminal Law and Criminal Justice* 83, 93.

to consider such offences when committed in the context of a criminal organisation as aggravating circumstances.⁶⁰⁷

The question is whether such legal changes are indeed reflecting and combating new realities or if they are used to squeeze through the back door tougher approaches to crime independently of such realities. In this sense, Levi notes that broad definitions of organised crime results from a tension between

*“a) those who want the legislator to cover a wide set of circumstances to avoid the risk that any major criminal might ‘get away with it’, and b) those who want the law to be quite tightly drawn to avoid the overreach of powers which might otherwise criminalise groups who are only a modest threat.”*⁶⁰⁸

As seen in the first part of this thesis, organised crime has been central to the development of ECL often serving as an umbrella concept for the EU to legislate in domains more or less related to it. It is thus perhaps not surprising that the EU’s approach to organised crime is particularly broad. However, the EU’s technique of adopting broad definitions of crime is seen in many other examples. The EU’s definition of terrorism, for instance, has been particularly commented upon as being very wide.⁶⁰⁹ Indeed, the EU defines terrorist acts as those committed with an

*“aim of seriously intimidating a population, or unduly compelling a Government or international organisation to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation, shall be deemed to be terrorist offences.”*⁶¹⁰

Article 1 of the Framework Decision on combating terrorism continues in more detail stating that those offences should comprise:

“(a) attacks upon a person’s life which may cause death; (b) attacks upon the physical integrity of a person; (c) kidnapping or hostage taking; (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major

⁶⁰⁷ Article 3 of the Framework Decision 2008/841/JHA, note 416.

⁶⁰⁸ M. Levi, “Organised crime and terrorism”, see *supra* note 377, 780.

⁶⁰⁹ See, inter alia, S. Douglas-Scott, “The Rule of Law in the European Union”, *supra* note 413, 230-232.

⁶¹⁰ Article 1 of the Council Framework Decision 2002/475/JHA, *supra* note 413.

economic loss; (e) seizure of aircraft, ships or other means of public or goods transport; (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons; (g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life; (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life; (i) threatening to commit any of the acts listed in (a) to (h).” “Any action involving aggravated theft, extortion or drawing up false administrative documents with the view of committing any of the acts mentioned earlier, shall be considered terrorist linked activities.”⁶¹¹

Examples of proposed academic and legislative approaches to terrorism are useful in helping to understand how broad and detailed the Framework Decision’s definition is. Commonly accepted definitions by law enforcement agencies, for instance, tend to be concise and narrower than the EU’s Framework Decision. The FBI considers terrorism

*“the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.”;*⁶¹²

whereas the CIA defines it as

*“premeditated, politically motivated violence perpetrated against non-combatant targets by subnational groups or clandestine agents, usually intended to influence an audience.”*⁶¹³

The contrast with previous national legislation on the definition of terrorism (or lack of) is also sharp. Indeed, before the adoption of the Framework Decision only six Member States criminalised terrorist acts autonomously: France, Germany, Italy, Portugal, Spain and the UK.⁶¹⁴ All of them had narrower definitions than the EU’s.

⁶¹¹ *Ibid.*

⁶¹² Terrorism research centre, at <http://www.terrorism-research.com/>, visited on 22 November 2011.

⁶¹³ Title 22 of the US Code, Section 2656f(d).

⁶¹⁴ Proposal for a Council Framework Decision on combating terrorism, Brussels, 19.9.2001, COM (2001)521 final, 6 - 7.

France, for instance, criminalised as terrorism an act that could seriously alter public order through threat or terror. Portugal included acts that were able to prejudice national interests, to alter or disturb the State's institutions, force public authorities to do or not to do something or threaten individuals or groups. Spain treated subverting constitutional order and seriously altering public peace as terrorist acts. Italy had a law similar to Spain's, criminalising terrorist actions as those that are able to subvert the democratic order.⁶¹⁵ Finally, the UK defined terrorist offences as acts capable of influencing the government or intimidating the public order or a section of the public with the purpose of supporting a political, religious, or ideological cause.⁶¹⁶

2.1. Increasing criminalisation at national level: the impact of broad definitions of crime

In fact the large majority of Framework Decisions criminalising Euro-crimes adopted broad definitions of the criminal offences at stake. This expanded definitions of criminal offences or introduced new criminal offences altogether at national level, thus increasing the amount and scope of national criminal law, leading to more formal criminalisation across the European Union. This takes place as framework decisions require Member States to introduce, on occasion, new types of criminal offences that did not exist in their legal orders; and, second, as they require Member States to enlarge pre-existent national definitions of punishable conducts.⁶¹⁷ These two effects translate directly in the enactment of more crimes as more conducts become subject to criminal liability.

Among many examples, in order to comply with the Framework Decision on terrorism the six countries which already criminalised terrorist acts had to enlarge the number and type of behaviours to be included in their definitions.⁶¹⁸ Furthermore, the definition of terrorist offences led to the adoption of new criminal offences in the majority of other Member States. Indeed, before the implementation of the Framework Decision, the majority of States treated terrorist actions under the framework of other offences (such as murder, offences against physical integrity, etc.). This changed with the

⁶¹⁵ *Ibid.*, pages 3, 6 and 7.

⁶¹⁶ *Ibid.*, pages 3, 6 and 7.

⁶¹⁷ A. Weyembergh speaks of a 'repressive orientation' of EU law in this regard when it makes use of broad and vague definitions of crime, namely in relation to the definition of terrorism, organised crime and facilitation of unauthorised entry, "Approximation of criminal law, the Constitutional Treaty and The Hague Programme"(2005) 42 *Common Market Law Review* 1567, 1588.

⁶¹⁸ European Commission, Proposal for a Council Framework Decision on combating terrorism, *supra* note 614, 6 - 7.

Framework Decision, which obliged the 21 Member States to specifically define terrorist offences.⁶¹⁹ The remaining EU Member States were required to create a ‘new offence’ that covers conducts that either were not punished before or were punished as ‘common’ criminality and hence considered less serious or morally wrong, rather than specifically labeled as terrorist crimes, as they are now.⁶²⁰

Moreover, the Framework Decision on trafficking in human beings, for example, defines the offence of trafficking for the purposes of labour or sexual exploitation as the recruitment, transportation, transfer, harbouring, or subsequent reception of a person, including the exchange or transfer of control over that person. It specifies that such acts shall be punishable where use is made of coercion, force or threat, including abduction or where use is made of deceit or fraud or there is an abuse of authority or of a position of vulnerability or where payments or benefits are given or received to achieve the consent of the person.⁶²¹ Member States such as Estonia and Poland did not have criminal offences corresponding with the conducts described in the Framework Decision, while all other Member States already contained provisions relating to such acts.⁶²² However, even in countries where such acts were already considered as offences, the definition of trafficking in the Framework Decision is broader than most pre-existing definitions in national laws and even in international instruments. This was mainly due to the introduction of the additional general element of trafficking for purposes of “*labour exploitation*”. Indeed, most legislation covered trafficking only for the purposes of sexual exploitation, prostitution or forced or slave labour (trafficking for purposes of labour is usually covered by legislation on smuggling of human beings; the concept itself is very general and difficult to circumvent).

For example, Dutch law did not include in its definition of trafficking any other purpose beside sexual exploitation.⁶²³ However, with the Framework Decision, the provision was amended in order to include “*coerced or forced work or services, slavery*

⁶¹⁹ European Commission, *Report from the Commission to the Council and the European Parliament based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism*, Brussels, 08.06.2004, COM(2004) 409, final, 6.

⁶²⁰ For the argument that major changes and new offences had been created at national level in consequence of EU’s action harmonising terrorism see also K. Nuotio, “Terrorism as a Catalyst for the Emergence, Harmonization and Reform of Criminal Law” (2006) 4 *Journal of International Criminal Justice* 998, 1008-1010; and M. Cesoni, “Droit penal europeen: Une harmonisation perilleuse”, in G. de Kerchove and A. Weyembergh (eds) *L’Espace penal europeen: Enjeux and perspectives* (Bruxelles: Universite de Bruxelles, 2002) 154-155.

⁶²¹ Article 1 of the Framework Decision 2002/629/JHA, *supra* note 409.

⁶²² European Commission, *Report from the Commission to the Council and the European Parliament based on Article 10 of the Council Framework Decision of 19 July 2002 on combating trafficking in human beings*, Brussels, 02.05.2006, COM (2006) 187 final, 6.

⁶²³ Article 250a of the Criminal Code, after changes introduced by the Act of 13 July 2002.

*and practices and bondage comparable to slavery.*⁶²⁴ Likewise, Portuguese law, in the earlier versions of the Portuguese Penal Code, only considered trafficking of persons for the purpose of sexual exploitation.⁶²⁵ In 2007 the crime was expanded in order to incorporate the purpose of labour exploitation and extraction of organs thus complying with the Framework Decision.⁶²⁶

The Framework Decision also contains a broader definition than the UN measures in this domain. The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children, for example, also offers a very broad notion of trafficking,⁶²⁷ but instead of the explicit purpose of “*labour exploitation*”, it mentions “*forced labour or services, slavery or practices very similar to slavery*” in a more limited formulation than that of the Framework Decision.⁶²⁸

In relation to illicit drug trafficking there are also some relevant changes in national legislation. The Framework Decision on drug trafficking requires the criminalisation of the

*“(a) the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of drugs”, “the cultivation of opium poppy, coca bush or cannabis plant”, “possession or purchase of drugs with the view of conducting one of the activities listed in (a)”, and of “the manufacture, transport and distribution of precursors, knowing that they are to be used in or for the illicit production or manufacture of drugs.”*⁶²⁹

The Commission noted how the national legislation of Member States did not include ‘illicit drug trafficking’ as a particular criminal offence, although they often focused on punishing related offences, such as production, cultivation, extraction, acquisition, and

⁶²⁴ Article 1 of the Framework Decision 2005/629/JHA, *supra* note 409.

⁶²⁵ Article 169 in the version of Decreto Lei n° 48/95, 15 of March and following the alterations of Lei 99/2001, 25 of August.

⁶²⁶ Lei 59/2007, 4 of September 2007.

⁶²⁷ “*The recruitment, transportation, transfer, harbouring or receipt of a person, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.*”, Article 3 of the Protocol to Prevent Suppress and Punish Trafficking in Persons, especially women and children, supplementing the United Nations Convention Against Organised Crime, A753/383, Annex II, 2000.

⁶²⁸ “*The exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices very similar to slavery, servitude or the removal of organs*”, *ibid.*.

⁶²⁹ Article 2 of the Framework Decision 2004/757/JHA, *supra* note 415.

possession, among others.⁶³⁰ A study by the United Nations showed that there were considerable differences between national laws.⁶³¹ German law, for instance, criminalised ‘illicit narcotics trafficking’ and Italian law, the ‘distribution of illegal drugs’.⁶³² The use of the expression ‘drug trafficking’ is necessarily broader than the latter, because ‘drug’ includes more substances than ‘narcotics’. Indeed, marijuana or even a prescription medication can be included in the concept of ‘drug’, while only opium, morphine or, in the broad sense, cocaine and heroin are considered ‘narcotics’.⁶³³ Hence, to criminalise the trafficking of drugs is more restrictive than to criminalise the trafficking of narcotics or illegal drugs and while the former would not, *strictu sensu*, be considered a criminal offence under German law it is required to be so following the Framework Decision on drug trafficking. Finally, trafficking is a broader concept than mere ‘distribution’, hence the punishable conduct under Italian law had to be extended to cover cases which are not distribution but which might be considered trafficking.

The Framework Decision on attacks against information systems also illustrates this trend. The Framework Decision requires the criminalisation of access without a right to the whole or any part of an information system (Member States have the choice to criminalise such conduct only when a ‘security rule’ was infringed), or the intentional serious hindering or interruption of the functioning of an information system by inputting, transmitting, damaging, deleting, deteriorating, altering, suppressing or rendering inaccessible computer data when committed without a right (the same is applicable to data in a computer system).⁶³⁴

The explanatory text accompanying the proposal for a Framework Decision noted that national laws in this area contained significant gaps and differences. Spain, the Netherlands and Poland for instance did not criminalise the unauthorised but intentional access to information systems altogether (so-called “hacking”), whose criminalisation is now called for by Article 3 of the Framework Decision.⁶³⁵ Greece,

⁶³⁰ Proposal for a Council Framework Decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking COM (2001) 259 final, Brussels, 23.5.2001, 5.

⁶³¹ UN Report covering Germany, Italy, Poland and the UK – E. Savona, *Organised crime across-borders*, The European Institute for crime prevention and control, affiliated with the United Nations, HEUNI Papers N 6, 1995, 27-28.

⁶³² *Ibid.*, 27-28.

⁶³³ Definitions from the A. Hornby et al, *Oxford Advanced Learners Dictionary* (Oxford: OUP, 2002).

⁶³⁴ Article 2, 3 and 4 of the Framework Decision, *supra* note 343.

⁶³⁵ M. Olinet, “Cybercriminalité: Énoncé du Cas Pratique et Synthèse des Réponses”, in M. Delmas-Marty, G. Giudicelli-Delage, E. Lambert-Abdelgawad (eds) *L’Harmonisation des*

Italy and Slovenia, on the other hand, only criminalised hacking when the system was protected by security measures, a condition not required by the Framework Decision. In addition, Greece did not criminalise the illegal interference with data, whereas the United Kingdom, Belgium, Spain and Finland criminalised only the alteration, damaging or deterioration of computer data,⁶³⁶ but not the deletion, suppression or rendering inaccessible of the same data, as required by the Article 4 of Framework Decision. Finally, the Danish criminal code was extended in order to also criminalise invasion of privacy and damage to property in a “systematic or organised” manner, whereas Finland extended the cases to be considered of serious damaged to property.⁶³⁷

Furthermore, the Framework Decision on combating fraud and counterfeiting of non-cash means of payment required the criminalisation, at least in relation to credit cards, Euro-cheque cards, other cards issued by financial institutions, travellers’ cheques, Euro-cheques and bills of exchange of the

*“theft or other unlawful appropriation of payment instruments”, of “the counterfeiting or falsification of payment instrument in order for it to be used fraudulently”, of the “receiving, obtaining, transporting, sale or transfer to another person or possession of a stolen or otherwise unlawfully appropriated, or a counterfeiting or falsified payment instrument in order for it to be used fraudulently”, and of “the fraudulent use of a stolen or otherwise unlawfully appropriated or of a counterfeited or falsified payment.”*⁶³⁸

Performing these same acts intentionally, without right *“introducing, altering, deleting or suppressing computer data”* by interfering with the functioning of a computer programme or system,⁶³⁹ or the fraudulent making, receiving, obtaining, sale or transfer to another person or possession of *“instruments, articles, computer programmes and any other means peculiarly adapted for the commission of the previous referred offences”* were also specified as matters which should be considered a criminal offence.⁶⁴⁰

Sanction Penales en Europe, vol.5 (Paris: Societe de Legislation Compare, Unite Mixte de recherché de Droit Compare de Paris, 2003) 353, 355-356.

⁶³⁶ Idem.

⁶³⁷ T. Elholm, “Does EU Criminal Cooperation Necessarily Mean Increased Repression?” (2009) 17 *European Journal of Crime, Criminal Law and Criminal Justice* 191, 201.

⁶³⁸ Article 2 of the Framework Decision 2001/413/JHA, *supra* note 411.

⁶³⁹ Article 3, *ibid.*.

⁶⁴⁰ Article 4, *ibid.*.

Again, the EU's provision was broader than many national ones. Finland and France initiated new legislation to fully criminalise conducts referred to in Article 2 of the Framework Decision, whilst in 2004 Spain still did not criminalise the fraudulent altering of payment instruments.⁶⁴¹ Likewise, Sweden provided for a narrow framework of criminalisation and did

*“not provide for punishment if the fraudulent use of a stolen or otherwise unlawfully appropriated, or of a counterfeited or falsified, payment instrument.”*⁶⁴²

Latvia and Lithuania introduced new offences in their national legislation with particular reference to computer programmes in order to comply with Article 4 of the Framework Decision.⁶⁴³ In 2006, Portuguese legislation also did not cover the offences under Article 4 (2), whilst Luxembourg did not contain any criminal offences as referred to in Article 4 of the Framework Decision.⁶⁴⁴ Finland in turn introduced a provision criminalising the possession of accessories and material for counterfeiting in order to comply with EU's measure.⁶⁴⁵

Still in the context of economic crime, Elholm notes how the implementation of the Framework Decision on counterfeiting of the Euro⁶⁴⁶ led to an increase in the scope of the offence of counterfeiting of coins and banknotes in Finland in order to include the import and export of forged coins and banknotes. Similarly in Sweden, it led to an introduction of a special offence on the purchasing of counterfeited money.⁶⁴⁷

Similarly, the Framework Decision on combating corruption in the private sector requires Member States to criminalise intentional active and passive corruption, namely promising, offering or giving a person who directs or works for a private sector entity an undue advantage of any kind in order for that person to perform or refrain from performing any act in breach of his or her duties; or requesting or receiving an undue advantage of any kind or accepting the promise of such advantage while in any

⁶⁴¹ European Commission, *Report from the Commission based on Article 14 of the Council Framework Decision of 28 May 2001 combating fraud and counterfeiting of non cash means of payment*, COM (2004)346 final, Brussels, 30.4.2004, 18.

⁶⁴² *Ibid.*, 18.

⁶⁴³ European Commission, *Second Report based on Article 14 of the Council Framework Decision of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment*, COM (2006)65final, Brussels, 22.02.2006, 4.

⁶⁴⁴ *Ibid.*, 4.

⁶⁴⁵ T. Elholm, “Does EU Criminal Cooperation Necessarily Mean Increased Repression?”, *supra* note 637, 194.

⁶⁴⁶ Council Framework Decision 2000/383/JHA, *supra* note 452.

⁶⁴⁷ T. Elholm, “Does EU Criminal Cooperation Necessarily Mean Increased Repression?”, *supra* note 637, 194.

capacity directing or working for a private sector entity, in order to perform or refrain from performing any act.⁶⁴⁸ Many Member States contained narrower provisions before the Framework Decision. Even after its implementation into national legal orders, 15 Member States maintained narrower provisions than the EU's one in relation to active private corruption and 9 did so in relation to passive corruption:

*“NL limited the offence to instances where the employer or principle was not informed of the case. LU requires that the employer is not aware and does not approve of the criminal behaviour. DE, AT, IT and PL had limited the scope of application in line with Article 2(3). DE limited the scope to acts relating to the purchase of goods or commercial services; AT limited the offence to ‘legal acts’ and PL limited the offence to behaviour resulting in losses, unfair competition or inadmissible preferential action. DE has informed the Commission that new legislation to meet this requirement of the Framework Decision is pending.”*⁶⁴⁹

3. Expanding criminalisation beyond definitions: increasing liable subjects and establishing minimum maximum punishment

3.1. Expanding liability to legal persons

Moreover, expansion of national criminal law as a direct or indirect effect of European criminal law was not confined to the expansion in scope of criminal offences. In addition to these, many framework decisions also require the extension of criminal liability to legal persons (and in any case require Member States to establish non criminal liability).⁶⁵⁰ Criminal liability of legal persons is a relatively new phenomenon which begins to find its place in legal systems in general.⁶⁵¹ In 2004, for example, Greece, Germany, Luxembourg or Italy did not provide for any criminal accountability of legal persons.⁶⁵² Lacey notes how corporate liability and more so *criminal* corporate

⁶⁴⁸ Article 1 (a) (b) of the Framework Decision 2003/568/JHA, *supra* note 352.

⁶⁴⁹ More details are further listed in the implementation report, *Report from the Commission*, *supra* note 450, 3-4.

⁶⁵⁰ See for instance Articles 8 and 9 of Framework Decision 2005/222/JHA, *supra* note 408; Article 5 of the Framework Decision 2003/568/JHA, *supra* note 417; or Articles 6 and 7 of the Framework Decision 2004/68/JHA, *supra* note 414.

⁶⁵¹ For examples of how some national legal orders world wide have struggled with ensuring legal criminal liability see, for instance, for the UK, C. Wells, “Cry in the Dark: Corporate Manslaughter and Cultural Meaning” in Ian Loveland (ed) *Frontiers of Criminality* (London: Sweet & Maxwell, 1995) 109; or for Canada, M. E. Beare, “Organized Corporate Liability: Corporate Complicity in Tobacco Smuggling”, in M. E. Beare (ed) *Critical Reflections on Organized Crime, Money Laundering, and Corruption*, op.cit.,183.

⁶⁵² European Commission, *Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union*, *supra* note 573, 31.

liability is a sensitive issue which touches upon social conventions that still tend to distinguish the ‘ordinary criminal’ from the ‘white collar criminal’:

*“...legislative and executive attempts to render corporations criminally liable for a range of fraudulent dealings, like prosecution strategies designed to render corporations liable for manslaughter, often founder. This is not so much because of concrete procedural or substantive barriers but rather because of discursive resistance exemplified in the practices of relevant decision-making agencies – courts, lawyers, the police. On other words, if corporate accountability or ideas of corporate blameworthiness find no place or only a marginal place in broader social understandings, it may be difficult or impossible to impose criminal liability.”*⁶⁵³

Most EU harmonisation measures attempt to break this ceiling of liability at national level, albeit still to a limited extent (as it gives Member States the option to choose between civil and criminal liability). The 2003 Framework Decision on private corruption, for instance, provides for liability of legal persons both in relation to active and private corruption when bribery is committed for their benefit by any person that has a leading position within that legal person and who is “*acting individually or as part of an organ of the legal person.*” Equally, liability should be extended to cases where the commission of the offence was made possible by lack of supervision or control.⁶⁵⁴

The scope of many domestic laws was much narrower. In fact, it so remains in some cases. By 2007 there is still a lot of resistance to implementing these provisions, with only five Member States providing liability of legal persons under the Framework Decision conditions.⁶⁵⁵ By 2011, the Commission reported significant improvements but still an “*overall poor transposition of Article 5*” with at least two countries not having transposed Article 5(1) and 8 not having fully transposed Article 5(2). Slovakia for example informed the Commission that criminal liability of legal persons had been included in the draft amendments to the Criminal Code and Criminal Procedure Code, whose adoption process was halted pending a Constitutional Court decision.⁶⁵⁶

⁶⁵³ N. Lacey, “Contingency and Criminalisation”, in I. Loveland (ed) *Frontiers of Criminality* (London: Sweet & Maxwell, 1995) 1, 13-14.

⁶⁵⁴ Article 5 (1) and (2) Framework Decision 2003/568/JHA, *supra* note 417.

⁶⁵⁵ European Commission Report COM(2007)328final, see *supra* note 450, 8.

⁶⁵⁶ European Commission, *Report from the Commission to the European Parliament and the Council based on Article 9 of the Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector*, COM(2011)309final, 6.

Changes towards the extension of liability to legal persons were also made following the 2001 Framework Decision on combating fraud and counterfeiting of non-cash means of payment. By 2006, five Member States reported to the Commission that legislation expanding such liability was before their national parliaments awaiting approval. Belgium, Denmark, Lithuania, the Netherlands, Poland and Slovenia had also taken the necessary measures

“to ensure that a legal person can be held liable where the lack of supervision or control by people in leading positions made the commission of offences possible”

and provided for liability in the other cases required by the Framework Decision.⁶⁵⁷

Examples of the introduction or extension of liability of legal persons can also be seen in consequence of the implementation of the 2002 Framework Decision on terrorism (amended in 2008), which also required the extension of liability to legal persons (Article 7). The Commission reported in 2007:

*“The Czech Republic, Latvia and Slovakia have failed to foresee the liability of legal persons for terrorist offences as requested in paragraph 1 and Luxembourg has not transmitted the relevant provisions. The other Member States evaluated have correctly implemented paragraph 1. Their provisions often go beyond the minimum level required by the Framework Decision through either setting more than one criterion or retaining wider criteria.”*⁶⁵⁸

Likewise, the Framework Decision on attacks against information systems also envisaged liability of legal persons.⁶⁵⁹ The Commission reported in 2008 that 16 Member States had taken the necessary measures to ensure such accountability. Estonia however had not accepted to expand criminal liability, considering that its rules on civil liability covered all the conducts described in the Framework Decision.⁶⁶⁰

⁶⁵⁷ European Commission, *Report from the Commission, Second report based on Article 14 of the Council Framework Decision of 28 May 2001 combating fraud and counterfeiting of non cash means of payment*, COM(2006)65 final, Brussels, 20.02.2006, 6.

⁶⁵⁸ European Commission, *Report from the Commission based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism*, COM(2007)681final, Brussels, 6/11,2007, 6.

⁶⁵⁹ Article 8 of the Framework Decision 2005/214/JHA, note 543.

⁶⁶⁰ European Commission, *Report from the Commission to the Council based on Article 12 of the Council Framework Decision of 24 February 2005 on attacks against information systems*, COM(2008)448 final, Brussels, 14.7.2008, 8.

3.2. A focus on minimum maximum penalties

Moreover, the shift towards a potentially more severe penal law was also seen in other elements beyond the broad definition of offences and the extension of liability to legal persons, namely in relation to penalties.⁶⁶¹ Most Framework Decisions require penalties to be effective, dissuasive and proportional (a criterion brought forward from the Maastricht years)⁶⁶² but the feature mostly explored after Amsterdam was the setting of specific minimum maximum sentences.⁶⁶³ As the Commission noted in relation to harmonisation of custodial sentences in 2004,

*“The formula used to harmonise penalties has not been so much to determine effective, proportionate and dissuasive penalties as to set minimum levels for maximum penalties.”*⁶⁶⁴

The Framework Decision on the counterfeiting of the Euro for example established a minimum of not less than eight years custodial sentences for some of the conducts criminalised.⁶⁶⁵ The Framework Decision on money laundering provided for a maximum imprisonment penalty of at least four years.⁶⁶⁶ The Framework Decision on terrorism requires Member States to punish participation in offences related to terrorist groups with at least eight years and the direction of such a group with at least fifteen years.⁶⁶⁷ In turn, the Framework Decisions on combating corruption in the private sector,⁶⁶⁸ sexual exploitation of children,⁶⁶⁹ cyber-crime⁶⁷⁰ and illicit drug trafficking⁶⁷¹ all require a maximum penalty of at least 1-3 years’ imprisonment (the latter two require a minimum maximum of, respectively, 2-5 and 5-10 years in case of aggravating circumstances).

⁶⁶¹ For more details on the method used by the Council to determine the threshold of minimum maximum penalties see Council of Justice Ministers, Home Affairs and Civil Protection, Luxembourg, 25-26 April 2002, 2423rd Council meeting, 7991/02 (Presse 104), 15.

⁶⁶² Chapter 2.

⁶⁶³ Note that no framework decision requires Member States to introduce, for example, mandatory penalties. For more details on the method used by the Council to determine the threshold of minimum maximum penalties see Council 2423rd Council meeting, 7991/02 (Presse 104), *supra* note 661.

⁶⁶⁴ European Commission Green Paper COM(2004)334final *supra* note 573, 15.

⁶⁶⁵ Council Framework Decision 2000/383/JHA, note 452. Article 6 of the Framework Decision, *ibid.*

⁶⁶⁶ Article 2 of the Framework Decision 2001/500/JHA, see *supra* note 410.

⁶⁶⁷ Article 5 (3) of the Framework Decision 2002/475/JHA, see *supra* note 413.

⁶⁶⁸ Council Framework Decision 2003/568/JHA, note 417 *supra*.

⁶⁶⁹ Council Framework Decision 2004/68/JHA, note 414 *supra*.

⁶⁷⁰ Council Framework Decision 2005/222/JHA, note 408 *supra*.

⁶⁷¹ Council Framework Decision 2004/757/JHA, note 415 *supra*.

There is a clear focus on harmonisation of ‘minimum maximum’ sentences but not ‘maximum’ sentences for example.⁶⁷² In fact, Elholm argues that on occasion some Member States with a history of leniency, while implementing several framework decisions, chose to upgrade their national penalties not only to the minimum imposed by the framework decision but, on occasion, to penalties more severe than the ones proposed by the European Union itself. In general, regarding penalties, the author finds that,

*“investigation of the Nordic countries shows that more than half the framework decisions have led to extensions of the penalty scales in one or more of the Nordic countries. In several cases the minimum and/ or maximum penalty for certain crimes have even more than doubled in one or more countries.”*⁶⁷³

This implementation by the Nordic countries shows how the national implementation often goes beyond the EU standard yet still complies with it. In the context of criminal law and, in particular, in the context of the implementation of criminalising provisions, such implementation can translate into an increase in the severity of the national standard of criminalisation and punishment.

In fact, the examples of actual and potential extended criminalisation in the EU space given throughout the chapter, reflect the paradox of minimum harmonisation in criminal matters: whilst the harmonisation of criminal law envisaged was minimal, focusing merely on minimum elements constituent of crimes and penalties, this was sufficient to have a significant impact on national legal orders namely by increasing their scope of formal criminalisation. In fact, it was seen how many Member States introduced new criminal offences or expanded the scope of pre-existing ones, introduced criminal liability to legal persons or expanded the pre-existing framework of such accountability, and introduced minimum maximum sentences - at times beyond

⁶⁷² Indirectly however the fact that most framework decisions set the condition that penalties must be ‘proportional’ does add some limitation to the measure of punishment at national level. Moreover, all EU Member States have abolished the death penalty, see, for example, E. Baker, “The Emerging Role of the EU as a Penal Actor”, note 13 *supra*. Regardless of these two elements, the EU does not engage in the definition of what it thinks should be the actual maximum penalty applicable.

⁶⁷³ T. Elholm, “Does EU Criminal Cooperation Necessarily Mean Increased Repression?”, *supra* note 637, 207; for the details on specific examples see pages 193-203. To be sure however, regardless of an increase in imprisonment rates in Nordic countries, rates have been relatively stable when compared with other legal systems. See comparable data on ‘World Prison Brief’, available at <http://www.prisonstudies.org/info/worldbrief/?search=europe&x=Europe>.

the threshold demanded by EU law. This however, was not without limitations, as it will be seen further below.

3.3. Pressure on more lenient systems

In addition to the trend of increasing criminalisation, harmonisation - as envisaged in ECL - places more pressure on more lenient legal systems than on more severe ones. This is so as Member States are required to criminalise at least the conduct defined in the Framework Decisions but can criminalise further if they choose to do so. They are required to introduce liability of legal persons in certain cases but allowed to introduce criminal liability in relation to more conducts. Finally, Member States are asked to introduce minimum maximum sentences but yet again given freedom to retain or introduce higher minimum maximum penalties than the ones set by the framework decisions. In fact, no framework decision establishes a ceiling of punishment, liability or criminalisation. This implies that Member States with more lenient criminal laws will more likely be required to introduce new higher standards in order to comply with the minimum EU standard. On the contrary, less lenient States are less likely to have to alter (or to alter more significantly) their national provisions, for they are more likely to already meet the minimum standard set by the EU's legal acts. This was seen throughout the chapter. Member States whose national criminal law provided for definitions of criminal offences which were narrower than those proposed by the Framework Decision had to broaden the scope of behaviours covered by the national norm in order to meet the requirements of the EU framework decisions. On the contrary, Member States whose national criminal law already provided for the criminalisation of those conducts did not have to alter national law as national provisions already criminalised the behaviour at stake. Likewise, it was also seen how some Member States who did not envisage the liability of legal persons had to expand national rules on liability in order to meet the requirements of the diverse framework decisions. Conversely, national legal orders which already provided for the liability of legal persons did not have to expand the scope of their national liability provisions as these already met the minimum requirement of the framework decisions.

Moreover, because most measures until the entry into force of the Treaty of Lisbon focused primarily on criminalisation and facilitation of prosecution (and less so on procedural rights, for example), the bias towards an upper trend in severity of the criminal law is further accentuated. This suggests that EU criminal law sets in motion a dynamic where harmony between different domestic legal systems is sought through a

levelling up of formal criminalisation, potentially bringing about a harsher criminal law across the European Union.⁶⁷⁴

Furthermore, the setting of minimum maximum sentences and the extension of the criminal liability to more subjects, namely legal persons, also contribute to this reality. As Husak explains,

*“Even when more behaviour is not punishable, the category of persons who face criminal prosecution [is] widened. The most obvious examples are juveniles and white-collar offenders each of whom had relatively little to fear from the criminal justice system until the last quarter of the 20th century, but recently have become more common prosecutorial targets.”*⁶⁷⁵

This scenario of increased criminalisation at national level as a consequence of EU law implementation is not without two important caveats. The first relates to the fact that ECL still leaves Member States with significant room to manoeuvre; the second relates to the need to distinguish between formal and substantive criminalisation, as will be explored in the next section.

4. The limitations of minimum harmonisation in criminal matters: uneven implementation and unpredictable outcomes

In fact, the trend set in place by harmonisation measures needs to be analysed carefully. Indeed, the harmonisation set in place does not avoid significant dissonance between national laws, nor does it ensure an equal standard of actual criminalisation and punishment at national level. It sets in motion a process but it does not have the tools to see it through entirely. First, because the setting of a minimum standard only falls short

⁶⁷⁴ Husak in this regard argues that more criminalisation leads necessarily to more punishment: *“it is patently clear that more criminalization produces more punishment in a straightforward manner: by expanding the type of conducts subject to liability. The incidence of punishment is at unprecedented levels partly because defendants are convicted of crimes that did not exist a few generations ago.”* However, a direct causation between EU legislation and increase in criminalisation at national law is *not* clear-cut. In fact, the distinction between formal and substantive criminalisation is here essential. Hence, as it will be seen below in the chapter, formal criminalisation does not necessarily need to lead to more substantive criminalisation as it also depends on numerous factors of national criminal policy (Husak refers to the US system in particular but the theoretical reasoning can be applied to the EU framework or any other legal system for that matter); D. Husak, *Overcriminalization, The Limits of the Criminal Law* (New York: OUP, 2008) 19-20.

⁶⁷⁵ We have omitted “*has*” and replaced it by [is]. Again, the author is referring to the US but his argument is being applied to the EU case, Husak, *ibid.*, 20.

of ensuring a degree of homogeneity among Member States. This can be seen at two levels – a legislative one and an executive one.

4.1. Disharmony in national laws

Authors have stressed how the implementation of framework decisions often leads to dissonance among Member States who are equally compliant with the EU standard. The first striking example is precisely the Framework Decision on combating organised crime, which leaves Member States the option of criminalising both or only one offence of conspiracy to commit offences in the context of a criminal organisation or of membership of such organisation.⁶⁷⁶

Indeed, the *prima facie* goal of harmonisation of national legislation seemed in itself to have been compromised in those provisions as Member States could choose to criminalise one or both offences of membership of a criminal organisation or conspiracy to commit offences in the context of such an organisation. The European Commission, joined by France and Italy, was particularly clear in this regard when it observed that the Framework Decision

*“does not achieve the minimum degree of approximation of acts of directing or participating in a criminal organisation on the basis of a single concept of such an organisation (...) but to continue to apply existing national criminal law by having recourse to general rules on participation in and preparation of specific offences.”*⁶⁷⁷

Dissonance was also pointed in relation to penalties by Horta Pinto, who noted that the harmonisation of minimum maximum penalties set in motion by the EU is unlikely to provide for actual harmonisation at national level. She demonstrates this lack of harmonisation even in maximum sentences in the light of one specific example of the implementation of Framework Decision on counterfeiting of the Euro which stipulated a minimum maximum sentence of at least eight years. The author notes how, since 2001, Portugal punishes counterfeiting with custodial sentences from three to twelve years;

⁶⁷⁶ This choice reflected the difficulties of agreeing on a common definition of organised crime among the 27 Member States particularly due to the existence of two models in the European Union: the ‘Anglo-Saxon’ model that tackles organised crime primarily via conspiracy offences and the ‘Continental model’ which criminalises the participation in a criminal organisation instead. The European Commission sought first to harmonise along the lines of the Continental model but the UK was not willing to let go of its conspiracy approach. V. Mitsilegas, *EU Criminal Law*, *supra* note 14, 94-95.

⁶⁷⁷ Statement by the Commission, joined by France and Italy, in Annex A to Annex to the Council Doc. 9067/06 on the Proposal for a Council Framework Decision on the fight against organised crime, Brussels, 10 May 2006, 12.

Spain with a imprisonment penalty from eight to twelve and with fine of up to ten times the value counterfeited; France with imprisonment up to thirty years and fine up to 450 000 Euros; Italy applies custodial sentences which can range from three to twelve years and a fine from 516 to 3098 Euros; whilst in Germany the same conduct is punishable with custodial sentences ranging from one to fifteen years (with some qualification depending on mitigating or aggravating circumstances).⁶⁷⁸ All these five Member States comply with the Framework Decision provisions on penalties, yet the different domestic provisions are hardly harmonised. Indeed, if one considers maximum penalties, whilst in France counterfeiting is punishable with custodial sentences of up to thirty years, Spain applies a maximum of ten years. Likewise, minimum penalties also vary greatly – see for instance the difference between one year in Germany to eight years in Spain. Clearly, the framework decision hardly led towards significant harmonisation.

In fact, the Commission had voiced concerns about the difficulty in harmonising penalties and noted in its Green Paper on the Approximation, Mutual Recognition and Enforcement of Criminal Sanctions that

*“The differences between Member States’ legislation on penalties are still quite sharp. There are historical, cultural and legal reasons for this, deeply rooted in their legal systems, which have evolved over time and the expression of the way in which Member States have faced and answered fundamental questions about criminal law. These systems have their own internal coherence, and amending individual rules without regard to the overall picture would risk generating distortions.”*⁶⁷⁹

The risk of generating distortions is not negligible if one considers the existing differences. Maximum custodial sentences for example range from life imprisonment in countries such as Belgium, Greece, the United Kingdom, France and Italy, to 30 years in Spain or even 25 years in Portugal and Greece. Among countries with life imprisonment the possibility of early release also varies immensely. Minimum periods can go up to 30 years in France, 20 years in Ireland, 15 in Germany or 10 in Belgium.⁶⁸⁰ A lack of coherence in the choice of the minimum maximum threshold for punishment was further pointed out by Weyembergh who notes in this regard, for example, how the Framework Decision against the counterfeiting of the Euro and the

⁶⁷⁸ I. Horta Pinto, “Os Efeitos do ‘Direito Penal Europeu’ nos Sistemas Sancionatórios dos Estados Membros da União Europeia”, in *Estudos de Homenagem ao Prof. Doutor Jorge Figueiredo Dias*, Vol I (Coimbra: Coimbra Editora, 2009) 821, 831-32. Our translation.

⁶⁷⁹ European Commission, Green Paper COM(2004)334final, see *supra* note 573, 8.

⁶⁸⁰ *Ibid.*, 29; I. Horta Pinto, “Os Efeitos do ‘Direito Penal Europeu’ nos Sistemas Sancionatórios dos Estados Membros da União Europeia”, note 678 *supra*, 825.

Framework Decision on trafficking in human beings have thresholds of penalties of equal severity for offences against goods and against persons.⁶⁸¹

4.2. The distinction between formal and substantive criminalisation

Second, harmonisation and the increase in criminalisation seen earlier might not translate in similar levels in prosecution and punishment in national legal systems. This is so as harmonisation of national criminal law focuses on legislative measures alone and it does not account for the functioning of criminal justice systems at national level (a domain largely ignored by ECL). Consequently, police and judicial norms, guidelines and practices, for example, remain outside the scope of EU harmonisation measures. However, whilst these are not harmonised, they determine strongly policing or prosecution and ultimately the levels of punishment of a legal system. Hence, even if Member States would all implement equally the same framework decision divergence could still occur. As Lacey notes, a distinction between formal criminalisation (legislation, treaties, statutes – ‘law in the books’) and substantive criminalisation (actual application of the law) ought to be made for

*“Substantive criminalisation might increase or decrease in a world of stable formal criminalisation, while expanded criminalisation will not necessarily lead to greater substantive criminalisation unless certain other conditions – notably an increase in the resources available to enforcement agencies, and/ or the changes in their incentives – are met.”*⁶⁸²

Hence, a wider scope of criminalisation in the law will contribute to but not always translate into actual harsher practices of punishment.⁶⁸³

⁶⁸¹ A. Weyembergh, “Approximation of Criminal Law”, *supra* note 617, 1585-88.

⁶⁸² N. Lacey, “Historicising Criminalisation: Conceptual and Empirical Issues” (2009) 72 *The Modern Law Review* 936, 946.

⁶⁸³ An interesting example of mismatch between a high level of formal criminalisation and a comparably low substantive criminalisation is the case of Italy during the Mussolini’s regime. The Rocco Code adopted in 1930 laid down very severe maximum sentences, throughout statutory minimum sentences and imprisonment as the primary method of punishment. Nonetheless, sentencing practice during those years was much more lenient than such code would suggest, thus toning formal criminalisation down; see V. Ruggiero, “Flexibility and intermittent emergency in the Italian penal system”, in V. Ruggiero, V. Ryan and J. Sim (eds) *Western European Penal Systems: A Critical Anatomy* (London: Sage Publications, 1995) 46, 51-52. For more examples of mismatch between formal and substantive criminalisation mainly due to the practices of judges and prosecutors in France and Germany respectively, see M. Cavadino and J. Dignan, *Penal Systems*, *supra* note 78, 338. Chapter 5 will also point out how different States make radical different use of prosecution instruments.

The dissociation between formal and substantive criminalisation is further accentuated in the context of the European Union, as ECL relies entirely on Member States to translate EU standards into their national criminal justice systems. This was particularly significant under the post-Amsterdam treaties which provided for a rather limited institutional framework in criminal matters which could at times compromise correct implementation of ECL (decision-making was to be done by unanimity, framework decisions lacked direct effect, the Commission had no enforcement powers or specific control over the implementation of ECL into national legal orders).⁶⁸⁴

The Lisbon reforms nevertheless will strengthen the ‘post formal criminalisation process’ as it will significantly improve the EU’s capacity to adopt directly effective legislation and to police its implementation (decision making will be done by qualified majority, framework decisions will be replaced by directives which have direct effect, enforcement mechanisms will be available to the Commission and the Court will have full jurisdiction).⁶⁸⁵ The new TFEU will also leave open doors to further expansion of the scope of EU Law.⁶⁸⁶ This might suggest that criminalisation trends are likely to be continued or further exacerbated as expansion in some domains, namely in relation to EU policies is bound to push ECL into further domains of regulatory criminal law.

Conclusion

This chapter shed light on the nature of harmonisation of national criminal law. It noted how the Treaties envisaged harmonisation as minimal in its range and depth but how in fact it was taken considerably beyond these boundaries. Measures were adopted in relation to Euro-crimes and these were defined through broad and catch-all concepts. Organised crime in this regard continues to be a clear example of EU’s flexible and broad approach to criminality. The chapter went on to show how harmonisation in criminal matters is facilitating the expansion of the domestic punitive framework. This was seen in three different ways: first, through the adoption of broad definitions of crime by the EU which led some Member States to introduce new criminal offences in their legal systems or to extend the scope of pre-existing ones; second, by requiring that liability for criminal actions be extended to legal persons which led several Member States to expand their domestic accountability framework; finally, by establishing minimum maximum penalties to be applied by Member States which led at times to a harshening of sentences at national level even beyond the threshold required by the EU norm. Overall thus, it was shown that harmonisation of national criminal law is

⁶⁸⁴ Chapter 3, section 2.1.

⁶⁸⁵ Chapter 3, section 3.

⁶⁸⁶ Chapter 3, section 3.

bringing about a harsher criminal law across the European Union whilst placing additional pressure on more lenient States.

These qualities of ECL mirror to some extent tendencies that national legal orders in Europe and even around the world have been experiencing. In fact, the harshening of national legal systems is a phenomenon common to many western legal orders for some decades now. Whilst the USA and the UK are the most striking examples in this matter,⁶⁸⁷ many other European countries have been evolving towards a harsher penalty either through the imposition of severer sentences or by passing stricter statutes (although the studies available focus almost exclusively on punishment and not on the definition of offences).⁶⁸⁸ Hence, the nature of harmonisation of national criminal law so far seems to have a repressive emphasis. This, it will be seen in the next chapter, has been further complemented by another mechanism of integration in criminal matters – the principle of mutual recognition – under which State prosecution and punishment has also been strengthened.

⁶⁸⁷ See, for example, J. Simon, *Governing through Crime*, *supra* note 568; D. Garland, *The Culture of Control*, *supra* note 42; and B. Hudson, “Diversity, crime and criminal justice”, in M. Maguire, R. Morgan, and R. Reiner, (eds) *The Oxford Handbook of Criminology* (Oxford: OUP, 2007) 158; M. Cavadino, J. Dignan, *Penal Systems*, *supra* note 78; V. Ruggiero, V. Ryan and J. Sim (eds) *Western European Penal Systems: A Critical Anatomy* (London: Sage Publications, 1995).

⁶⁸⁸ M. Cavadino, J. Dignan, *Penal Systems*, *supra* note 78. Differences amongst EU countries are nevertheless very sharp. Data of 2003, for example, shows that some new Member States had a prison population proportionately six times higher than Scandinavian countries (the latter imprisoned in average 50 to 70 prisoners per 100 000 inhabitants whilst the former imprisoned an average of 350 prisoners per 100 000 inhabitants).

Chapter 5 Mutual recognition in criminal matters: building a European Union investigation, prosecution and punishment legal order

Introduction

The principle of mutual recognition was endorsed by the European Council as the cornerstone of judicial cooperation in the EU in 1999. Regardless of not being written in the Treaties at the time, it has ever since deeply reshaped European Union criminal law (ECL) and its relationship with national legal orders. This chapter will restate how in its light, ECL went beyond its focus on Euro-crime and became virtually applicable to *any* type of criminality. Furthermore, it will show that, being the most dynamic area of integration in criminal matters it allowed for yet a further expansion of ECL into domains thus far left untouched. It will be suggested that the ultimate goal of mutual recognition has been one of facilitating State investigation and prosecution, and securing and managing punishment beyond national borders. In doing so, the principle re empowers the *ius puniendi* of the the State. Furthermore, the features of the application of the principle in criminal matters accentuate its punitive emphasis by favouring States who more readily prosecute or which criminalise more broadly.

Looking at the principle in more detail, it will be suggested that it experienced two main stages of development. The first one featured a powerfully built punitive impetus where prosecution and sentence enforcement were highly enhanced and fundamental rights considerations were largely absent. As national legal orders struggled to accept and adapt to the deep changes that this first period of mutual recognition brought about (changes of, at times, constitutional nature), the principle entered its second stage. The latter saw the punitive emphasis of mutual recognition surviving, although in a nuanced form. This was seen in the integration of other elements, namely fundamental rights protection, a more assertive role to the executing State, and a more managerial approach to mutual recognition.

The chapter will seek to develop this argument through four main sections. Section 1 will look at the introduction and development of the principle of mutual recognition in the domain of criminal law. It will provide an overview of how the principle was borrowed from other domains of EU integration and how this was reflected in an expansionist and demanding shape in ECL – in fact its application grants

extraterritoriality to nothing less than to the *ius puniendi* of the different Member States. Furthermore, not only does it require Member States who are receivers of requests to recognise a foreign decision, it obliges them to execute it too, often by lending its law enforcement apparatus to the service of the requesting State. This is a more demanding form of mutual recognition than in other EU policy areas. Section 2 will look at how this is reflected in practice. In particular, it will look at the infamous European Arrest Warrant – the first and most important legislative development of mutual recognition thus far. It will be seen how, with a view of facilitating the surrender of individuals to face criminal proceedings or serve sentences in a different Member State, the EAW dropped long lasting extradition protectionist principles that enshrined national constitutional orders and practices such as the principle of non extradition of nationals, the possibility to refuse extradition based on human rights concerns and the principle of dual criminality. It will be shown how these changes greatly enhanced States' capacity to prosecute and seek sentence enforcement across the EU and how they have the potential to favour the most severe or more 'active' legal system. Indeed, it will be seen how this punitive impetus is used differently by different States: whilst some have issued a significant amount of EAWs, others show little interest in seeking prosecution beyond their national borders. This section will then look at how the punitive impetus of the EAW had a strong impact upon many domestic systems and was not necessarily well received by many national constitutional courts. Thus, some Member States introduced more exceptions and qualifications than the ones specifically provided in the Framework Decision. This ultimately led to a fragmented and uneven implementation across the EU. These were mostly driven by concerns with the possible deterioration of individual protection and the enhanced position of requesting States in the context of the removal of the principle of dual criminality.

The chapter will then turn to the evolution of mutual recognition post EAW. It will be seen how, regardless of the hurdles of the EAW implementation, mutual recognition continued its path towards facilitating criminal investigation, prosecution and sentence enforcement in domains of financial penalties, evidence, prison penalties and alternative sanctions (section 3). It will be argued that, regardless of its ongoing punitive impetus, mutual recognition became more moderate or at least more accommodating of interests of the several actors involved (and not only of the issuing/requesting Member State). This was seen mostly in three elements: in a very weak implementation of measures on mutual recognition of financial penalties, on the partial or complete reintroduction of the principle of dual criminality throughout framework decisions on evidence and imprisonment sentences and in the consideration of the position of the individual in the operation of some of these measures. The last section of the chapter will pick up on this

last point and look at how the CJEU has interpreted the principle of *ne bis in idem* in the context of mutual recognition in criminal matters. It will be seen how the CJEU had repeatedly taken a broad view of the interpretation of the principle granting a wide protection to individuals who might see themselves facing threats of repeat prosecution or punishment by different Member States. However, it will also be suggested that such a wide protection rewards the State which is faster to prosecute. This is the case, for example, where a second State can no longer prosecute the same individual because a first State has already given closure to criminal proceedings regarding the same offences. It will be seen in this last section that this can raise questions of opportunity and balance when, for example, States are taking longer to prosecute because in order to gather sufficient evidence related to criminal organisations. In a final remark to this section it will be suggested that the EU is further expanding mutual recognition into a more managerial approach, attempting at coordinating positive conflicts of jurisdiction preventing *a priori* situations where there can be a violation of the *ne bis in idem* principle.

1. The expansionist and punitive bias of the principle of mutual recognition in criminal matters

Judicial cooperation in criminal matters was introduced into the Treaties in 1993 as a main axis for cooperation in justice and home affairs, side by side with police cooperation. Nonetheless, during most of the nineties developments in this domain were somehow limited.⁶⁸⁹ In 1999 however judicial cooperation went through a significant transformation when the European Council endorsed the principle of mutual recognition as the cornerstone of judicial cooperation in criminal matters across the European Union.⁶⁹⁰

To be sure, until the Treaty of Lisbon mutual recognition in criminal matters had no mention in the Treaties. However, as harmonisation was proving politically difficult to achieve, the UK proposed mutual recognition – a principle long responsible for the

⁶⁸⁹ See chapter 1 and 2.

⁶⁹⁰ Presidency Conclusions, Tampere European Council, see *supra* note 54, para 33. The Cardiff European Council in 1998 had already called for the enhancement of effective judicial cooperation in the fight against cross-border crime, Presidency Conclusions, Cardiff European Council, 15 and 16 June 1998, para 39.

development of the single market - as an alternative.⁶⁹¹ The Commission followed up on this idea submitting that,

*“... borrowing from concepts that have worked very well in the creation of the Single Market, the idea was born that judicial co-operation might also benefit from the concept of mutual recognition which, simply stated, means that once a certain measure, such as a decision taken by a judge in exercising his or her officials powers in one Member State, has been taken, that measure – in so far as it has extranational implications- would automatically be accepted in all other Member States, and have the same or at least similar effects there.”*⁶⁹²

The Commission continued by explaining that this automaticity was possible because there was mutual trust between Member States’ criminal justice systems,

“Mutual recognition is a principle which is widely understood as being based on the thought that while another state may not deal with a certain matter in the same or even similar way as one’s own state, the results will be such that they are acceptable as equivalent to decisions by one’s own state. Mutual trust is an important element, not only trust in the adequacy of one’s partners’ rules, but also trust that these rules are correctly applied.

*Based on the idea of equivalence and the trust it is based on, the results the other state has reached are allowed to take effect in one’s own sphere of legal influence. On this basis, a decision taken by an authority in one state could be accepted as such in another state, even though a comparable authority may not even exist in that state or could not take such decisions, or would have taken an entirely different decision in a comparable case.”*⁶⁹³

⁶⁹¹ UK Delegation, Note from UK Delegation to the K4 Committee, Document 7090/99 submitted to the K4 Committee, Brussels, 29 March 1999, para 7 and 8.

⁶⁹² European Commission, *Commission Communication to the Council and the European Parliament on Mutual Recognition of Final Decisions in Criminal Matters*, COM(2000)495final, Brussels, 26.7.2000, 2.

⁶⁹³ *Ibid.*, 4. In 2001 the Commission released a very extensive Programme of measures envisaging the application of mutual recognition to a wide range of areas of the criminal justice process, from pre-trial orders, extradition, prison sentences, among others, European Commission, *Programme of Measures to implement the principle of mutual recognition of decisions in criminal matters*, OJ C 12/10 (2001). The idea of mutual recognition and mutual trust was further reinforced by the Commission in 2005 in the Green Paper COM(2004)334final, see *supra* note 573, 12.

1.1 Expanding State power

The transferability of the principle from the single market to criminal matters nonetheless has shown to be more complex than envisaged by the Commission. In fact, it has been argued that the principle reaches further and is more demanding in the criminal law context than in other policy areas. This is so because, whilst in other domains mutual recognition ensures free movement of goods and persons, in criminal matters mutual recognition ensures the free movement of judgments – the result of the ultimate expression of national sovereignty.⁶⁹⁴ As Lavenex argues, the applicability of mutual recognition to criminal matters allows the principle to become an ‘instrument of governmentalisation’ as it facilitates the free circulation of sovereign governmental acts. This, the author suggests, enhances States’ sphere and capacity of intervention, in contrast with mutual recognition in trade and consumption, which tends to enlarge the freedom and rights of the individuals vis-à-vis the State.⁶⁹⁵ Hence, mutual recognition ensures that should a State choose to prosecute or punish someone the power to do so is no longer limited to its own borders and law enforcement means but rather facilitated across the European Union. National decisions can be deemed valid, recognised and enforced beyond the domestic legal order and its physical and systematic boundaries. Mutual recognition seems to lend a possibility of extraterritoriality to domestic judicial decisions, consequently enhancing the State’s sphere of action.⁶⁹⁶ Furthermore, mutual recognition is more demanding in criminal matters as the type of recognition imposed is not passive as in other domains. In fact, it requires States to lend their law enforcement structures for the sake of the effectiveness of another State sovereign power. This is ultimately a more demanding form of recognition – a form of ‘systems recognition’ as Miguel Maduro labels it.⁶⁹⁷ As Maduro explains, the mutual recognition of judicial decisions is not based simply on the recognition of an applicable norm. Rather, it is based on the assumption that the other State’s judicial and legislative decisions are legitimate in systematic terms. This, the author continues,

⁶⁹⁴ For an overview and critique of the extension of the principle from other areas of EU integration to criminal matters see S. Peers, “Mutual Recognition and Criminal Law in the European Union: Has the Council Got it Wrong?” (2004) 41 *Common Market Law Review* 5, 23-28.

⁶⁹⁵ S. Lavenex, “Mutual recognition and the monopoly of force: limits of the single market analogy” (2007) 14 *Journal of European Public Policy* 762, 765.

⁶⁹⁶ For more on the idea of mutual recognition as creator of extraterritoriality see K. Nicolaidis and G. Shaffer, “Transnational Mutual Recognition Regimes: Governance without Global Government” (2005) 68 *Law and Contemporary Problems* 263, 267-268.

⁶⁹⁷ M. Maduro, “So Close and Yet So Far: the Paradoxes of Mutual Recognition” (2007) 14 *Journal of European Public Policy* 814, 823.

“(...)involves the recognition of rules, goals and the processes and institutions through which they are adopted and implemented in another system. Other forms of recognition also entail some recognition of the other’s system, only the latter is, in reality, deduced from the existence of policy coincidence or overcome if goal differentiation takes place in a non-systematic area (a more limited and less sensitive policy).”⁶⁹⁸

Finally, as Mitsilegas notes, mutual recognition is a true ‘journey into the unknown’ in the sense that it requires national authorities of one State to accept, recognise and – in criminal matters – execute a national standard from another Member State. Although what is specifically being recognised is a specific national judicial decision, the latter is, as just seen, the embodiment of a States’ policy choices. To be sure, in other domains, as well as in criminal matters grounds for refusal to recognise have been introduced to avoid the complete automaticity of mutual recognition. Hence, although a State is, in principle, required to accept the other State’s national standard, it can still verify if certain condition are met and, in case they are not, it can refuse such recognition. These checks and safeguards however are being heavily contested in criminal matters as being insufficient or inadequate as it will be seen below.⁶⁹⁹

1.2 Expanding State power to any criminality

The principle of mutual recognition in criminal matters also has a broad scope. It was seen so far in the thesis that ECL has been focusing for most of its existence on Euro-crimes and that most of its measures have been adopted following an idea of need to fight organised crime and protect EC interests and policies. However, with the adoption of mutual recognition as the cornerstone of judicial cooperation in the European Union, the previous focus of ECL unfolds into domains previously left entirely untouched by the EU and in fact potentially to the entire realm of offences dealt with by domestic criminal law. The influence of ECL on national law via mutual recognition has two spheres. The first is composed of 32 serious criminal offence types in relation to which recognition operates almost automatically.⁷⁰⁰ This is achieved mostly by the abolition of the principle of dual criminality in relation to those offences. Hence, States are required to recognise and enforce judicial decisions of other States even when they refer to acts which are not considered criminal offences by the law of the ‘recognising’ State.

⁶⁹⁸ *Ibid.*, 823.

⁶⁹⁹ V. Mitsilegas “The Constitutional Implications of Mutual Recognition in Criminal Matters in the European Union” (2006) 43 *Common Market Law Review* 1277, 1281-1282.

⁷⁰⁰ See, for example, Article 2(2) of the Framework Decision 2002/584/JHA, *supra* note 383.

Besides these listed offences, mutual recognition also operates in relation to any other crimes but in those cases States only have to recognise decisions which refer to acts which are also deemed as criminal by their own law. Ultimately then mutual recognition can involve any type of criminality and becomes a tool of extraterritorial enforcement in relation not only to crimes with a European, transnational or cross border element, but even in relation to crimes that are purely national.⁷⁰¹

2. European Arrest Warrant

The 2002 Framework Decision on the European Arrest Warrant,⁷⁰² adopted in 2002, aimed at making extradition between Member States an easier and swift process⁷⁰³ by adopting a simplified and fast procedure and weakening or abolishing some of its traditional principles and operational extradition mechanisms.⁷⁰⁴

⁷⁰¹ This broad application has a caveat in relation to the Framework Decision on the EAW which sets a general threshold of applicability as it will be seen below (see note 643 below). See also chapter 3.

⁷⁰² Council Framework Decision 2002/584/JHA, *supra* note 383.

⁷⁰³ According to some authors and views this was felt to be necessary in order to compensate for a freedom of movement of fugitive criminals across borders, task which had arguably been taken away from States which, with the removal of internal borders, no longer had the tools or capacity to be guarantors of internal security. Accordingly, a common market could also be seen at the same time as a 'common criminal space'. See for example, W. Wagner, "Building an Internal Security Community: The Democratic peace and the Politics of Extradition in Western Europe" (2000) 40 *Journal of Peace Research* 695, 705; and N. Vennemann, "The European Arrest Warrant and its Human Rights Implications" (2003) 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaoRV)* 103. See also chapters 1-3 of this thesis.

⁷⁰⁴ We will use the terms surrender and extradition interchangeably in this dissertation. Nonetheless, it is fundamental to note that differences between extradition and surrender were debated by several authors whose opinion differed on whether the two were similar or distinct concepts. The controversia related to the fact that the Framework Decision replaces former European instruments on extradition whilst using the word 'surrender' instead of 'extradition'. The debate was thus (and remains to some extent) whether amongst EU countries extradition in the classic sense had been replaced by 'surrender' or if the two concepts were synonyms. For a detailed account of distinction between the two from a substantive and procedural point of view see, for example, O. Lagodny, "'Extradition' without granting procedure: The Concept of 'Surrender'", in Judge R. Blekxtoon and W. van Ballegooij (eds) *Handbook on the European Arrest Warrant* (The Hague, The Netherlands: T.M.C. Asser Press, 2005) 39. Lagodny argues that the EAW creates a "new system in relation to procedural aspects whilst giving a more modest qualitative leap". A more distinctive account was given by Advocate General Ruiz-Jarabo Colomer, for instance, in its conclusions in the case *Advocaten voor de Wereld*, where he held that, besides the common rationale of serving the same purpose of surrendering individuals, the two had nothing in common. This position was justified mainly with the factors that extradition can be operated between two sovereign States only, is decided on a case-by-case basis, goes beyond the legal sphere into the political realm and enters the scope of international relations, and, finally, justifies the applicability of the principles of reciprocity and dual criminality. Advocate General Ruiz Jarabo Colomer, Case C-303/05, ECR I 3633 [2007] 41.

These changes in extradition across the European Union took place in a haste after the 9/11 attacks in NY with the Commission's submission of a draft proposal ten days after the events. The proposal was further pushed through the Council in three months only. To be sure, the Framework Decision was already being negotiated for a significant amount of time but those negotiations had, at that stage, no end in sight and the draft put forward by the Commission after 9/11 was significantly different. Hence, the EAW, which Douglas Scott called the "*jewel in the crown of the EU's responses to the terrorist attacks*", was passed through the deliberative process with extreme urgency.⁷⁰⁵

The EAW is a judicial decision issued by a judicial authority of a Member State aiming at the arrest and surrender of a requested person by another Member State for the purposes of conducting a criminal prosecution or executing a detention order or a custodial sentence.⁷⁰⁶ Such a judicial decision can be issued only in relation to acts punishable by the law of the issuing Member State by a custodial sentence or a detention order of a maximum of at least 12 months, or by a passed sentence of a custodial sentence of at least 4 months.⁷⁰⁷

The main objective of the Framework Decision is to make extradition in relation to such criminality a simpler and faster process.⁷⁰⁸ A first step to this involved the 'depoliticisation' of the process which is now to be entirely decided by the judiciary. This was expected to make surrender based on more objective and formal criteria rather than bilateral processes that can involve political negotiation. Secondly, very tight deadlines for the execution of an EAW and the surrender of individuals in question were established. The wording of the framework decision is particularly telling when it noted that a request shall be dealt with as a 'matter of urgency'.⁷⁰⁹ In fact, the final decision to surrender an individual shall be taken within 10 days (when the requested person consents to her surrender) or within 60 days (when there is no such consent).⁷¹⁰ Furthermore, the person requested shall be surrendered no later than 10 days after the

⁷⁰⁵ Accordingly the speed of the process was such that the European Parliament even received out of date and last minute drafts, see S. Douglas-Scott, "The rule of law in the European Union", see *supra* note 393, 228.

⁷⁰⁶ See Article 1(1) of the Framework Decision 2002/584/JHA, *supra* note 383.

⁷⁰⁷ Article 2(1), *ibid.*

⁷⁰⁸ The EAW "*should replace all the previous instruments concerning extradition*", Intent 11 of the Preamble of the Framework Decision, *ibid.*

⁷⁰⁹ Article 17 *ibid.*

⁷¹⁰ Article 17 *ibid.*

final decision on the execution of the EAW.⁷¹¹ Moreover, the procedure is to be simplified and operated with great automaticity whilst the request is made through a form with limited details regarding the offence and facts at stake.⁷¹²

Furthermore, the simplification of the former extradition procedure was complemented by the partial abolition of three fundamental pillars of extradition - the principle of non-extradition of nationals, the refusal to extradite on human rights grounds and the principle of dual criminality.

The exception or principle of non-extradition of nationals was a long-standing feature of European extradition law dating back to the nineteenth century.⁷¹³ The principle was based on an idea of a connection, a special link between the State and its own nationals, which would grant the latter the right to be protected by its own State in different ways, including by not being exposed to the violence and extra burden of a foreign criminal justice system. The reasons for non-extradition of nationals were varied and date back to the late nineteenth century as well.⁷¹⁴ In Britain, a Commission appointed in 1978 to analyse the issue of extradition, summarised (and rejected)⁷¹⁵ in four main points the

⁷¹¹ Article 23 (2) *ibid.*.

⁷¹² The form ought to include information on the following elements only: identity and nationality of the requested person, contact details of the issuing judicial authority, evidence of an enforceable judgment, an arrest warrant or an enforceable judicial decision, the nature and legal classification of the offence, a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person (the form leaves a 5 line space for this information), the penalty imposed if there is a final judgement or the prescribed scale of penalties for the offence under the law of the issuing Member State, if possible other consequences of the offence. Article 8 and Annex to the Framework Decision, *ibid.*.

⁷¹³ France was the first European country to sign an extradition Treaty in 1834 specifically prohibiting the extradition of French nationals. By mid nineteenth century most European civil law countries had adopted this protection and such feature persisted until very recently (this included Switzerland, The Netherlands, Italy and a special agreement between Nordic countries). Common law countries did not make use of the exception of non extradition of nationals. For an account of the historical evolution of the principle ever since ancient Greece until today see M. Plachta, "(Non) Extradition of Nationals: A Neverending Story?" (1999) 13 *Emory International Law Review* 77.

⁷¹⁴ Deen-Racsmany and Blextoon note how the abolishment of the nationality exception in Europe was expected and predicted by many given the similarity of values and the long shared European history, Z. Deen-Racsmany and R. Blekxtoon, "The Decline of the Nationality Exception in European Extradition? The Impact of the Regulation of (Non)Surrender of Nationals and Dual Criminality under the European Arrest Warrant" (2005) 13 *European Journal of Crime, Criminal Law and Criminal Justice* 317, 320-321.

⁷¹⁵ In fact, the principle of non-extradition of nationals is common to civil law countries but not necessarily to common law ones. The latter tend to prefer territorial jurisdiction and accept the extradition of their own nationals under due human rights conditions (whilst civil law systems

arguments against extradition of nationals: a subject ought not to be withdrawn from his natural judges; the state owed its citizens the protection of its laws; it is impossible to place entire confidence in the justice of a foreign country; and it is a serious disadvantage for a person to be tried in a foreign language and where he is separated from his friend and resources and from those who bear witness of his previous life and character.⁷¹⁶ The main European legal instrument regarding extradition was, until recently, also along these lines. The European Convention on Extradition of 1957, for example, conferred the right to the contracting parties to refuse extradition of their nationals.⁷¹⁷ In fact, at least 18 of the EU Member States had attached such a declaration to the Convention.⁷¹⁸ Other European arrangements also abided by the principle, such as the Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters signed in 1962 which laid down an obligation not to extradite.⁷¹⁹

A first sign that the use of this exception was beginning to subside in Europe was seen in the Convention implementing the Schengen Agreement in 1990 which no longer prohibited directly the extradition of nationals as long as the person concerned would agree to it and the laws of the requested State did not prohibit it.⁷²⁰ This shift was later on confirmed by the 1996 Convention on Extradition between the Member States of the European Union which attempted to make the principle of non extradition of nationals the exception to the normal regime, whilst in fact still allowing it if a Member State would declare a wish to continue not to extradite its own nationals.⁷²¹ Regardless of the proposed flexible framework, six Member States still attached declarations firmly

tended to prefer personal jurisdiction over territorial one). For a detailed account of English and Wales law see M. Hirst, *Jurisdiction and the Ambit of the Criminal Law* (Oxford: OUP, 2003).

⁷¹⁶ Royal Commission on Extradition, Report of the Commissioners, C.2039, 1878, in M. Plachta, “(Non) Extradition of Nationals”, *supra* note 713, 86-87. See also, for example, M. Gavouneli, *Functional Jurisdiction of the Law of the Sea* (Leiden: Martinus Nijhoff Publishers, 2007)13-14; and R. Donner, *The Regulation of nationality in international law*, 2nd ed. (New York: Transnational Publishers, 1994).

⁷¹⁷ Article 6 (1) (c) of the Council of Europe European Convention on Extradition, ETS No24, 13 December 1957.

⁷¹⁸ The 18 countries were: Austria, Cyprus, Germany, Denmark, Estonia, Finland, France, Greece, Hungary, Ireland, Lithuania, Luxembourg, Latvia, The Netherlands, Poland, Portugal, Spain and Sweden in Z. Deen-Racsmany and R. Blekxtoon, “The Decline of the Nationality Exception”, *supra* note 714, 323.

⁷¹⁹ Article 5(1), Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters, 616 UNTS 120, 27 June 1967.

⁷²⁰ Article 66 of the Convention applying the Schengen Agreement of 14 June 1985, *supra* note 59.

⁷²¹ Article 7, Council Act drawing up the Convention relating to extradition between the Member States of the European Union, 27 September 1996, OJ C 313 [1996]. The Convention never entered into force mostly due to French and Italian failures to ratify (although it was provisionally applied between some Member States) and it was superseded by the Framework Decision on the EAW, see Article 31(1)(d) of the Framework Decision 2002/584/JHA, note 383.

refusing the extradition of their own nationals (Austria, Denmark, Germany, Greece Luxembourg and Latvia) whilst seven others (Belgium, Finland, Ireland, the Netherlands, Portugal, Spain and Sweden) declared they would allow extradition of nationals under certain conditions only (dual criminality, guarantees of return, reciprocity, among others).⁷²²

The abolition of the principle of non-extradition of nationals seem thus to break the initial link between the national citizen and the State, embodying a new connection between the national citizens and the EU. In fact, in an increasingly more volatile and integrationist legal Europe - and world - the reasons for refusal to extradite nationals became partially out-dated and the long lasting connection between the State and its own nationals began to subside and be questioned by other notions such as residence or even EU citizenship. The new paradigm ultimately assumes that an individual can stand trial before any European court and not just before those of her State of nationality. The EU space becomes an area of justice where EU nationals are no longer granted the protection of the borders of their country of nationality or residence and are potentially equally accountable to any European court regardless of their geographical location, nationality or place of residence.⁷²³ This reshaped relationship between citizens and the State led to negative reactions in national legal orders and received strong criticisms from national constitutional courts, as will be seen below.

Protection by the State, traditionally granted for individuals, was further shaken with the non-inclusion in the Framework Decision of the possible violation of human rights in the requesting State as an exception for non-surrender. Refusal on a human rights basis was common even in countries with liberal traditions of extradition (for example States which would extradite their nationals such as those with a common law tradition).⁷²⁴

⁷²² More details in Z. Deen-Racsmany and R. Blekxtoon, “The Decline of the Nationality Exception”, note 714, 326.

⁷²³ Nonetheless, as it will be seen below, the Framework Decision leaves some options of retreat relating to the exercise of territorial jurisdiction and to the serving of the sentence. Article 4(7) allows a Member State to refuse surrender in case the offence was committed in whole or in part in its own territory; whereas Article 5(3) allows Member States to surrender under the condition of return of the person in order to serve a resulting custodial sentence or detention order in the State of origin.

⁷²⁴ See, for example, M. Plachta, “(Non) Extradition of Nationals”, note 713, 86-87. It is argued by some that human rights do not necessarily always operate as a barrier to refusal as different human rights can have different importance or violations can vary in their severity. For a short summary of different positions in the literature and of the ECHR decisions on the matter see M. Mackarel, “Human Rights as a Barrier to Surrender”, in N. Keijzer and E. van Siedregt (eds) *The European Arrest Warrant in Practice* (The Netherlands: T.M.C. Asser Press, 2009) 140-143.

To be sure, concerns with fundamental rights in general, although not enumerated as grounds for refusal to surrender, are mentioned in the preamble of the Framework Decision:

“(12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, in particular chapter VI thereof. Nothing in this Framework Decision shall be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person’s position may be prejudiced for any of those reasons (...)

(13) No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.”⁷²⁵

Furthermore, Article 11 of the Framework Decision details the rights of the requested person: the latter shall be informed of the EAW and its contents and of the possibility of consenting to surrender; it shall furthermore have the right to be assisted by a legal counsel and by an interpreter in accordance with the law of the executing Member State.

These elements, according to Morgan, should be a reassurance of the satisfactory level of protection offered by the Framework Decision and EU law as there are at least three categories of safeguards for a person subject to a European Arrest Warrant: the fair trial guarantees enshrined in the ECHR and other international instruments, additional measures by the Commission such as the proposal for a Framework Decision on certain procedural rights (whose negotiations failed – see chapter 3) and finally the safeguards built in the Framework Decision on the EAW itself, such as the reference to

⁷²⁵ Intend (12) and (13), Preamble of the Framework Decision 2002/584/JHA, note 383. This enunciation largely mirrors the European Court of Human Rights (ECtHR) case law, namely its fundamental decision in 1989 prohibiting extradition when the person to be extradited would be likely to suffer inhuman or degrading treatment or torture. More significantly this prohibition concerned extradition from the UK to the USA, regardless of the latter not being signatory of the ECHR, *Soering v. UK*, No 14038/88, judgment of 7 July 1989.

fundamental rights in the preamble and the right to legal aid and interpretation enshrined in Article 11 of the Framework Decision.⁷²⁶

This framework is significantly improved in the post Lisbon framework with the adoption of two Directives on procedural rights, namely the Directive on the right of information in the course of criminal proceedings which was very recently adopted.⁷²⁷ The Directive envisages the provision of an ‘appropriate’ Letter of Rights to persons who are arrested for the purpose of the execution of an EAW, although it does not provide further details on the type of information that should be provided in those cases.⁷²⁸ Likewise, a Directive on translation and interpretation rights has also been adopted,⁷²⁹ covering the right to interpretation and translation in criminal proceedings and proceedings for the execution of an EAW which shall apply to persons from the time they are made aware that they are suspected or accused of having committed a criminal offence until conclusion of the proceedings and if applicable sentencing and resolution of any appeal.⁷³⁰

Regarding the Framework Decision on the EAW itself, however, the placement of the principle of protection of fundamental rights in extradition in the preamble, but not in the list of grounds for refusal or of conditions that can be demanded from the requesting State, creates a distinction between the two. This distinction is suggested by the Commission when it pointed out, in its implementing reports and working documents, that States which expressly introduced a ‘human rights clause’ - as grounds for refusal to surrender - in their national legislation implementing the Framework Decision, went beyond the wording of the latter.⁷³¹ This implies that, in the Commission’s opinion, the

⁷²⁶ C. Morgan, “The EAW and Defendant’s Rights”, in Judge R. Blekxtoon and W. van Ballegooij (eds) *Handbook on the European Arrest Warrant* (The Hague/ The Netherlands: T.M.C. Asser Press, 2005) 195. N. Keijzer and P. Garlick also share the idea of balance in the amount of protection given by the EU framework to the protection of the fundamental rights of the requested person, see N. Keijzer, “Extradition and Human Rights: A Dutch Perspective”, in Judge R. Blekxtoon and W. van Ballegooij (eds) *Handbook on the European Arrest Warrant* (The Hague/ The Netherlands: T.M.C. Asser Press, 2005) 183; and P. Garlick, “The European Arrest Warrant and the ECHR”, in Judge R. Blekxtoon and W. van Ballegooij (eds) *Handbook on the European Arrest Warrant* (The Hague/ The Netherlands: T.M.C. Asser Press, 2005) 181.

⁷²⁷ Directive 2012/12/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142/1 [2012].

⁷²⁸ Article 5, *ibid.*.

⁷²⁹ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right of interpretation and translation in criminal proceedings, OJ L 280/1 [2010].

⁷³⁰ Articles 1, 2 and 3, *ibid.*.

⁷³¹ European Commission, *Commission Staff Working Document Annex to the Report from the Commission on the Implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, SEC(2007)979, Brussels 11.7.2007; in relation to Lithuania and Denmark who introduced a

text of the preamble does not amount to actually granting States the option of introducing a human rights exception in domestic laws.⁷³²

The absence of a human rights clause coupled with its statement in the preamble conveys the idea that the standard of protection of human rights across the European Union is satisfactory - the same basis that in any case allowed for the assumption of mutual trust between Member States. Nonetheless, this is not always the case. Alegre and Leaf point out in this regard that there is no mechanism for monitoring or ensuring that ECHR rights are respected and enforced across the EU.⁷³³ Additionally, many Member States have at times in fact struggled with meeting the Convention's standard.⁷³⁴ The CJEU has recently clearly acknowledged so in case *N.S.* noting that the ratification of the ECHR by a Member State "...cannot result in the application of a conclusive presumption that that State observes those conventions."⁷³⁵ Moreover, the Commission itself has voiced concerns on the relationship between the EAW and human rights. This was noted recently in the last implementing report:

"From the issues raised in relation to the operation of the EAW it would seem that, despite the fact that the law and criminal procedures of all Member States are subject to the standards of the European Court of Human Rights, there are often some doubts

human rights exception as a mandatory ground for refusal, see page 9; in relation to Italy, who introduced a human rights exception as an optional ground for refusal see page 16.

⁷³² It will be interesting to see if in the future a case concerning the introduction of these human rights provisions into national legal orders reaches the CJEU. This is so as the Court often refers to the preamble of legislation for guidance in its teleological reasoning. In doing so it requires that the object, scheme and purpose of the legislation be taken into account when interpreting specific provisions. In *West*, for example, an EAW related case, the CJEU commented on recitals 5 and 7 of the preamble of the Framework Decision holding that: "(...) as is clear from recitals 5 and 7 in the preamble to the Framework Decision, the purpose of the Framework Decision is to replace the multilateral system of extradition between Member States with a system of surrender, as between judicial authorities, of convicted persons or suspects for the purpose of enforcing judgments or of criminal proceedings, that system of surrender being based on the principle of mutual recognition (...)"; Case C-192/12 PPU *Proceedings concerning the execution of a European arrest warrant issued in respect of Melvin West*, not yet published, 54.

⁷³³ S. Alegre and M. Leaf, *European Arrest Warrant – a solution ahead of its time?* (London: Justice, 2003) 14.

⁷³⁴ P. Garlick, "The European Arrest Warrant and the ECHR", *supra* note 726, 177.

⁷³⁵ Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State*, Judgment of the Court of 21 December 2011, not yet published, para 103. The case concerns the transfer of asylum seekers from the UK back to Greece (their point of entrance). The Court further stated that the assumption that asylum seekers will be treated in a way which complies with fundamental rights must be rebuttable, hence allowing in particular circumstances the reassessment of the conditions according to which, in this case asylum seekers, will be treated in the State where they would be returned to (see para 104-107). Hence, the Court found that the transfer of an asylum seeker to another Member State should not take place if there are substantial grounds that the asylum seeker would face real risk of being subject to inhuman or degrading treatment which the Court found to be the case in this particular dispute.

*about standards being similar across the EU. While an individual can have recourse to the European Court of Human Rights to assert rights rising from the European Convention of Human Rights, this can only be done after an alleged breach has occurred and all domestic legal avenues have been exhausted. This has not proved to be an effective means of ensuring that signatories comply with the Convention's standards.*⁷³⁶

The same concerns are also voiced specifically vis-à-vis defence rights laid down in Article 11 of the Framework Decision. These leave out a significant part of the surrender procedure, such as the right to legal representation in the executing State and detention conditions, for example. Again, the Commission came to voice this in 2011:

*“While welcoming the fact that the EAW is a successful mutual recognition instrument in practice, the Commission is also aware of the EAW's remaining imperfections, notably when it comes to its implementation at national level. The Commission has received representations from European and national parliamentaries, defence lawyers, citizens and civil society groups highlighting a number of problems with the operation of the EAW: no entitlement to legal representation in the issuing state during the surrender proceedings in the executing state; detention conditions in some Member States combined with sometimes lengthy pre-trial detention for surrendered persons(...).”*⁷³⁷

Finally, the partial abolition of dual criminality⁷³⁸ - the principle which ensures that no one shall be punished for acts not deemed as criminal where and when they are committed (*nullum crimen sine lege*) - also weakened the position of the individuals.⁷³⁹ The principle of dual criminality relates closely to the principle of legal certainty, according to which the law must be clear and precise, its legal implications foreseeable. The abolition of dual criminality also balanced the relationship between States themselves. The principle holds that States can refuse extradition in cases where the conduct at stake is not deemed as criminal by their own laws. This relies on the idea that

⁷³⁶ European Commission, *Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between the Member States*, COM(2011) 175 final, Brussels, 11.4.2011, 6.

⁷³⁷ European Commission Report, *ibid.* 6. For more details on detention see section below in this chapter.

⁷³⁸ Also known as principle of double criminality.

⁷³⁹ N. Keijzer, “The Double Criminality Requirement” in Judge R. Blekxtoon and W. van Ballegooij, *Handbook on the European Arrest Warrant* (The Hague/ The Netherlands: T.M.C. Asser Press, 2005) 137, 137-138.

States should not have to use their sovereign powers for the enforcement of norms contrary to their own conceptions of law. The principle was contemplated, for example, by the 1957 European Convention on Extradition and hence, previous to the EAW, the absence of dual criminality functioned as mandatory ground for refusal to extradite amongst Member States.

Under the new EAW regime this guarantee can no longer be maintained in relation to requests regarding 32 types of offence listed as long as these are punishable in the issuing Member State by a custodial sentence or detention order of at least 3 years. The offences include Euro-crimes (such as trafficking in human beings or drugs, fraud, terrorism, participation in a criminal organisation, etc.), crimes within the jurisdiction of the International Criminal Court, or serious crimes which have been untouched by harmonisation at EU level (such as arson, murder, rape, racketeering or extortion, among others).⁷⁴⁰ Hence, in relation to these offences as defined by the issuing Member States and as long as punishable with at least 3 years imprisonment, surrender of an individual cannot be refused even in the circumstance where the same acts are not deemed as criminal offences under the law of the executing Member State.

The abolition of dual criminality raises several issues. First, it raises a question of whether it is necessary. If EU Member States share common values and understandings of the purpose and goals of criminal justice (as suggested by the assumption of mutual trust) it would be expected that, at least in relation to serious criminality (of which the 32 types of offence to which dual criminality does not apply are certainly examples), their legal approaches would be similar to an extent where dual criminality would be practically irrelevant because different Member States would make similar criminalising options.⁷⁴¹

Hence, the fact that the principle of dual criminality was partly removed, suggests that such similarity is lacking and that Member States still criminalise certain crimes differently. In fact - different national laws do offer different definitions of the same offences.⁷⁴² Hence, whilst in some countries a certain type of behaviour is considered a criminal offence, in others the same behaviour might simply escape the umbrella of the

⁷⁴⁰ Article 2(2) of the Framework Decision 2002/584/JHA, note 383.

⁷⁴¹ See G. Vermeulen, "How Far can We Go in Applying the Principle of Mutual Recognition?", in C. Fijnaut and J. Ouwerkerk (eds) *The Future of Police and Judicial Cooperation in the European Union* (Martinus Nijhoff Publishers, Leiden/Boston, 2010) 243.

⁷⁴² This in fact happens even in relation to crimes whose definition has been harmonised by the EU, see chapter 4.

criminal law altogether. The textbook example is, of course, that of euthanasia which is deemed as murder by most legal orders but is permitted, under certain statutory conditions, in Belgium and in the Netherlands. The lack of dual criminality in cases involving such acts and those countries can lead to cases where the limits of the EAW will be tested. Deen-Racsmany and Blektoon give the hypothetical example of the Dutch doctor who is charged with murder in Italy for legal euthanasia in Belgium.⁷⁴³ Equally representative would be the case of rape, an offence that has very different definitions in different Member States. Whilst in some the lack of consent of the victim for sexual penetration is sufficient to constitute rape, in other Member States the use of compulsion, threat or physical force is absolutely necessary.⁷⁴⁴

These differences in the criminalisation of the same acts by different Member States partly defeat the idea of commonality between Member States' views of crime. As the examples given by Deen-Racsmany and Blektoon show, the abolition of dual criminality clearly gives priority to the Member State who punishes a certain conduct even if the executing State does not consider the same conduct as a criminal act. Ultimately then, by dropping the requirement of dual criminality, the EAW gives preference to the legal order that punishes more widely. The more lenient system – for example the one that does not criminalise euthanasia – sees no use in the EAW in relation to those acts. Consequently, it becomes a mere receiver of other States' requests. In this light, the EAW clearly becomes a tool of facilitation of prosecution and punishment for the States that criminalise more heavily and / or that have more proactive prosecuting authorities and policies.

Data on the EAW in practice clearly suggests this imbalance – some Member States are heavy issuers of EAWs whilst others seem to use them moderately if not parsimoniously. Germany and Poland, for example, issue a significantly higher number of EAWs than any other country. If we look at the number of EAWs issued in 2009 we find 4844 EAWs issued by Poland and 2433 by Germany as opposed to, for example, 17 EAWs issued by Cyprus, 220 by the UK, 263 EAWs by Finland and 1240 by France.⁷⁴⁵ In fact, Poland has been a very active user of the EAW from the beginning.⁷⁴⁶ This can

⁷⁴³ Z. Deen-Racsmany and Judge R. Blektoon, "The Decline of the Nationality Exception", *supra* note 714, 353.

⁷⁴⁴ See for a detailed list of differences N. Keijzer, "The Double Criminality Requirement, *supra* note 739, 152-160.

⁷⁴⁵ See complete data (except for Italy who hasn't provide information on their own practices yet) in European Commission 2011 Report, *supra* note 736, 12.

⁷⁴⁶ The extremely high number of EAWs it issues, many to the UK, has led to slightly surreal situations as reported by The Economist in an article on the EAW in 2010: "Every fortnight an

be partly explained by the fact that the Polish criminal justice system endorses the principle of legality or compulsory prosecution, which obliges public prosecutors to institute or carry out preliminary proceedings when there is a good reason to suspect an offence has been committed. Nonetheless, the public prosecutor retains some discretionary powers,⁷⁴⁷ and, accordingly, the room for discretion in prosecution has been increasingly, especially in cases of lesser importance as noted by a representative of the Polish National Prosecution Officer.⁷⁴⁸ This discretion also exists in relation to the EAW – Article 607a of the Polish Code of Criminal Procedure states that a Circuit Court may issue an EAW upon request of a public prosecutor.⁷⁴⁹ This suggests that the issuing of EAWs in Poland is subject to a degree of discretion which makes the Polish impetus to issue such a high number of EAWs all the more significant.

The use of the EAW, in general, has been considered successful by the Commission who stated in 2006 that the EAW was an ‘overall success’ and that the average time to execute a warrant had fallen from more than 9 months to 43 days. In the period from January to September 2004, 2603 warrants were issued, 653 persons arrested and 104 persons surrendered.⁷⁵⁰ Furthermore, a year later a new report by the Commission tells of renewed tales of success as the Commission reports,

*“For the whole of 2005, nearly 6 900 warrants were issued by the 23 Member States that sent in figures (excluding Belgium and Germany), twice as many as in 2004. In over 1 770 cases, the person wanted was traced and arrested.”*⁷⁵¹

aeroplane carrying Polish policemen touches down at an airport in southern England. Waiting for them each time is a glum of handcuffed men who are to be flown back to face trial in Poland. Extradited prisoners are normally to be transferred on ordinary commercial flights, but a surge in the number being sent from Britain to Poland means that now fortnightly ‘ConAir’ service is being laid on by the Polish authorities. [...]” The Economist, “Extraditions to Poland – Wanted, for chicken rustling”, January 2nd 2010.

⁷⁴⁷ T. P. Marguery, “Unity and Diversity of the Public Prosecution Services in Europe, A study of the Czech, Dutch, French and Polish systems”, PhD Dissertation, University of Groningen, 12 June 2008, 202-211.

⁷⁴⁸ J. Szymanski, “Discretionary Powers of public prosecution: opportunity and legality principle – Advantages and disadvantages”, Conference of Prosecutors General of Europe, 5th Session, Council of Europe, Celle, 23-25 May 2004, 3.

⁷⁴⁹ Translation available in “The European Arrest Warrant Database”, Council of the European Union, last visited on 23 May 2012. Available at http://www.law.uj.edu.pl/~kpk/eaw/legislation/Poland_National_legislation_EAW.pdf

⁷⁵⁰ European Commission, *Report from the Commission based on Article 34 of the Council Framework Decision on the European arrest warrant and the surrender procedures between Member States (revised version)*, COM(2006)8 final, 24.1.2006.

⁷⁵¹ European Commission, *Report from the Commission since 2005 of the Council Framework Decision on the European arrest warrant and the surrender procedures between Member States*, COM(2007)407final, 11.7.2007.

By 2011, numbers on the EAW were significantly higher:

*“Available statistics compiled for the years between 2005 and 2009 [...] recorded 54 689 EAWs issued and 11 630 EAWs executed. During that period between 51% and 62% of requested persons consented to the surrender, on average within 14 to 17 days. The average surrender time for those who did not consent was 48 days.”*⁷⁵²

The average of executed EAWs was 2 326 during these years – more than double than 2004 number.

A closer look at these data however puts the whole rationale of the EAW into perspective and brings further to the fore its punitive nature. The EU jewel in the crown of counter terrorism and of the EU fight against serious criminality⁷⁵³ is often being used by Member States to pursue the prosecution of much more trivial offences. Examples are many. Already in 2007, it was reported that Member States were issuing EAWs for non serious - if not petty – criminality. Examples varied from the possession of very small quantities of drugs (0,45 grams of cannabis; 1,5 grams of marijuana; 0,15 grams of heroin; 3 ecstasy tablets); to petty theft (theft of a piglet; theft of two car tyres); or for the driving of a car under the influence of alcohol where the limit was not significantly exceeded (0,81mg/l).⁷⁵⁴ In 2008, The Guardian reported similar cases of issuing of EAWs for theft of a dessert, for removal of a wardrobe door (EAWs issued by Poland) or ‘piglet rustling’ (EAW issued by Lithuania).⁷⁵⁵ And by 2011 this trend was maintained. This led the Commission to particularly address the issue of proportionality in its latest report in rather alarming terms:

⁷⁵² European Commission Report COM(2011)175 final, *supra* note 736, 3.

⁷⁵³ Article 2(1) of the Framework Decision 2002/584/JHA sets a threshold of punishability of offences below which EAWs may not be issued: “*A European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.*”, *supra* note 383.

⁷⁵⁴ Council, *Note from the Presidency to the Working Party on Cooperation in Criminal Matters on the Proposed subject for discussion at the experts’ meeting on the application of the Framework Decision on the European arrest warrant on 17 July 2007 – the proportionality issue*, Document 10975/07, Brussels, 9 July 2007, 3; See also Council of the European Union, *Information Note 11371/07 on Replies to questionnaire on quantitative information on the practical cooperation of the European Arrest Warrant – Year 2006*, Doc. 11371/2/07, REV2, Brussels, 27 July 2007.

⁷⁵⁵ David Cronin, “No justice in EU extradition system”, *The Guardian*, 5 August 2009.

“Confidence in the application of the EAW has been undermined by the systematic issue of EAWs for the surrender of persons sought in respect of often very minor offences.”⁷⁵⁶

This use of the EAW precisely suggests that the more pro-punishment and pro-prosecutorial Member States can make use of an extra tool to expand their sovereign powers beyond their national borders – and this can be done not only in relation to extremely serious criminality but also petty crime as seen in the former section. Hence EU instruments whose stated political rationale was to fight serious criminality are *de facto* being used as instruments to prosecute or seek sentence enforcement for a significantly broader range of crimes.

2.1 Nuancing the punitive impetus of the EAW: EU and national judicial reactions

The CJEU and the EAW

To be sure, the Framework Decision still offers several grounds for refusal to surrender. It allows Member States to maintain or introduce three mandatory grounds for refusal (cases where a Member State has to refuse the execution of a EAW): the offence being covered by an amnesty in the executing State (when that State has jurisdiction to prosecute such offence); when the person has already been finally judged by the same acts; when the person may not be held criminally responsible owing to his age.⁷⁵⁷ These mandatory grounds are complemented by optional grounds for non-execution of the warrant. The list is longer than the previous one and some criteria seem to overlap at least partially. Eight grounds for optional refusal of a EAW by the executing Member State are envisaged: the verification of dual criminality in relation to non-listed offences; ongoing criminal prosecution in the executing Member State for the same acts; where a final judgement has been passed in the executing Member State or when the latter decided not to prosecute or to halt proceedings; when prosecution is statute-barred according to the law of the executing Member State; when the requested person has been finally judged in a third State in respect to the same acts and a sentence has been served, is being served or can no longer be served under the law of the sentencing country; if the requested person is staying in, is a national or a resident of the executing State and the latter undertakes to execute the sentence or detention order in accordance with its domestic law; and finally, when the offences are regarded by the law of the executing

⁷⁵⁶ European Commission Report COM(2011)175 final, *supra* note 736, 7.

⁷⁵⁷ Article 3 of the Framework Decision 2002/584/JHA, note 383.

State has having been committed in whole or in part in the territory of the executing Member State or when the offences were committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for those offences when committed outside its territory.⁷⁵⁸

Furthermore, besides grounds for refusal, Article 5 of the Framework Decision lists three conditions that executing State can demand for in order to agree to surrender an individual. First, it allows for the executing Member State to make surrender dependent upon giving the requested individual the opportunity to apply for a retrial when a sentence was passed in absentia and he or she was not summoned or otherwise informed of the trial.⁷⁵⁹ Second, where a life sentence could be imposed, the executing Member State can demand the guarantee that the sentence can be reviewed after 20 years at the latest.⁷⁶⁰ Finally, the surrender can be made conditional upon the return of the national or resident in order to serve the passed sentence in the territory of the Member State of origin.⁷⁶¹

The CJEU has had the opportunity to provide some guidance in the interpretation of several of these provisions. Article 4(6) of the Framework Decision, for instance, has been the focus of several cases brought before the Court. The provision is one of the listed optional grounds for refusal and stipulates that an executing authority may refuse to execute carry out an EAW issued for the purposes of executing a sentence where that warrant concerns a person who “*is staying in, or is a national or a resident of the executing Member State*” and in case that State undertakes to execute that sentence in accordance to its domestic law.

In *Kozłowski*,⁷⁶² the Court was asked to clarify the meaning of the terms ‘resident’ or ‘staying in’ for the purposes of Article 4(6) of the Framework Decision. Mr. Kozłowski had been sentenced in Poland on 28 May 2003 to five months imprisonment for destruction of another person’s property. The sentence had become final but was not executed immediately. Since 10 May 2006, Mr. Kozłowski was imprisoned in Stuttgart (Germany) where he was serving a custodial sentence of 3 years and 6 months to which he was sentenced by two judgments of the Amtsgericht Stuttgart, dated 27 July 2006 and 25 January 2007, in respect to 61 fraud offences committed in Germany. On 18 April

⁷⁵⁸ Article 4 (1)(2)(3)(4)(5)(6)and (7), *ibid.*.

⁷⁵⁹ Article 5(1), *ibid.*.

⁷⁶⁰ Article 5(2), *ibid.*.

⁷⁶¹ Article 5(3), *ibid.*.

⁷⁶² Case 66/08 *Proceedings concerning the execution of a European arrest warrant issued against Szymon Kozłowski* ECR I-06041 [2008].

2007, Polish authorities requested the German authorities to surrender Mr. Kozłowski, who did not consent to his surrender. The German executing authorities informed Mr. Kozłowski that they did not intend to raise any ground for non-execution, taking into account that he did not have habitual residence in Germany, his successive periods of residence were characterised by the commission of several crimes, he was single and childless, had no command of the German language, had grown up and lived in Poland until the end of 2003, and only from February 2005 until May 2006 had lived in Germany—with some interruptions. Providing guidance in relation to the meaning of the terms ‘resident’ or ‘staying in’, for the purposes of Article 4(6) of the Framework Decision, the Court explained that first, the provision has the goal of enabling the executing authority to consider the person’s chances of reintegrating into society.⁷⁶³ Accordingly, it should cover situations in which the person in question either has established his actual place of residence in the executing Member State or has acquired, following a stable period of presence, connection with that State which is of a similar degree to those resulting from residence. The Court further clarified that, in order to determine whether, in a specific situation, there is such a connection between the person concerned and the executing Member State, it is necessary to make an overall assessment of the objective factors characterising the person’s situation—such as the length, nature and conditions of his presence, and the family and economic connections which he has with that State.⁷⁶⁴ The Court also noted that neither the fact that a person systematically commits crimes in the executing Member State nor the fact that he is in detention there, serving a custodial sentence, is a relevant factor in this regard.⁷⁶⁵ Finally, the Court declared that Member States are not entitled to adopt a broader meaning, in this case of the term ‘staying in’, than that which derives from the Court’s uniform interpretation.⁷⁶⁶

⁷⁶³ Para 44 of the judgment, *ibid.*.

⁷⁶⁴ Para 48 and 54, *ibid.*.

⁷⁶⁵ Para 51, *ibid.*.

⁷⁶⁶ Para 43, *ibid.*.

Subsequently, in *Wolzenburg*⁷⁶⁷, the Court gave guidance regarding the meaning of ‘resident’ and the conditions under which Member States can make use of Article 4(6) of the Framework Decision. The Court found that a Member State’s requirement for a continuous period of five years residence for nationals of other Member States for the ground for non-execution of the EAW to apply, was not to be considered excessive, in particular having regard the requirements of integration of the requested person into society when the sentence imposed expires. In particular, the Court found that such requirements did not violate Article 12 EC (the principle of non discrimination on grounds of nationality).⁷⁶⁸ However, the Court did impose limits as to the demands that a Member State (in this case The Netherlands) could impose upon the requested person. The Court noted that a Member State cannot, in addition to the condition of the duration of residence, make application of the ground of non refusal of execution of the EAW subject to supplementary administrative requirements, such as the possession of a residence permit of indefinite duration.⁷⁶⁹

The Court further clarified in *Lopes da Silva*⁷⁷⁰ that a Member State cannot limit the non-execution of a warrant on the grounds envisaged by Article 4(6) solely to their own nationals, by automatically and absolutely excluding nationals of other Member States who are staying in or are a resident of the executing Member State, irrespective of their connections with that Member State. This, the Court clarified, would not be compatible with the principle of non-discrimination on grounds of nationality (now enshrined in Article 18 TFEU).

⁷⁶⁷ Case C-123/08 *Proceedings concerning the execution of a European arrest warrant issued against Dominic Wolzenburg* ECR I-09621 [2009].

⁷⁶⁸ Para 62- 74; in particular para 74 of the judgement, *ibid.*.

⁷⁶⁹ See para 52 and 53 of the judgement, *ibid.*.

⁷⁷⁰ Case C-42/11 *Proceedings concerning the execution of a European arrest warrant issued against João Pedro Lopes da Silva Jorge*, not yet published.

With these judgements, the Court stipulated minimum and maximum parameters of interpretation and application of Article 4(6). The Court held that the term ‘staying in’ could not be interpreted too broadly, thus avoiding too liberal interpretations of this ground for refusal in the Framework Decision. Hence, an executing authority cannot refuse the execution of an EAW simply based on the fact that the requested person is temporarily located in the territory of the executing Member State. This would defeat the purpose and goal of the Framework Decision. On the contrary, the executing Member State has to take into consideration the objective factors characterising the situation of that person and a degree of connection with the executing Member State is essential if grounds for refusal are to be considered. Furthermore, the Court also set limits in order to avoid too strict interpretations of such provision. Hence, it held that the executing State cannot, *a priori*, exclude nationals of other Member States from benefiting from the provision, as this would amount to a violation of the principle of non-discrimination based on nationality.

Furthermore, in *Leymann and Pustovarov* the CJEU sought to strike a balance between the punitive impetus of the EAW and the protection of the person individual in relation to further prosecutions to which he or she can become exposed after being surrendered.⁷⁷¹ In the case in question the CJEU had the opportunity to clarify the scope of Article 27 of the Framework Decision—the ‘specialty rule’—which holds that a person surrendered under an EAW for the purposes of prosecution for a criminal offence, can only be prosecuted for that same offence. The Court clarified that, in order to determine whether or not a different offence was concerned, it must be established whether the elements of the offences as described in the EAW are still present in the current prosecution and whether there is a sufficient connection between the two. Certain alterations are allowed under specific circumstances, such as those of time and place.⁷⁷² Furthermore, in this specific case, the Court found that an alteration in the class of narcotics concerned (from amphetamines mentioned in the EAW to hashish mentioned in the criminal proceedings) was not, in itself, capable of characterising another offence. This was so, given that both offences were punishable by imprisonment of the same maximum period of at least three years and came under the rubric of ‘illegal trafficking in narcotic drugs.’⁷⁷³

⁷⁷¹ Case C-388/08 PPU *Criminal proceedings against Artur Leymann and Aleksei Pustovarov* ECR I-08993 [2008]. See also below Case C-261/09 *Proceedings concerning the execution of a European arrest warrant issued in respect to Gaetano Mantello*, ECR I-11477 [2010].

⁷⁷² C-388/08 PPU, para 59, *ibid.*.

⁷⁷³ Para 62-63, *ibid.*.

These grounds for refusal and conditions that can be asked upon surrender have been often criticised by the national judiciary as being insufficient to compensate for the deep changes in the extradition regimes – from the abolition of non extradition of nationals, dual criminality, possibility of assessment by the executing State, etc. These changes caused difficulties often at national level and led readjustments of domestic legal orders. These were made via judicial reactions at national level – often from national constitutional or supreme courts – or via the laws implementing the Framework Decision into domestic legal systems.

The Second Senate of the Federal Constitutional Court of Germany⁷⁷⁴ dealt with a large majority of these issues already in 2005 in an emblematic case involving Mamoun Darkazanli, a German-Syrian national, suspected of links to the 11 September attacks, of financing Al-Qaida and of connecting its members to Europe. He was sought in Spain and in Germany for crimes committed between 1993 and 2001. In Spain nevertheless he was also prosecuted for participation in a terrorist organisation (acts which were not criminalised in Germany before August 2002). Upon the issue of a EAW against him by Spain, Mr. Darkazanli challenged the EAW on several grounds, such as non respect of the principle of dual criminality (given that membership of a criminal organisation was not a crime in Germany at the date of the facts in relation to which the EAW against him had been issued) and breach of his right to judicial review as the extradition decision could not be challenged. The German Federal Constitutional Court found with Mr. Darkazanli and annulled the law implementing the Framework Decision in the German system. But in its reasoning, the Court took a wider approach to the matter than the one proposed by the defendant. First and foremost the Court found the law implementing the EAW in Germany did not adequately protect German citizens' fundamental rights of recourse to a Court as argued by the party but also of freedom from extradition. More specifically, the Court attacked the implementing act as it did not implement the optional grounds for refusal allowed by the Framework Decision (such as the territorial exceptions - when the offences were committed fully or in part in German territory or when committed outside the territory of issuing and executing States and German law

⁷⁷⁴ Judgment of the Second Senate of the Federal Constitutional Court of Germany on the European Arrest Warrant, 18 July 2005, Zitierung: BVerfG, 2 BvR 2236/04 vom 18.7.2005, Absatz-Nr. (1 - 203) available here <http://www.bundesverfassungsgericht.de/en/press/bvg05-064en.html>.

does not deem the acts in question as criminal).⁷⁷⁵ Furthermore, the German Constitutional Court also clarified that, in its view, although minimal conditions for trust could exist, these did not dispense with a procedure where all circumstances of the case and of the systems of criminal justice of the issuing state ought to be examined – a clear sign of mistrust in other States’ systems.⁷⁷⁶

Similar issues such as dual criminality, equality before the law and legality in criminal proceedings were also raised before the Belgium Cour D’Arbitrage which referred the case to the CJEU.⁷⁷⁷ This was the first time the CJEU had the opportunity to address the controversial EAW and participate in the constitutional dialogue with national courts.⁷⁷⁸ In a nutshell, the Cour d’Arbitrage questioned three main points - the legal basis of the framework decision (in fact whether a framework decision was the correct instrument for the EU to legislate on extradition matters); and, more importantly to our discussion here, the possible violation of the principle of equality and legality in criminal proceedings namely by the abolition of the principle of double criminality. This was so as the Framework Decision listed the 32 offence types to which dual criminality could not be applied without justifying such choice and with no reference to their legal definition and content.

The CJEU offered a very formalistic and hermetic reasoning. In relation to the legality argument the Court noted that the list in the Framework Decision is not intended to create criminal offences and penalties *per se* but rather to simply refer to the law of the issuing Member State (hence it is this law that ought to fully comply to the principle of legality). The Court went on to focus on the ‘equality’ questions: namely that there was

⁷⁷⁵ See para 65-100, *ibid.*. For a detailed analysis of the case see Nicolas Nohlen, “Germany: The European Arrest Warrant case” (2008) 6 *International Journal of Constitutional Law* 153 or A. Hinarejos, Case Note (2006) 43 *Common Market Law Review* 583.

⁷⁷⁶ See mostly para 118 *ibid.*. Ironically, regardless of these findings, German authorities continued to issue European arrest warrants to other Member States although refusing to execute incoming requests. This was not well received by Spain or Hungary, for example, and both invoked the principle of reciprocity, refusing to recognise German warrants during that period. They considered that if Germany was not applying the principle of mutual trust they should not do so either. Section 2.1.2., page 5 of the 2007 Report from the Commission, see *supra* note 641. The Thessaloniki Supreme Court and the Greek High Court, for example, also took similar stances, see E. A. Stefanou & A. Kapardis, “The First Two Years of Fiddling around with the Implementation of the European Arrest Warrant (EAW) in Cyprus” in E. Guild (ed) *Constitutional challenges to the European Arrest Warrant* (Nijmegen: WLP, 2006) 75, 76.

⁷⁷⁷ Case C-303/05, *Advocaten voor de Wereld*, ECR I 3672 (2007).

⁷⁷⁸ Apart from the EAW however the ECJ has adjudicated on a considerable number of cases in which it touched upon the relationship between national and EU legal orders and Community and national law. For more details on this case law, including the national case law in relation to the EAW, see V. Mitsilegas “Constitutional Principles of the European Community and European Criminal Law”, *supra* note 454, 301. See also chapter 3.

no justification to choose those specific 32 types of offences and not others. The CJEU again dismissed this argument in a rather circular manner deferring the justification to the choice previously made by the Council and noting that,

*“the council was able to form the view, on the basis of the principle of mutual recognition and in the light of the high degree of trust and solidarity between the member states, that, whether by reason of their inherent nature or by reason of the punishment incurred of a maximum of at least three years, the categories of offences in question feature among those the seriousness of which in terms of adversely affecting public order and public safety justified dispensing with the verification of double criminality.”*⁷⁷⁹

In replying to the questions asked by the national Court, the CJEU evaded the main concerns of the claimants and of many constitutional courts.⁷⁸⁰ It did so by linking the justifications of the choice of principles and crimes either to the issuing State or to the political decision of the Council without entering into considerations regarding any of the two. In a nutshell, the CJEU held that the principle of legality was not violated given that the definition of offences and their clarity were to be assured by the law of the issuing State. This argument, however does not address the situation of the person who only travels through the issuing State and commits an offence, or more significantly, of the person who commits an offence outside the issuing State and sees prosecution being brought against her by the executing State. The fact that, for instance, rape has a clear definition in Portuguese law, does not provide legal certainty nor behavioural guidance to a person in Sweden or in the UK (or anywhere else besides Portugal). It is this ‘dislocation’ that raises serious questions of legal certainty, with which the CJEU did not engage with in its decision. Secondly, when the Court circumvented discussing the choice of crimes in relation to which dual criminality is abolished, by noting that the Council had itself taken that choice upon itself, considering the inherent nature and gravity of those offences, it provided for a purely formal argument. Hence, instead of discussing the choice of crimes and seeking to look at why these listed offence types deserved an enhanced regime of cooperation amongst Member States, the Court simply stated that the Council made the decision according to its own reasoning. Hence, as Sarmiento argues, although this is a narrow decision by the Court, it strongly encapsulates the idea that both Council and Member States enjoyed a high degree of

⁷⁷⁹ Case C-303/05, *supra* note 777, para 57.

⁷⁸⁰ D. Leczykiewicz, “Constitutional conflicts and the third pillar” (2007) 33 *European Law Review* 230.

discretion in Title VI TEU(A), one which the Court, in this case, was not willing to scrutinise.⁷⁸¹

Most judicial resistance at national level related either to the abolition of the principle of non extradition of nationals or to the lack of a human rights and political clause as a ground for refusal to extradite. This resistance was signalling a shift in the paradigm of cooperation, not least because the previous legal status quo, which protected those guarantees, was enshrined in Member States' constitutional orders. Hence, several Constitutional Courts had to take a stance on whether or not to allow extradition of their own nationals. On 27 April 2005, the Polish Constitutional Court delivered a decision in relation to a Dutch EAW that had been issued in respect to a Polish citizen to face criminal proceedings in the Netherlands. The Court was forced to annul the provision of national law implementing the Framework Decision on the EAW authorising the extradition of Polish nationals on the grounds that it was unconstitutional as it violated Article 55 (1) of the Polish Constitution which stated the prohibition of extradition of Polish citizens. Nonetheless, the will of the Court was one of conciliation between the Polish Constitutional legal order and EU law. It expressed this clearly when stating the EAW to be:

*“...a form of advanced cooperation between the Member States, assisting the fight against crime and improving security. Accordingly, ensuring the continuity of its functioning should constitute the Polish legislator's highest priority.”*⁷⁸²

The Court found an alternative way thus to conciliate the national Constitution with the EAW and suspended the ruling for 18 months to allow for the necessary constitutional changes to take place.⁷⁸³ Once this would happen the annulled provisions could be

⁷⁸¹ D. Sarmiento, “European Union: The European Arrest Warrant and the quest for constitutional coherence” (2008) 6 *International Journal of Constitutional Law* 171.

⁷⁸² Judgment of the Polish Constitutional Court on the European Arrest Warrant, P 1/05, 27 April 2005; English Translation of the Decision can be found at http://www.asser.nl/euowarrant-webroot/documents/cms_eaw_74_1_EAWrelease_270405.pdf, last visited on 22 January 2012.

⁷⁸³ Komarek, for example, is of opinion that the Court could have reached a similar outcome by interpreting the Constitution in a more “EU-opened way”, see J. Komarek, “European Constitutionalism and the European Arrest Warrant: Contrapunctual Principles in Disharmony”, Jean Monnet Working Paper 10/05, New York School of Law, NY 10012, 14; A. NuBberger, on the contrary, argues that although the judgement might seem to suggest that the Tribunal denies the supremacy of EU law and is adopting a Eurosceptical position given the obligation to apply consistently its constitutional provisions, its reasoning as a whole indicates a pro-European attitude, in “Poland: The Constitutional Tribunal on the Implementation of the European Arrest Warrant” (2008) 6 *International Journal of Constitutional Law* 162.

normally reintroduced into national Polish law and surrender of nationals could take place.⁷⁸⁴

The Czech Constitutional Court also issued the decision concerning the Czech national legislation on the European Arrest Warrant in May 2006 where it found that such legislation was compatible with both the Czech Charter of fundamental rights and the penal procedural code's spirit.⁷⁸⁵ To be sure, this was not clear-cut and the court had to follow a broad interpretation of the wording of national legislation. The Czech Charter of Fundamental Rights holds that every citizen has the right to enter Czech territory freely and that all Czech citizens have the right not to be forced to leave their homeland. The Court stated in its ruling that such dispositions should be interpreted in order to meet the realities of the 21st century:

*“We must not forget that people are highly mobile these days, and that there is an increasing international cooperation and growing trust between the democratic States of the EU, which places new demands on extradition arrangements within the context of the union”.*⁷⁸⁶

It continued then by noting that,

*“If Czech citizens benefit from the advantages of relating to the law of the EU citizenship, it is natural that along with the disadvantages they should accept a certain measure of responsibility.... In the opinion of the constitutional court there is no reason to assume that the current standards of protection for fundamental rights within the EU, through the application of the principles arising from these rights, offers a level of protection inferior to that which is provided in the Czech Republic.”*⁷⁸⁷

⁷⁸⁴ However, as seen above, Polish law still applies dual criminality to extradition of their own nationals and maintains as a ground for refusal to extradite the fact that a Polish national commit a crime in Polish territory or in the territory on a third State (non requesting and non requested) and Polish law doesn't deem such acts as criminal.

⁷⁸⁵ Decision of the Czech Constitutional Court No. Pl. ÚS 66/04 from May 3, 2006, available at <http://www.eurowarrant.net/index.asp>.

⁷⁸⁶ Para 70 of the Decision, *ibid.*

⁷⁸⁷ Para 71, *ibid.*

Such reasoning led the Court to conclude that the temporary surrender of a citizen, conditional upon his return to the homeland did not violate the Czech Charter of Fundamental Rights.⁷⁸⁸

Finally, the French Conseil d'État dealt with the issue of the constitutionality of the law implementing the framework decision on the EAW in an opinion given as early as 2002.⁷⁸⁹ The main issue of the Conseil d'État was not extradition of nationals (although France had a long established tradition in this regard, this was not embedded in the Constitution), but rather the lack of a political exception as a ground for refusal (this ground allows States to refuse to extradite individuals who are accused of committing offences of a political nature or with a political motivation). The French Constitution lays down the prohibition of extradition of any person for offences of political nature, whereas the EAW did not lay down such option. This was an important change. Extradition and surrender are often related closely with the political sphere of the individual or the State. The EAW seems to disregard such element by moving the decision completely to the realm of the judiciary and by excluding the reference to political offences. Regardless, the *Conseil d'État* ruled in a very 'pro-European way' holding that the French Constitution should be amended in order to enable the implementation of the EAW.

These judicial constitutional challenges to the EAW are symptomatic of the deep changes in several fundamental principles of inter-State cooperation to fight crime.⁷⁹⁰ One such underlying issue was the lack of trust in other criminal justice systems. In fact, this was also felt at a legislative level, as many Member States opted to introduce, via their implementing legislation, the nuances they thought necessary to achieve a 'functional level of trust'. This will be shown in the following section.

⁷⁸⁸ The Supreme Court of Cyprus also found the surrender of Cypriots unconstitutional, leading the Government to a Constitution revision. The alteration, however, only allows the surrender of Cypriots for acts committed after the date of accession of Cyprus to the EU – May 2004. Other Constitutional courts such as the Portuguese and the EL have also upheld domestic provisions authorising the surrender of their nationals, European Commission Report COM(2007)407 final, *supra* note 751, Section 2.1.2.

⁷⁸⁹ Avis du Conseil d'État n° 368-282 (26 September 2002), available at <http://www.senat.fr/rap/102-126/102-12610.html>.

⁷⁹⁰ For an overview and critique of most constitutional challenges see Z. Deen-Racsmany, "The European Arrest Warrant and the Surrender of Nationals Revisited: The Lessons of Constitutional Challenges" (2006) 14 *European Journal of Crime, Criminal Law and Criminal Justice* 271.

2.1.1 Further resistance: national implementation

The resistance to the changes introduced by the EAW was also felt at a legislative level. In fact, several Member States opted to maintain exceptions based on human rights, nationality, dual criminality, among some others. Examples are many and varied. Italy for instance added seven mandatory grounds for refusal including the political nature of the offence, insufficient evidence, subjection of the requested person to an indefinite period of preventive custody, or, unawareness that certain acts are deemed as criminal in another State, where the requested person is an Italian citizen, where the requested person is pregnant or is a mother of a child less than 3 years old (except in circumstances of an exceptional gravity).⁷⁹¹

the Netherlands shall refuse extradition of a national if the Dutch executing authority finds out that there can be no doubt that the requested person is innocent.⁷⁹² Portugal and Denmark both introduced political reasons as grounds for mandatory refusal.⁷⁹³

The UK allows its Secretary of State to overrule the decision of a judge or direct a judge if he believes the requested person was acting in the interests of the UK. It also introduced other ground for refusal based on passage of time and extraneous considerations.⁷⁹⁴

Poland introduced refusal based on political grounds and partly reintroduced the principles of non extradition of nationals and dual criminality by preventing execution when the offence was committed by a national in Polish territory or when the offence

⁷⁹¹ European Commission Report COM(2007)407 final, *supra* note 751, 8-9. See also 'Disposizioni per conformare il diritto interno alla decisione quadro 2002/584/GAI del Consiglio, del 13 giugno 2002, relativa al mandato d'arresto europeo e alle procedure di consegna tra Stati membri'; available at http://www.asser.nl/upload/euowarrantwebroot/documents/cms_eaw_41_1_EJN646.pdf.

⁷⁹² *Ibid.*, 10. See for a link to Dutch national legislation implementing the EAW http://www.asser.nl/Default.aspx?site_id=8&level1=10789&level2=10836&level3=11077.

⁷⁹³ *Ibid.*, 10. See, in relation to Portugal, Law 65/2003 of 23 August, available at http://www.asser.nl/upload/euowarrant-webroot/documents/cms_eaw_2_1_EJN468.pdf; and, in relation to Denmark, Law No 433 of 10 June 2003 amending the Law on the extradition of offenders and the Law on the extradition of offenders to Finland, Iceland, Norway and Sweden (transposition of the Council Framework Decision on the European arrest warrant, etc.), available at http://www.asser.nl/upload/euowarrant-webroot/documents/cms_eaw_187_1_EJN402.pdf.

⁷⁹⁴ *Ibid.*, 10. See also Extradition Act 2003, available at http://www.asser.nl/upload/euowarrant-webroot/documents/cms_eaw_55_1_bill%20england.pdf.

was committed by a national abroad and the same acts do not constitute an offence under Polish law.⁷⁹⁵

Denmark introduced further grounds for refusal based on human rights related issues, such as possible threat of torture, degrading treatment, violation of due process or unreasonable humanitarian grounds. Likewise, Lithuania also can refuse extradition when the “*surrender of the person would be in breach of fundamental rights and (or) liberty*”.⁷⁹⁶

As for the implementation of Article 4, relating to optional grounds for non-execution of an EAW, the situation is very confusing. The Commission’s conclusions are telling:

*“[...] many States have made these grounds for refusal mandatory. At the same time, since this Article is optional some Member States have not transposed it at all. [...] Hence the implementation of this article amounts to a patchwork which is contrary to the Framework Decision.”*⁷⁹⁷

Furthermore, although several Member States introduced alterations to comply with the Commission recommendations offered in its implementing reports in the light of these incorrect implementations these did not cover in most cases the change in the grounds for refusal as mentioned above. Protectionist national legislation hence continues in force.⁷⁹⁸

3. Mutual recognition after the EAW: a continuously expanding and punitive dynamic with a more moderate approach

Regardless of the difficulties experienced, mutual recognition in the EU continued to be expanded. Its aim continued to clearly be one of facilitating criminal investigation, prosecution or securing and managing punishment. In some aspects, new measures

⁷⁹⁵ *Ibid.*, 10. ‘Unofficial translation of the Polish provisions implementing Framework decision 2002/584/ JHA of 13 June 2002 on European Arrest Warrant and the surrender procedures between Member States of the European Union.’ available at http://www.asser.nl/default.aspx?site_id=8&level1=10789&level2=10837&level3=11089&textid=30333

⁷⁹⁶ *Ibid.*, 9. See the Criminal Code of the Republic of Lithuania (Zin., 2000, No. 89-2741).

⁷⁹⁷ European Commission, *Commission Staff Working*, *supra* note 731.

⁷⁹⁸ European Commission Report COM(2011)175 final, *supra* note 736, 6-8.

further enhanced some of the punitive features of the EAW. In others, however, measures became more moderate because either their remit was narrower or their goals tentatively more balanced. Furthermore, implementation of measures post-EAW has been poor, which has contributed to the slowing down of mutual recognition in general.

3.1 Financial penalties

Measures focusing mostly on financial enforcement were adopted in the following years aiming at securing the enforcement of financial sentences and to a lesser extent of securing evidence: freezing, confiscation orders and financial penalties. These largely maintained the footprint of the EAW: almost automatic recognition, speedy execution, very limited grounds for refusal, largely absent individual considerations.

Although maintaining the same footprint, they extended the application of mutual recognition to other domains: first to the enforcement of financial penalties – financial penalties broadly understood represent the large majority of criminal penalties imposed at national level;⁷⁹⁹ second as they expand mutual recognition to any type of crime for which a financial penalty is applicable, regardless of its seriousness. This contrasts with the EAW that could only be issued (even when dual criminality could be tested) in relation to acts punishable with at least one year custodial sentence.⁸⁰⁰ Hence, these new measures drop the threshold of gravity of the crime. Consequently, they are applicable to *any* crime regardless of its gravity, cross border or transnational connection.

The first of these measures was the 2005 Framework Decision on the mutual recognition of financial penalties.⁸⁰¹ It aimed at ensuring the swift recognition and enforcement of financial penalties (sums of money on conviction of an offence, compensation imposed to benefit victims or public funds for victims' support, sums in respect to costs of courts or administrative proceedings leading to the decision).⁸⁰² The authorities of the executing State are required to recognise a decision “*without any further formality being required and shall forthwith take all the necessary measures for its execution*”.⁸⁰³

⁷⁹⁹ Financial penalties are the most used criminal sentence in England & Wales, K. Bullock, “Enforcing Financial Penalties: The Case of Confiscation Orders” (2010) 49 *The Howard Journal of Criminal Justice* 328.

⁸⁰⁰ See former section.

⁸⁰¹ Council Framework Decision 2005/214/JHA, *supra* note 420.

⁸⁰² Article 1 (b), *ibid.*.

⁸⁰³ Article 6, *ibid.*.

Furthermore, the list of types of offences to which dual criminality is not applicable is extended to 39 offences.⁸⁰⁴

All grounds for refusal are optional: incomplete or inexistant certificate, *ne bis in idem*, lack of dual criminality for non listed types of offences, if the execution is statute barred, if the decision relates to acts committed in whole or in part in the territory of the execution State or on the territory of a third State and the law of the executing State does not allow for prosecutions for those offences when committed outside its territory, immunity, age not subject to full criminal liability yet, trial *in absentia*, or if a financial penalty is below EUR 70 or the equivalent of that amount.⁸⁰⁵

Subsequently, in 2006, a Framework Decision on mutual recognition of confiscation orders was adopted.⁸⁰⁶ The terms of recognition and execution of these orders are similar to the other instruments. The executing State “*shall forthwith take all the necessary measures for its execution*”.⁸⁰⁷ Dual criminality is abolished for the usual list of 32 types of offences.⁸⁰⁸ Grounds for refusal are optional.⁸⁰⁹

Regardless of the surpassed deadlines for implementation,⁸¹⁰ this group of framework decisions has a very poor implementation. By 2008, the Framework Decision on mutual recognition of financial penalties for example had only been implemented by 11 Member States (none of the remaining 16 Member States had notified the Commission of its implementation).⁸¹¹ Of those States that notified the Commission many misimplemented it by for example not stipulating time limits for the execution of the penalties or by excluding the liability of legal persons (hence giving national laws a narrower approach than required by EU law).⁸¹² Similarly, by 2010 the Framework

⁸⁰⁴ Article 5, *ibid.*..

⁸⁰⁵ Article 7 (1) (2), *ibid.*..

⁸⁰⁶ Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, OJ L 328/59 [2006].

⁸⁰⁷ Article 7, *ibid.*..

⁸⁰⁸ Article 6, *ibid.*..

⁸⁰⁹ Article 8, *ibid.*..

⁸¹⁰ The deadline for implementation of the Framework Decision on financial penalties was 22 March 2007, Article 20 of the Framework Decision, *supra* note 420.; 24 November 2008 for the Framework Decision on confiscation orders, note 806, Article 22 of the Framework Decision; and 2 August 2005 for the Framework Decision 2003/577/JHA on the execution of orders freezing property and evidence, OJ L 196/45 [2003], Article 14 of the Framework Decision.

⁸¹¹ European Commission, *Report from the Commission based on Article 20 of the Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties*, COM(2008)888 final, Brussels, 22.12.2008, 2.

⁸¹² *Ibid.*, 6.

Decision on confiscation orders which had been adopted in 2006 had been implemented by 13 States only. Of these the Commission notes that they implemented the provisions of the Framework Decision correctly,

*“... with the exception of Article 8 on the grounds for refusal. Most Member States included additional grounds for refusal not provided for by the Framework Decision.”*⁸¹³

It is unclear whether this is due to a protectionist reaction after the complexity of the EAW in practice or simply to a lack of interest or capacity of Member States.⁸¹⁴ The fact that monies obtained from the execution of the decision shall accrue to the executing Member States unless otherwise agreed by the two States⁸¹⁵ might contribute indeed to the latter. Either way this low implementation rate is a clear slow down in the mechanism of mutual recognition.

3.2 Evidence

Following these measures on financial enforcement, mutual recognition turned to yet other realms of the criminal justice process. In this context, the Framework Decision on the execution of orders freezing property and evidence enabling judicial authorities to quickly secure evidence and seize property across borders, adopted in 2003.⁸¹⁶ The Framework Decision is applicable to freezing orders issued in relation to any offences and it further drops the verification of dual criminality in relation to the listed 32 offence types.⁸¹⁷ Authorities in the executing Member States must recognise a freezing order

⁸¹³ European Commission, *Report from the Commission to the European Parliament and the Council based on Article 22 of the Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders*, COM(2010)428 final, Brussels, 23.8.2010, 2.

⁸¹⁴ The execution of financial penalties can in fact be a thorny issue even at national level, see – for the case of confiscation orders – K. Bullock, “Enforcing Financial Penalties”, *supra* note 799.

⁸¹⁵ Monies obtained from the enforcement of decisions shall accrue to the executing State unless otherwise agreed - Article 13, Framework Decision 2005/214/JHA, *supra* note 420.; Money obtained from the execution of the confiscation order shall be kept by executing Member State if below 10 000 EURO, if above the amount shall be shared by the two States (50%/50%) - Article 16, Framework Decision 2006/783/JHA, *supra* note 806.

⁸¹⁶ Council Framework Decision 2003/577/JHA, *supra* note 806.

⁸¹⁷ Article 3 (1) (2) (4), *ibid.*.

“without any further formality being required and shall forthwith take the necessary measures for its immediate execution in the same way as for a freezing order made by an authority of the executing State...”.⁸¹⁸

Grounds for refusal are substantially fewer than the ones in the EAW: an incomplete certificate (the form necessary for transmission of the order); immunity or privilege that makes it impossible to execute the order; *ne bis in idem*; dual criminality if regarding an offence outside the list of 32 serious criminal offence types.⁸¹⁹

Article 8 however does allow for grounds postponement of the execution namely the possible damage to an on-going criminal investigation, or when a property or evidence is already subjected to a freezing order in the executing State. The Framework Decision also provides for legal remedies for interested parties. An order might thus be challenged in both States (issuing and executing) by any interested party, including *bona fide* third parties (if the challenge relates to the substantive grounds of the case the action will have to be lodged on the issuing State).⁸²⁰

Also in the context of mutual recognition of evidence there were proposals for the introduction of a European Evidence Warrant (EEW).⁸²¹ The proposal for a Framework Decision on a EEW had been on the table since 2003.⁸²² Yet because of difficult and lengthy negotiations a final draft surfaced only in 2006 and was finally published in 2008. Difficulties during the negotiations varied from the general issues of automaticity of the EEW and the scope of the measure (types of evidence available) to issues of equivalence of admissibility and means of evidence between issuing and executing Member State (whether issuing State could use or request evidence which is not admissible under the laws of the issuing State but is so under the executing State regime; and whether the issuing State could oblige the executing State to use coercive means which are allowed in the issuing State).⁸²³ These concerns led to the limitation of the

⁸¹⁸ Article 5 (1), *ibid.*.

⁸¹⁹ Article 7, *ibid.*.

⁸²⁰ Article 11, *ibid.*.

⁸²¹ Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350/72 (2008).

⁸²² For an overview and analysis of the initial proposal see C. Williams, “Overview of the Commission’s Proposal for a Framework Decision on the European Evidence Warrant”, in J.A.E. Vervaele (ed) *European Evidence Warrant: Transnational Enquiries in the EU* (Antwerpen/Oxford:Intersentia, 2005) 69.

⁸²³ For an analysis of the major difficulties with an European system of evidence see John R. Spencer, “An Academic Critique of the EU Acquis in Relation to Trans-border Evidence

scope of the EEW. Hence, whilst there was a high degree of mutual recognition thus far in relation to surrender requests and financial sentences, mutual recognition of evidence was to be narrower. To be sure, the Framework Decision on the EEW never came into force and a Directive on an European investigation order with a broader scope has been proposed already.⁸²⁴ Yet, for the understanding of mutual recognition post EAW it is of interest to analyse the EEW.

An European evidence warrant is thus a judicial decision issued

*“with a view of obtaining objects, documents and data from another Member State for use in criminal proceedings...”*⁸²⁵

before a judicial authority or in proceedings before an administrative authority in respect to acts which may give rise to proceedings before a court with jurisdiction in criminal matters, including proceedings brought against a legal person.⁸²⁶

The request must be executed

*“without any further formality being required and shall forthwith take the necessary measures for its execution in the same way an authority of the executing State would obtain the objects, documents or data...”*⁸²⁷

In the case of the listed 32 offence types the executing State needs to ensure that search and seizure are available (whilst it is not obliged to use search and seizure for the other non listed offences).⁸²⁸

Gathering”, in ERA-Forum, Special Issue on European Evidence on Criminal Proceedings, 2005, 28-40; for concerns relating to civil liberties in general see for example LIBERTY’s response to the Home Office consultation on the proposed European Evidence Warrant, July 2004; available at www.liberty-human-rights.org.uk/resources/policy-papers/index.shtml.; for concerns relating to due process see for example S. Gless, “Mutual Recognition, Judicial Enquiries, Due process and Fundamental Rights”, in J.A.E. Vervaele (ed) *European Evidence Warrant: Transnational Enquiries in the EU* (Antwerpen/Oxford:Intersentia, 2005) 121.

⁸²⁴ This new initiative will be considered in more length in chapter 6. Initiative (...) for a Directive of the European Parliament and of the Council of... regarding the European Investigation Order in criminal matters, OJ C 165/02 [2010].

⁸²⁵ Article 1(1) of the Framework Decision 2008/978/JHA, *supra* note 821.

⁸²⁶ Article 5, *ibid.*

⁸²⁷ Article 11, *ibid.*

An EEW can only be issued with the view to obtaining documents, objects and data.⁸²⁹ In fact, the Framework Decision goes to lengths to specify that an EEW cannot be issued to conduct interviews, take statements or initiate other types of hearing with suspects, witnesses, experts or any other parties; neither to carry out bodily examinations or obtain biometric data including DNA; nor to obtain information in real time such as interception of communications, covert surveillance or monitoring of bank accounts; conducting analysis on objects, documents or data; to obtain communications data retained by providers if a publicly available electronic communications service or network.⁸³⁰ Furthermore, EEW can only be issued when the evidence sought is necessary and proportionate for the purposes of the proceeding and if the evidence could equally be obtained in a comparable case in the issuing State (even if different procedural measures apply). These conditions shall be assessed by the issuing State only.⁸³¹

The EEW was not only narrow in its scope. In fact, with it, dual criminality suffered its first set back with the introduction of a declaration by Germany, reserving its right to make execution of an EEW subject to verification of dual criminality when an EEW involved search and seizure in relation to the offences of terrorism, computer related crime, racism and xenophobia, sabotage, racketeering and extortion or swindling.⁸³² This blow to the principle of dual criminality – one of the main features of mutual recognition and mutual trust – was symbolic of the slowing down and progressive moderation of the principle. As seen earlier in this chapter, the abolition of dual criminality gave priority to the more severe penal law or, said differently, to the legal order which adopted broader definitions of conducts to be criminalised. Having accepted the abolition of dual criminality in relation to the 32 types of offences in the EAW, Germany has imposed limitations regarding what crimes it is willing to help other States to build their prosecution against. It will be seen in the next section that the mutual recognition measures that followed the EEW allow for Member States to reintroduce dual criminality fully.

⁸²⁸ Article 11 (3) (ii), *ibid.*.

⁸²⁹ Article 4 (1), *ibid.*.

⁸³⁰ Article 4(2) (a)(b)(c)(d)(e), *ibid.*. In this regard Belfiore notes how the EU Convention on mutual legal assistance in criminal matters of 2000 was more pioneering than the EEW as it included types of evidence not covered by the Framework Decision, R. Belfiore, “Movement of Evidence in the EU: The Present Scenario and Possible Future Developments” (2009) 17 *European Journal of Crime, Criminal Law and Criminal Justice* 1, 17.

⁸³¹ Article 7 of the Framework Decision 2008/978/JHA, *supra* note 821.

⁸³² Article 23 (4), *ibid.*; Declaration of the Federal Republic of Germany, OJ L 350/92 [2008].

3.3 Imprisonment and alternative sanctions

After the EEW, mutual recognition was further expanded to the domains of enforcement and supervision of pre-trial detention, custodial sentences, probation and alternative sanctions. The principle continued to be largely focused on securing and managing punishment. However, these measures introduced a new gist to mutual recognition in criminal matters as ideas of rehabilitation and reintegration of prisoners began to surface in this new wave of measures. Furthermore, as mutual recognition further ventures into yet other fields of criminal justice, it suffers significant blows to its initial logic as it allows States to fully reintroduce the test of dual criminality in relation to all offences.

3.3.1 Pre-trial measures

In relation to pre-trial detention a Framework Decision on supervision measures as an alternative to provisional detention was adopted in 2009.⁸³³ The Framework Decision lays down the rules according to which one Member State recognises a decision on supervision measures issued in another Member State as an alternative to provisional detention, how it monitors the supervision of the measure and surrenders the person concerned again when the supervision is breached.⁸³⁴ Member States are thus required to recognise and apply six supervision measures: obligation of the person to inform the competent authorities of any change of residence; obligation not to enter certain localities, places or areas; obligation to remain at a certain place; limitations on leaving the territory of the executing State; obligation to report at certain times to a specific authority; obligation to avoid contact with certain people. Besides this list, Member States may choose to also make themselves available to monitor five other types of measures (which vary from obligation not to drive a vehicle to obligation to undergo therapeutic treatment or treatment for addiction).⁸³⁵ The list of grounds for refusal is largely maintained (certificate incomplete or inexistent, lack of required consents, *ne bis in idem*, dual criminality when applicable, statute barred offences, immunity or the person being too young).⁸³⁶

Again, recognition is expected to be swift,

⁸³³ Council Framework Decision 2009/829/JHA, *supra* note 534. The date for implementation of the Framework Decision is 1 December 2012, Article 27, *ibid.*

⁸³⁴ Article 1, *ibid.*

⁸³⁵ Article 8 (1) and (2) *ibid.*

⁸³⁶ Article 15, *ibid.*

*“The competent authorities in the executing State shall, as soon as possible and in any case within 20 working days of receipt of the decision on supervision measures and certificate, recognise the decision on supervision measures forwarded... and without delay take all necessary measures for monitoring the supervision measures...”*⁸³⁷

Regardless of these obligations, the executing State receives considerably more room to act than in any other mutual recognition instruments thus far, in what is a clear slowing down of the processes of mutual recognition. Indeed, dual criminality becomes fully optional in relation to any criminality – i.e. even in relation to the listed 32 serious criminal offence types. In fact, although the Framework Decision retains the same format as all others adopted thus far – hence providing for a special regime for the listed 32 types of offences in case they are punishable by deprivation of liberty of at least three years – it also states that,

*“Member States may, for constitutional reasons... declare that they will not apply paragraph 1 in respect to some or all offences referred to in that paragraph.”*⁸³⁸

Pre trial detention has for long been a thorny issue in many criminal justice systems, both because of long detention periods and because of the disproportionate numbers of non nationals in pre-trial detention. Detention periods in many countries can be very long: although the average length of pre-trial detention in Member States is 5.5 months this disguises the extremely long periods in countries such as, for example Latvia, Greece or Hungary where the average is one year.⁸³⁹ In fact, countries such as Latvia or Spain stipulate that pre-trial detention can go up to 4 years, whilst Sweden does not have a maximum period at all.⁸⁴⁰ Furthermore, in EU Member States, there is a disproportionately high rate of incarceration of non-nationals, many of whom are in pre-

⁸³⁷ Article 12, *ibid.*

⁸³⁸ Article 14 (4), *ibid.*

⁸³⁹ See Table 3.2 in *Commission’s Staff Working Document accompanying document to the Proposal for a Council Framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union*, COM (2006)468 final, Impact Assessment, Brussels, 29 August 2006, 10-11.

⁸⁴⁰ Fair Trials International Report, “Detained without trial: Fair Trials International’s response to the European Commission’s Green Paper on detention”, October 2011, 28. In Sweden however, if no action towards conditional release is taken within 14 days of detention a new remand hearing is required, *ibid.*, 28.

trial detention.⁸⁴¹ The Commission notes that this incidence relates to the fact that courts perceive a greater risk of flight of non-nationals due to their lack of social ties in the country where they are being prosecuted for a crime.⁸⁴² This assessment increases significantly the burden upon the individual being prosecuted. In fact, in addition to the likelihood of remaining in detention whilst awaiting trial, other penalising elements of facing trial in a foreign country will be felt, such as language/communication difficulties, distance from family and friends and professional relations. The Framework Decision addresses this specific concern and holds in its preamble that,

*“There is a risk of different treatment between those who are resident in the State of trial and those who are not: a non-resident risks being remanded in custody pending trial even where, in similar circumstances, a resident would not.”*⁸⁴³

Furthermore, it refers to a need to accommodate the protection of the general public by ensuring the supervision of a person subject to criminal proceedings and the right to liberty and the presumption of innocence.⁸⁴⁴

3.3.2 Post trial detention

The application of the principle of mutual recognition to detention is further developed in 2008 with the Framework Decision on custodial sentences or measures involving deprivation of liberty.⁸⁴⁵ The Framework Decision focuses mostly on the transfer of

⁸⁴¹ The European Commission noted in 2006 that an estimated of 10000 EU nationals are detained in pre trial detention in EU countries other than their countries of residence in a total of 4500 of EU nationals in pre trial detention in countries other than that of their nationality. Furthermore, the Commission estimated that at least 80% of those could have been applied alternative non-custodial measures. European Commission Staff Working Document on ESO, *supra* note 839. For a more detailed overview of the problem in relation to all types of detention and foreigners, see A.M. van Kalmthout, F.B.A.M. Hofstee-van der Meulen and F. Dunkel, *Foreigners in European Prisons*, vol. I (Nijmegen/The Netherlands: Wolf Legal Publishers, 2007), especially at 70-77. For a critical analysis see also L. Wacquant “Suitable Enemies: Foreigners and Immigrants in the Prisons of Europe” (1999) 1 *Punishment and Society* 215 and M. Tonry, “Symbol, Substance and Severity in Western Legal Systems” (2001) 3 *Punishment and Society* 517.

⁸⁴² See Commission’s Staff Working Document on ESO, *supra* note 839, 7; and A.M. van Kalmthout, *Foreigners in European Prisons*, *supra* note 841, 41-44.

⁸⁴³ Intent (5) of the Framework Decision 2009/829/JHA, *supra* note 534.

⁸⁴⁴ Intent (3) and (4), *ibid.*.

⁸⁴⁵ Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or

prisoners with the view of *'facilitating the social rehabilitation of the sentenced person.'*⁸⁴⁶

The sentencing State can forward the judgment to the State of nationality where the sentenced person lives, to the State of nationality to where the sentenced person is to be deported once released from the sentence (regardless of being the State where the person usually lives) and, finally, to any other Member State as long as the latter and the sentenced person so consent.⁸⁴⁷ The right of initiative remains clearly on the sentencing State. This can also be derived from the fact that although Article 4 (5) allows the executing State and the sentenced person to place requests themselves for the forwarding of the sentence, those requests do not create any obligation on the sentencing State. Equally, an opinion on the suitability of the request by the executing State does need to be taken in consideration by the forwarding State.⁸⁴⁸ Furthermore, the issuing State may withdraw the certificate from the executing State as long as the enforcement of the sentence has not begun in which case the executing State shall no longer execute the sentence.⁸⁴⁹

The executing State shall recognise the judgment and “*shall forthwith take all necessary measures for the enforcement of the sentence*”⁸⁵⁰

It also shall decide

“... *as quickly as possible whether to recognise the judgment and enforce the sentence...*” and “*Unless a ground for postponement exists... the final decision... shall be taken within a period of 90 days of receipt of the judgment and the certificate.*”⁸⁵¹

However, this exclusive right of initiative on the sentencing State is not a synonym for a completely passive position of the executing State. In fact, the latter recovers once again some of the guarantees that had initially been foregone in other mutual recognition

measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ L 327/27 [2008].

⁸⁴⁶ Article 1, *ibid.*

⁸⁴⁷ Article 4 (1) (a) (b) (c), *ibid.*

⁸⁴⁸ Article 4(4), *ibid.*

⁸⁴⁹ Article 13, *ibid.*

⁸⁵⁰ Article 8 (1), *ibid.*

⁸⁵¹ Article 12 (1) and (2), *ibid.*

instruments, namely the possibility of applying dual criminality in relation to any type of crime – even one of the 32 listed types of offences.⁸⁵² The executing State can also adapt the sentence in terms of its duration and of its nature (though measures shall correspond as closely as possible with those applied in the sentencing State and the sentence shall not be converted into a pecuniary punishment.⁸⁵³ Finally, the executing State may refuse the recognition and execution of the sentence in a number of cases, namely those of incomplete or incorrect certificate, when enforcement would be contrary to the principle of *ne bis in idem*, when there is immunity under the law of the executing State, when the judgment was rendered in absentia, among other criteria.⁸⁵⁴

Besides giving more room to the executing State, the Framework Decision also continues to develop the trend of moderating mutual recognition in criminal matters by introducing the idea of rehabilitation of the offender, a theme thus far largely absent in the legal narratives of ECL.⁸⁵⁵ In fact, the facilitation of reintegration or rehabilitation of the offender by allowing for a custodial sentence to be served in the country of nationality or residence has been developed by several instruments in Europe ever since the 1970s.⁸⁵⁶ However, the Framework Decision introduces some nuances to these practices. Although the reintegration of the offender is stated as the main objective of the Framework Decision, both the consent of the executing State (as seen) and the consent of the offender are dispensed with in a large majority of cases (namely when transfer is to be made to the country of nationality where the offender lives or to the country of nationality where the offender is to be deported once the sentenced is served regardless of where he lives).⁸⁵⁷

⁸⁵² Article 7(4), *ibid.*

⁸⁵³ Article 8 (2) and (3), *ibid.*. This adaption cannot lead to an aggravation of the sentenced passed. Article 8(4), *ibid.*

⁸⁵⁴ Article 9, *ibid.*

⁸⁵⁵ See chapter 3 and 4. The CJEU however has on occasion made reference to the rehabilitation of offenders as, for example, in *Tsakouridis*. In this case the Court noted that the wish for a State to expel an offender once a sentence against him had been enforced had to take into account the balance between the offender's rehabilitation and the interests of the Union in general given that such individual would be able to exercise his or her rights of free movement once expelled, case C-145/09 ECR I-11979 [2010].

⁸⁵⁶ European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders of 1964, ratified by 19 countries; European Convention on the International Validity of Judgments of 1970, also ratified by 19 States; Convention on Transfer of Sentenced Persons of 1983 ratified by 61 countries (including all States of the European Union, the United States and Canada); additional Protocol to the latter from 1997 ratified by 31 countries; and the Agreement on the Application between the Member States of the European Communities of the Council of Europe Convention on the Transfer of Sentenced Persons of 1987.

⁸⁵⁷ Article 6 (2) of the Framework Decision 2008/909/JHA, *supra* note 845.

The preamble explains this choice by explaining that,

*“Notwithstanding the need to provide the sentenced person with adequate safeguards, his or her involvement in the proceedings should no longer be dominant by requiring in all cases his or her consent to the forwarding of a judgement to another Member State for the purpose of its recognition and enforcement of the sentence imposed.”*⁸⁵⁸

To be sure, the person can be consulted but her opinion need not to be taken in consideration.⁸⁵⁹ Traditionally, the consent of the sentenced person was needed.⁸⁶⁰ As De Wree, Beken and Vermeulen point out,

*“The abolition of a requirement for consent evokes an ambitious response. On the one hand, it would not be difficult to accept that transfer to his home country is in a sentenced person’s interest. (...) On the other hand, the Transfer Convention included the requirement of consent because the legislator presumed that transfer without an offender’s consent would be counterproductive to his rehabilitation.”*⁸⁶¹

As the authors go on to argue this raises questions about the intention of the legislator.⁸⁶² In fact, with no consent procedure there is no room for a proper dialogue nor to an actual understanding of the prisoners’ exact needs or concerns, which does not seem to be in agreement with the objective of his reintegration.⁸⁶³ Whilst the will of the prisoner is very often to be returned to the State of residence and nationality this might not always be the case especially if the countries at stake have very different detention conditions⁸⁶⁴ or if there are political reasons for a prisoner to prefer to serve her sentence away from her State of nationality or residence. Furthermore, as Platcha argues, this categorical link with the State of nationality is inconsistent with the rationale behind the EAW which

⁸⁵⁸ Intent (5) of the preamble, *ibid.*.

⁸⁵⁹ Article 6(3), *ibid.*.

⁸⁶⁰ See Article 3 (1) (d) of the Council of Europe Convention on the Transfer of Sentenced Persons, Strasbourg, 21 March 1983; see also E. De Wree, T. Vander Beken and G. Vermeulen, “The transfer of sentenced persons in Europe – much ado about reintegration” (2009) 11 *Punishment and Society* 111.

⁸⁶¹ *Ibid.*, 118.

⁸⁶² *Ibid.*, 119.

⁸⁶³ M. Platcha, “Prisoner Transfer within the European Union: The European Enforcement Order and Beyond” in N. Keijzer and E. van Sliedregt (ed) *The European Arrest Warrant* (The Hague:T.M.C.Asser Press, 2009) 339.

⁸⁶⁴ M. Platcha, *ibid.*, 355.

delinked the national from its State of nationality – and caused so much struggle for doing so.⁸⁶⁵

Thus the Framework Decision has the potential to become a tool for the regulation of prison costs and prison population. Indirectly it can become a tool which permits the attainment of migration policy goals such as the normalisation and compensation of high flux of migrants in some countries.⁸⁶⁶ Mitsilegas notes on this matter that

*“Although the proclaimed aim of the Framework Decision is to facilitate the social rehabilitation of the sentenced person, its real aim appears to be to alleviate the burden of prisons in EU Member States...”*⁸⁶⁷

The lack of need for consent on the part of the executing State also suggests this possibility. Furthermore, as seen in the previous section, the proportion of foreigners (both EU and non-EU nationals) in prisons in many EU countries is a thorny issue that Member States face. In fact, the risk that the Framework Decision might be used to alleviate overcrowding in one Member State whilst exacerbating overcrowding in another was noted by the Commission in its Green Paper on the application of EU criminal justice legislation in the field of detention.⁸⁶⁸ This was also a concern that some countries have voiced very clearly. Poland, for example, being a country of origin of many immigrants in Western Europe, asked for a derogation from the Framework Decision in order to be able to cope with the possible impact of transfer of Polish prisoners to Poland. Intent 11 of the preamble holds,

“Poland needs more time than the other Member States to face the practical and material consequences of transfer of Polish citizens convicted in other Member States, especially in the light of an increased mobility of Polish citizens within the Union. For that reason, a temporary derogation of limited scope for a maximum period of five years should be foreseen.”

⁸⁶⁵ M. Platcha, *ibid.*, 359.

⁸⁶⁶ See G. Vermeulen, “Mutual Instrumentalization of Criminal and Migration Law from an EU Perspective” (2007) 9 *European Journal of Migration and Law* 357.

⁸⁶⁷ V. Mitsilegas, “The third wave of the third pillar” (2009) 32 *European Law Review* 523, 542.

⁸⁶⁸ European Commission, *Green Paper strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention*, COM(2011)327 final, Brussels, 14 June 2011, 6.

3.3.3 Probation and alternative sanctions

Finally, this group of framework decisions on measures involving deprivation of liberty is complemented by a Framework Decision on probation and alternative sanctions,⁸⁶⁹ whose aims are more eclectic than the previous sister measures:

*“This Framework Decision aims at facilitating the rehabilitation of sentenced persons, improving the protection of victims and of the general public, and facilitating the application of suitable probation measures and alternative sanctions, in case of offenders who do not live in the State of conviction.”*⁸⁷⁰

With this in mind the Framework Decision sets the rules for the recognition, enforcement and supervision of probation or alternative sanctions by a State other than the sentencing one.

The Framework Decision introduces a clear moderation of the thus far problematic aspects of mutual recognition. This is so first, as it introduces the need for the consent both of the sentenced person and of the executing State. This is perhaps not surprising giving the considerable means and effort the executing State has to use to execute and supervise probation or an alternative sanction. Second, dual criminality can be applied even for the serious offences⁸⁷¹ whilst the remaining grounds for refusal remain generally the same.⁸⁷² Furthermore, the executing State will be responsible for all the subsequent decisions relating to

*“...a suspended sentence, conditional release, conditional sentence and alternative sanction, in particular in case of non-compliance with a probation measure or alternative sanction or if the sentenced persons commits a new criminal offence.”*⁸⁷³

The Framework Decision on probation appears as the first mutual recognition instrument where the individual and the executing State are afforded room to manoeuvre. This is so, on the one hand, as the individual’s consent is necessary; on the

⁸⁶⁹ Council Framework Decision 2008/947/JHA, *supra* note 421.

⁸⁷⁰ Article 1, *ibid.*

⁸⁷¹ Article 10, *ibid.*

⁸⁷² Article 11, *ibid.*

⁸⁷³ Article 14, *ibid.*

other hand, as the executing State's consent is also required and the principle of dual criminality can be applied. These features make sense in the light of the active role that the sentenced person and the executing State have to take, at this stage of the criminal process.

4. Mutual Recognition and fundamental rights: managing positive conflicts of jurisdiction whilst protecting individual rights

Ne bis in idem is a fundamental principle at the national level in most EU national legal orders⁸⁷⁴ and is also enshrined in international instruments.⁸⁷⁵ In its simplest form it basically states that no one should be tried or prosecuted twice for the same criminal conduct. The principle made its way into the EU legal order via the incorporation of the Schengen *acquis* by the TEU(A).⁸⁷⁶ Article 54 of the Schengen Convention holds:

“A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the Contracting Party.”

Ne bis in idem aims at the recognition of finally disposed trials and is thus related to matters of mutual recognition. The rationale behind it is that a person who is exercising his or her free movement rights within the EU may not be penalised for the same acts because of the exercise of those rights. Hence, Member States must recognise the outcome of finally disposed criminal sentences in other Member States and refrain from prosecuting that same person for acts in relation to which he or she was already

⁸⁷⁴ M. Fletcher, “Some Developments to the *ne bis in idem* principle in the European Union: Criminal Proceedings Against Huseyin Gozotuk and Klaus Brugge” (2003) 66 *The Modern Law Review* 769, 770.

⁸⁷⁵ The principle is part of the European Convention of Human Rights which assures *ne bis in idem* at national level only. For an overview of the background of *ne bis in idem* in international instruments see M. Fletcher, “The Problem of Multiple Criminal Prosecutions” (2007) 26 *Yearbook of European Law* 33, 34-38; for a comparison between the ECHR and the CJEU case law see R. Loof, “54 CISA and the Principles on *ne bis in idem*” (2007) 15 *European Journal of Crime, Criminal Law and Criminal Justice* 309.

⁸⁷⁶ The Schengen area and cooperation were initiated in 1985 with the Schengen Agreement and later developed in 1990 with the Schengen Convention which abolished internal borders checks and created common rules regarding visas, asylums and checks at external borders, in order to allow for the free movement of persons within the Schengen area. The area has gradually expanded to include today nearly all Member States. The Schengen Agreement and Convention and the body of norms developing were incorporated in accordance with a protocol attached to the TEU(A). For more details see chapter 1, *supra* notes 59 and 194.

prosecuted elsewhere in the EU. Rather than an active obligation Member States are thus under an obligation to refrain from prosecuting or stopping prosecution.

Mutual recognition in the light of the *ne bis in idem* principle can thus protect individual rights. This was significantly explored by the CJEU which has delivered important judgements on the principle of *ne bis in idem*. This case law has been welcomed for focusing mostly on the protection of the individual and hence striking some balance to the enhanced punitive framework of mutual recognition. It will be seen however how such wide protection can have a second effect of favouring a fast justice and an allocation of jurisdiction on a first come first served basis.

The exact meaning and extent of the CISA provision has proven to be unclear and requests for its clarification have reached the CJEU. The first dispute on the interpretation of the provision reached the CJEU in 2003 in the joint cases *Gozotuk and Brugge*.⁸⁷⁷ Both cases involved the termination of criminal proceedings by public prosecutors via out of court settlements (by Belgium and Germany respectively) with another Schengen State seeking to prosecute and punish after that first settlement had been finalised. The question raised before the CJEU was in essence whether *ne bis in idem* applied to such out of court settlements. The Court took a broad view on the matter highlighting that any procedure which barred further prosecution - when taken by an authority playing a part in the administration of criminal justice in national systems - would be regarded as 'finally disposed of' for the purposes of Article 54 of the CISA.⁸⁷⁸

The Court noted that the Schengen *acquis* is aimed at enhancing European integration and, in particular, at enabling the EU to more rapidly become an area of freedom, security and justice. It continued by remarking that the objective of Article 54 CISA was to ensure that no individual would be prosecuted twice for the same facts in several Member States because of having exercised his free movement rights. This goal would not be fully attained if it would not apply to decisions definitely discontinuing

⁸⁷⁷ Joined cases C-187/01 and C-385/01 [2003] ECR I-345. For a detailed analysis of the facts and the decision see J. Vervaele, Case note (2004) 41 *Common Market Law Review* 795.

⁸⁷⁸ In fact, it had been noted by for example Germany, Belgium and France that the application of *ne bis in idem* to cases where no court has been involved in the reaching of the final decision was not envisaged by the Contracting Parties to the Schengen Convention nor to other international instruments which also have a narrower interpretation of *ne bis in idem* in this case. The Court disagreed and found that nothing in the wording of Article 54 precluded such an interpretation and further noted that when the Convention had been drafted it had been so not at the light of its future incorporation in the framework of the EU, hence that historical and teleological argument would no longer be accurate, see para 41, 42 and 46, *ibid.*.

prosecution in a Member State, even when such decisions were adopted without the involvement of a court or did not take the form of a judicial decision.⁸⁷⁹

This broad interpretation of the principle of *ne bis in idem* was followed by a significant number of cases in which the CJEU consistently took a wide interpretation when deciding on the meaning of *idem*,⁸⁸⁰ of *bis*⁸⁸¹ and of the ‘enforcement of penalties’ (the last part of Article 54 CISA). The Courts’ decisions draw a clear parallel between national and European. Accordingly, what is valid nationally is also to be deemed valid and effective beyond those national boundaries. Ultimately this is tantamount to granting criminal decisions complete extraterritoriality.

This broad line of interpretation of the principle was further developed and reasserted by the CJEU. In *Van Esbroek* the Court turned to examine the meaning of *idem* finding that it should be based on

*“the identity of the material acts, understood as the existence of a set of facts which are linked together, irrespective of the legal qualification given to them or the legal interest protected.”*⁸⁸²

The Court found this broad interpretation necessary, once again, in the light of securing free movement:

*“Only if the perpetrator of an act knows that, once he has been found guilty and served his sentence, or, where applicable, been acquitted by a final judgment, he may travel within the Schengen territory without fear of prosecution in another Member State.”*⁸⁸³

The Court further developed this interpretation of *ne bis in idem* in *Van Straaten*⁸⁸⁴ and *Gasparini*.⁸⁸⁵ In *Van Straaten* the Court elaborated on the notion of ‘same acts’ and decided along the lines of *Van Esbroek*. In particular, the Court ruled that the movement

⁸⁷⁹ Para 37, 38, *ibid.*.

⁸⁸⁰ Same acts or same offences (or what constitutes either of these two).

⁸⁸¹ Whether the principle is applicable to decisions on the merits only (determining someone’s innocence or guilt) of if it also includes decisions on procedural grounds.

⁸⁸² Case C-436/04 *Criminal proceedings against Van Esbroeck* ECR I- 2333 [2006] para 42.

⁸⁸³ Para 34, *ibid.*.

⁸⁸⁴ Case C-150/05 *Criminal proceedings against Van Straaten* ECR I-9327 [2006].

⁸⁸⁵ Case C-467/04 *Criminal proceedings against Gasparini* ECR I-9199 [2006].

of drugs between two Schengen countries – the ‘export’ from one country and ‘import’ into the other country - are basically the same acts. As Wasmeier and Thwaites note

“The ECJ clearly stated that the variety of interpretations linked to the EU’s nature is incompatible with the proper and consistent application of *ne bis in idem* as a fundamental principle. This echoes the European Council’s conclusions of its summit in Tampere where it was stressed that: ‘in a genuine European Area of Justice individuals (...) should not be prevented or discouraged from exercising their rights by the incompatibility or complexity of legal and administrative systems in the Member States.’”⁸⁸⁶

In *Van Straaten* the CJEU went further when considering the concept of *bis* as well, finding that a courts’ final decision of acquittal for lack of evidence should be subsumed within the application of the principle. The Court noted that, not including these decisions in the concept of *bis* and allowing criminal proceedings in a different Member State for the same acts, would affect the exercise of the right of free movement and would undermine the principles of legal certainty and legitimate expectations.⁸⁸⁷

Along the same lines in *Gasparini*⁸⁸⁸ the CJEU held that decisions where the defendant was acquitted because prosecution was time barred are to be included in the remit of the principle.⁸⁸⁹

This wide interpretation has also been taken in relation to the last part of Article 54 CISA namely to what is the meaning of enforcement of a penalty.⁸⁹⁰ In this regard the Court took the view that a suspended sentence is a penalty in the course of being

⁸⁸⁶ M. Wasmeier and N. Thwaites, “The development of *ne bis in idem* into a transnational fundamental right in EU law: comments on recent developments” (2006) 31 *European Law Review* 565, 573.

⁸⁸⁷ Case C-150/05, *supra* note 884, para 58-60.

⁸⁸⁸ Case C-467/04, *supra* note 885.

⁸⁸⁹ This went against the findings of AG Sharpston who found that a decision that does not involve examinations of the merits of the case does not settle societies account with the individual nor does it strike a balance between free movement and fighting crime which could lead to a forum shopping jurisdiction by offenders, para 74-76, 81, 84 and 104 of the AG Conclusions in *Criminal proceedings against Gasparini* delivered on 15 June 2006, ECR I- 9203.

⁸⁹⁰ The last part of Article 54 CISA holds that for the principle to apply a penalty imposed “*has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the Contracting Party.*” *Supra* note 59.

enforced⁸⁹¹ and that a sentence rendered in absentia that could never have been enforced is also covered by the principle.⁸⁹²

However, the Court did not always withdraw the freedom of the State who wishes to prosecute. The case *Mantello*⁸⁹³ stands as a prime example where the Court chose to respect a margin of discretion of national prosecution authorities. In 2005, Mr. Mantello was convicted by the Tribunale di Catania (Italy) of unlawful possession of cocaine intended for onward sale. In 2008, the same court issued an EAW regarding Mr. Mantello, alleging that between 2004 and 2005 he had participated in organised drug trafficking in a number of Italian towns and as well as in Germany. In fact, at the time of the investigation that had led to Mr. Mantello's conviction for the possession of cocaine, the Italian authorities already had enough evidence to prosecute him for participating in the organised trafficking of narcotic drugs.⁸⁹⁴ For the purposes of investigation, at the time, this information was not passed on to the investigating judge nor was he requested to prosecute such acts. The question was—whether the fact that Italian authorities had, at the time of the first conviction for possession of cocaine, evidence of the accused's participation in a criminal organisation—meant that there was already a decision, which could be regarded as final, regarding the facts set out in the EAW. The CJEU reasserted that whether the person has been 'finally judged', is determined by the law of Member State in which the judgment was delivered. Consequently, a decision which does not

⁸⁹¹ Case C-288/05 *Criminal proceedings against Ketzinger* ECR I-6441 [2007].

⁸⁹² Case C-297/07 *Criminal proceedings against Bourquain* ECR I-09425 [2008]. This later case was particularly thorny given the nuances of the trial having been in absentia and the fact that the sentence was never served and could never have been served in any case. Mr. Bourquain, a German citizen serving in the French legion in the Algerian war, was sentenced for desertion and homicide of another German legionnaire by a French permanent military tribunal in 1961. The trial and sentencing were in absentia and there was no proof that the defendant had ever been notified of the decision. Mr. Bourquain sought refuge in Germany. In 2003 the German Public Prosecutor charged him for the same acts and contacted the French authorities. The latter informed that, under French law, a non appealed judgment in absentia becomes time-barred (no appeal is admitted) after 20 years. Moreover, if the person convicted reappears during those 20 years the sentence cannot in any case be enforced, rather, new proceedings must be initiated. Ultimately, this implies that such sentence could never have been enforced. Furthermore, the French authorities also informed that in 1968 France passed an amnesty in relation to all offences committed by military personnel serving in Algeria, fact that the Court ignored in its decision. The AG however did take this aspect into consideration in its conclusions suggesting that *ne bis in idem* should be applicable to such feature as well. See mostly para 11-13 of the Judgement and Para 18 of the Conclusions of AG Ruiz-Jarabo Colomer delivered on 8 April 2008, ECR I-09425. For a detailed analysis of the case see S. Brammer, Note case (2009) 46 *Common Market Law Review* 1685.

⁸⁹³ Case C-261/09 *Proceedings concerning the execution of a European arrest warrant issued in respect to Gaetano Mantello*, ECR I-11477 [2010].

⁸⁹⁴ Para 27 of the judgment, *ibid.*

definitely bar further prosecution at the national level does not constitute a procedural obstacle to the possible opening or continuation of criminal proceedings.⁸⁹⁵

This wide interpretation of *ne bis in idem* by the Court goes hand in hand with other mutual recognition instruments in that it validates the national decision beyond the national territory, potentially to the entire European Union.⁸⁹⁶ Furthermore, mutual recognition as a punitive and protective tool raises questions regarding the nature and reach of the principle. As Mitsilegas puts it,

*“While the maximum mutual recognition of coercive measures such as the European Arrest Warrant leads to concerns regarding the extension of the State’s punitive sphere, a broad application of ne bis in idem (viewed as a facilitator of free movement) has thus far led to the opposite results – an extension of the protective sphere for the individual in the ‘area of freedom, security and justice’.”*⁸⁹⁷

4.1 *Ne bis in idem* as reassertion of *ius puniendi*

However, the principle of *ne bis in idem* as it has been shaped, does not favour the individual alone but also the fastest State to give closure to a criminal process in whatever form. As shown above, the fact that a State gives closure to criminal proceedings will, in most cases, prevent other EU jurisdictions from prosecuting the same person for the same crime. This is tantamount to allocating adjudication on a ‘first come, first serve basis’, raising questions of policy, opportunity and legitimacy in the adjudication of criminal decisions across the EU.⁸⁹⁸ The Commission voiced these concerns in its Green Paper on *ne bis in idem* noting that,

“(…) without a system for allocating cases to an appropriate jurisdiction while proceedings are ongoing, ne bis in idem can lead to accidental or even arbitrary results: by giving preference to whichever jurisdiction can first take a final decision, its effects amount to a ‘first come first served’ principle. The choice of jurisdiction is currently left

⁸⁹⁵ Para 46-47, *ibid.*.

⁸⁹⁶ As noted above, the principle of *ne bis in idem* was introduced in the context of ECL via the incorporation of the Schengen *acquis* in EC and EU law by the Treaty of Amsterdam (TEU(A)), see *supra* note 194.

⁸⁹⁷ V. Mitsilegas, *EU Criminal Law*, *supra* note 14, 149.

⁸⁹⁸ See AG Sharspton points on the shortcomings of preventing decisions on the merits of the case, in her Conclusions in the *Gasparini* case, *supra* note 889.

*to chance, and this seems to be the reason why the principle of ne bis in idem is still subject to several exceptions.*⁸⁹⁹

The Commission's proposed solution is thus to act *a priori* by allocating jurisdiction before final decisions are reached by any State. This was in fact attempted with the adoption of Framework Decision on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings,⁹⁰⁰ aiming at fostering and promoting cooperation between competent authorities of two or more Member States in cases of positive jurisdictions.⁹⁰¹ The Framework Decision however does not set in place a system of allocation of jurisdiction but merely obligations on States to contact and reply to each other when there are grounds to believe that parallel proceedings are being conducted.⁹⁰² It also sets the obligation for States to enter into direct negotiations when there is confirmation that parallel proceedings are in course in two or more Member States.⁹⁰³

This Framework Decision clearly ventures into a new realm of mutual recognition in criminal matters, a managerial/ regulatory one, and perhaps sets the foundations for future regulation of States' competences and allocation of jurisdiction. This could help to prevent conflicts of jurisdiction *a posteriori* and could also permit a choice of the better jurisdiction which in cases of serious criminality (such as organised crime) or with vulnerable victims could be sensible and necessary for a proper evaluation of the merits of the case. However, as Mitsilegas suggests, the tone of the Commission's Green paper raises concerns that the criteria for allocation of jurisdiction would prioritise the goal of prosecutorial efficiency. Additionally, a system of allocation of jurisdiction could represent an additional intrusion into the domestic sphere, namely by preventing Member States from prosecuting behaviour which may lead to a criminal conviction in their jurisdiction.⁹⁰⁴ Given that mutual recognition suffered several blows in the latest framework decisions, it is uncertain whether this path could be feasible.

⁸⁹⁹ European Commission, *Green Paper on Conflicts of Jurisdiction and the Principle of ne bis in idem in Criminal Proceedings*, COM(2005)696final, Brussels, 23.12.2005, 3.

⁹⁰⁰ Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, OJ L 328/42 [2009].

⁹⁰¹ Article 1, *ibid.*.

⁹⁰² Articles 5 and 6, *ibid.*.

⁹⁰³ Article 10, *ibid.*.

⁹⁰⁴ V. Mitsilegas, EU Criminal Law, *supra* note 14, 156.

Conclusion

The introduction and development of the principle of mutual recognition in criminal matters embodies a paradox. Mutual recognition was chosen as an alternative to harmonisation as it was thought to be less demanding given that the measures adopted do not aim to alter national criminal law (this is a task for harmonisation). However, this perception does not match the impetus and reach of its influence. With mutual recognition, ECL now reaches virtually any type of criminality as well as extensive domains of criminal justice. Furthermore, it does so by facilitating and enhancing criminal investigations, prosecution and punishment beyond national borders, adding yet another punitive layer to ECL. The EAW is a stringent example of the punitive reach of mutual recognition in practice.

However, these new developments of ECL were received with resistance by many legal orders which struggled to accept some of the most fundamental changes brought about by the EAW and mostly so the principle of non extradition of nationals and the abolition of dual criminality. Many of these reactions were of no small importance and re-wrote in part the constitutional dialogue between the EU and some Member States. This resistance was novel to ECL and might signal that the limits of ECL were partly reached for the time being. The lack of interest in the implementation of financial enforcement measures and the moderation in the tone of the instruments adopted post EAW also so suggests. Furthermore, the latest measures on mutual recognition show some moderation in the punitive tone that characterised some of the first framework decisions adopted. This modulation was done in particular via a partial or complete reintroduction of the principle of dual criminality and by an acknowledgement, even if to a limited extent, of the rights of individuals as defendants or prisoners.

Finally, it should be noted that mutual recognition was made to continue to be the central area of development of ECL under the post-Lisbon settlement. Under the new framework, implementation will be required and enforcement mechanisms to sanction Member States will be in place.⁹⁰⁵ These changes can interfere with the *status quo*, given that so many Member States failed properly to implement the measures in force (implementation is thus likely to improve under the post-Lisbon framework). Furthermore, the passage of time will also shed light on how the more moderate instruments are being implemented and or used (or not) by Member States. In fact, it was seen in this chapter that mutual recognition tools are at the disposition of the States.

⁹⁰⁵ See chapter 3.

In other words, the real impact of mutual recognition does not depend on a correct implementation alone - it depends also on the use Member States make of these new EU tools (Poland's use of the EAW was a case in point). Ultimately, this will determine whether the future tone of mutual recognition will continue to be a punitive one or if, on the contrary, Member States will resort to the more moderate options given by mutual recognition (pre-detention and probation transfers, for example).

Chapter 6 Conclusion: Towards a European Union Criminal Policy

1. A changing penal world

In the past decades criminal justice systems around the world have undergone significant changes. As David Garland has suggested there has been a growing sense that the State could no longer cope effectively with crime control by itself.⁹⁰⁶ Thus, internally, the State began to devolve some crime prevention and crime control responsibilities to civil society, which became increasingly involved in criminal matters.⁹⁰⁷ Externally, it began to seek transnational alliances in order to face an increasingly globalised world with new intertwined patterns of criminality between States and continents, which in turn brought about new perceived threats that the States struggled to tackle alone.⁹⁰⁸ Terrorism and organised crime in particular played to this idea of the insufficiency of the State's response to crime at the national and, more so, at international level. Since the 1960s, ideas of organised crime threats in countries like the US and Italy have travelled across continents and played to the mind of the public, politicians and legislators.⁹⁰⁹ Similarly, both in the 1970s and at the beginning of the new millennium, terrorism led to a new impetus in international cooperation and, equally, to a re-empowering of the State at a domestic level.⁹¹⁰ This has had political and legal repercussions and has brought about new tensions. In particular, in the light of these threats, academics, political actors and commentators have taken opposite stances between, as Walker and Loader explain, those who believe that Western humanist and liberal democracies face new, unprecedented threats to their values and that urgent decisive measures ought to be taken and those that, on the contrary, believe governments are reacting 'selectively' to threats in ways that shake long standing democratic principles and rights.⁹¹¹

⁹⁰⁶ D. Garland, "The limits of the Sovereign State", *supra* note 1.

⁹⁰⁷ L. Johnston and C. Shearing, *Governing Security*, *supra* note 49.

⁹⁰⁸ Baker and Roberts note how globalisation has contributed to the promotion of some short-term punitive policies, to the harmonisation of problems and responses and an acceleration of transfer of penal policies across different systems. These common trends however do not imply that globalisation will always have those effects across jurisdictions. E. Baker and J. Roberts, "Globalisation and the new punitiveness" in J. Pratt et al. (eds) *The New Punitiveness* (Portland: Willan Publishing, 2005) 122,136. See also D. Nelken, "The Globalization of Crime and Criminal Justice, Prospects and Problems", *supra* note 605.

⁹⁰⁹ V. Mitsilegas, "From National to Global, From Empirical to Legal: The Ambivalent Concept of Transnational Organized Crime", *supra* note 595.

⁹¹⁰ K. Nuotio, "Terrorism as a Catalyst for the Emergence, Harmonization and Reform of Criminal Law", *supra* note 620.

⁹¹¹ I. Loader and N. Walker, *Civilizing Security* (Cambridge: Cambridge University Press, 2007) 2. See also L. Lazarus and B. Goold, "Introduction: Security and Human Rights" in B. Goold and L. Lazarus (eds) *Security and Human Rights* (Oxford and Portland: Hart Publishing, 2007) 2-8. For a similar opinion on the tension between opposite fears brought about by the globalisation of crime – mostly in the context of organised crime see D. Nelken, "The Globalization of Crime and Criminal Justice, Prospects and Problems", *supra* note 605, 253-255. For an argument challenging the idea that the threats faced today are so unprecedented that they cannot be fought

It was seen how it was precisely at the beginning of these transformations – in the 1970s – that cooperation in criminal matters began to take place in the EC context albeit to a very limited extent and in an indirect or secretive fashion. On the one hand, the European legal order as merely complementary of national systems lacked the capacity to seek enforcement of its provisions to the same extent as national legal orders. On the other hand, the EC was in a privileged position to facilitate intergovernmental cooperation amongst like-minded countries that were facing similar pressures from crime. Hence, the EU was often constructed as a forum that facilitated the adoption of solutions for these common perceived threats.⁹¹² Nonetheless, at the same time, the EU's intervention in criminal matters was always deeply constrained by Member States' reassertion of their own sovereign power and by the EU's own limited institutional framework. Hence, kept at the centre of these tensions, ECL's nature has been a changing and fragmented one.

Regardless, this thesis has shown that some coherence can already be found in ECL and that its nature, despite remaining in transition, is beginning to acquire more defined contours. It was shown how ECL is evolving today along two clear dynamics and how its current shape is the culmination of incremental changes that have characterised the field ever since its early origins. This has been reflected both in its institutional arrangements and in its scope: ECL has moved from peripheral, informal and indirect arrangements towards a supranational formalised position at the core of the EU project; and has veered from an initial focus on matters of terrorism, drug trafficking, organised crime and some EC policies only, to potentially any type of criminality today. It was shown that this expansionist tendency was initially driven by two main rationales, namely that of the fight against organised crime and the protection of EC interests and policies. Through the development of these themes, ECL began to focus on Euro-crime—a criminality with a complex structure affecting primarily public goods or goods in the public sphere. These crimes reflect, to some extent, the nature of contemporary societies where interactions are more volatile and entwined than before. Hence, at the end of the 1990s, ECL presented itself with an identifiable scope and claim. However, it was further seen that the entry into force of the Treaty of Amsterdam (TEU(A)) and the introduction of the principle of mutual recognition in criminal matters in 1999 deeply transformed this state of affairs. On the one hand, whilst the rationales and focus built thus far continued to be central to ECL and further developed, other themes began to emerge, although to a more limited degree, such as the protection of victims' right.

within the normal context of the criminal justice system see C. Gearty, *Can Human Rights Survive?* (Cambridge: Cambridge University Press, 2005).

⁹¹² See for example, chapter 2, section 3.

Measures adopted along these narratives largely maintained their focus on Euro-crimes. On the other hand, however, with the introduction of the principle of mutual recognition in criminal matters in 1999, the idea of ECL as centred in particular types of offences and as developing around identifiable rationales faded as mutual recognition crafted ECL as potentially involved and applicable to any type of criminality. Furthermore, this thesis has shown how the legal mechanisms of ECL - harmonisation of national criminal law and mutual recognition in criminal matters - have been contributing to a potentially more severe penalty by increasing levels of formal criminalisation, by facilitating criminal investigation, prosecution and punishment beyond national borders and by placing more pressure on more lenient States.

However, this thesis has also shown that in recent years, ECL slightly toned down the punitive bias of several measures, mostly in the realm of mutual recognition. This was so as several legal instruments reintroduced the principle of dual criminality and began to give consideration to other values such as the reintegration of offenders, for example. Equally, the CJEU and the national judiciary adjudicated on a number of important cases, which have clearly added qualifications as to whether and how some ECL measures—and their punitiveness—are to be interpreted and incorporated in national criminal justice systems. Furthermore, the entry into force of the Lisbon Treaty in 2009 deeply reshaped the EU's architecture in criminal matters. Hence, this concluding chapter will look at the most recent developments in the field, particularly after the entry into force of the Treaty of Lisbon, suggesting that ECL will continue to expand in scope and punitiveness. Nonetheless, the chapter will also highlight that criminalisation at the EU level is beginning to follow more objective criteria and the field is becoming ever more balanced as the protection of fundamental rights and the consideration of values, such as reintegration of offenders, are becoming increasingly important. This indicates that the future of ECL will be constructed on a dialogue between punitiveness and individual rights. The chapter will further suggest that the greatest challenge for the future of ECL will be one of maintaining its fragile coherence and not falling into increasing patterns of fragmentation.

1. The dynamics of European Union Criminal Law after Lisbon: a continuously expanding field

It was shown throughout this thesis that the evolution of ECL was always deeply constrained by the Union's institutional structures (or lack thereof). In particular, the EC's lack of competence (as asserted by the TEU(M)(A)) to act in criminal matters and the extent of the competence attributed to the EU, made a significant difference

regarding ECL's evolution, to the fashion according to which it responded to common perceived threats and needs in criminal. To look at the history of ECL is thus to look not only but also at its institutional structures, at how these both limited and empowered political and legal actors and conditioned the focus, shape and dynamics in the field at different times. As seen in Chapter 3, the Lisbon Treaty made deep changes to the old institutional structure, which was divided into three pillars. After Lisbon, these were reconfigured into two Treaties: the Treaty on the European Union (TEU(L)) and the Treaty of the Functioning of the European Union (TFEU),⁹¹³ which paved the way to the merging of the old pillar structure. This is of major significance for criminal matters within the EU, which, as seen throughout the thesis, were always kept in the separate framework of the third pillar (although, as also, this did not prevent a growing presence of criminal matters within the first pillar). Furthermore, the Treaty of Lisbon has also elevated the Charter of Fundamental Rights to the same legal value as the Treaties.⁹¹⁴ Specific to ECL, the TFEU formalised previous developments and left room for more expansion in the field. The central provisions for ECL are now Article 82 and 83 TFEU which, respectively, concern mutual recognition in criminal matters and the harmonisation of national criminal law. It was also seen in chapter 4 and 5 of this dissertation that both principles of harmonisation of national criminal law and mutual recognition in criminal matters are contributing to a more severe penalty across the EU. This was taking place in a threefold manner: first, by increasing levels of formal criminalisation at the national level;⁹¹⁵ second, by facilitating criminal investigation, prosecution as well as securing punishment across the European Union;⁹¹⁶ thirdly, by potentially placing more pressure on more lenient States.⁹¹⁷ It will be seen below that, in the light of the new institutional framework of the Treaty of Lisbon, ECL is likely to continue to lead to an increase in formal criminalisation.

1.1. Recent developments in harmonisation of national criminal law

Recent developments in harmonisation of national criminal law suggest that the trends of increasing expansion and punitiveness will continue to echo throughout ECL. Expansion is seen first in the wording of the Article 83 TFEU, which envisages the possibility of adoption of further harmonisation measures in relation to serious and cross border crime on the basis of "*developments of crime*";⁹¹⁸ second, Lisbon also gives the EU competence to adopt criminal measures if these are necessary to ensure the effective

⁹¹³ Article 1 TEU(L) attributes the same legal value to both Treaties. This chapter will also refer to the two Treaties in more general terms as 'Treaty of Lisbon' or 'Lisbon Treaty'.

⁹¹⁴ Article 6(1) TEU(L).

⁹¹⁵ Chapter 4.

⁹¹⁶ Chapter 5.

⁹¹⁷ Chapter 4 and 5.

⁹¹⁸ Article 83(1) TFEU.

implementation of Union policies.⁹¹⁹ The latter development clearly extends the competence recognised by the CJEU in relation to the protection of EC environmental and transport policies via the criminal law.⁹²⁰

2.1.1. Fighting serious cross-border crime

Article 83(1) explicitly grants competence for the EU to establish minimum rules concerning the definition of criminal offences and sanctions in area of serious cross-border crime. Specifically, ten different areas of crime are identified: terrorism, trafficking in human beings, sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. In this context, several new Directives have been adopted or proposed aiming at further harmonisation and at replacing previous framework decisions. Most of these instruments amend and further expand the scope of criminalisation.

This broadened scope will likely lead to a second wave of increased formal criminalisation. This is seen, for example, in the new Directive on trafficking in human beings.⁹²¹ The Directive replaces the former Framework Decision⁹²² and adopts a broader concept of what should be considered under ‘trafficking in human beings’. Hence, it requires Member States to criminalise a broader range of conducts than the preceding Framework Decision. The new behaviours to be criminalised include: the exploitation of begging, including the use of a trafficked dependent person for begging; the exploitation of criminal activities, namely the exploitation of a person to commit , among other, pick-pocketing, shop-lifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain; and trafficking for the purpose of organ removal.⁹²³ Similarly, the Directive also increases the level of penalties to be applied. A new minimum-maximum sentence of at least five years imprisonment is now to be applicable in ordinary trafficking offences, whilst previously the Framework Decision did not specify a minimum maximum for non-aggravated offences (it did require however, that the offences would be punishable by effective, proportionate and dissuasive penalties, which may entail extradition).⁹²⁴ Similarly, the minimum maximum sentence to be applied in cases where aggravating circumstances are verified is now at

⁹¹⁹ Article 83(2) TFEU.

⁹²⁰ See chapter 3.

⁹²¹ Directive 2011/36/EU of the European Parliament and the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Framework Decision 2002/626/JHA, OJ L 101/1 [2011].

⁹²² Framework Decision 2002/629/JHA, *supra* note 409.

⁹²³ Article 2 of the Directive. See also intend 11 of the preamble, *supra* note 921.

⁹²⁴ See Article 3(1) of the Framework Decision and Article 4 of the Directive, *supra* notes 409 and 921.

least ten years imprisonment in contrast with eight years, provided in the Framework Decision.⁹²⁵ The Directive also broadens the concept of ‘aggravating circumstances’ to include all cases with child victims and the commission of the offence by public officials.⁹²⁶ Moreover, it further requires Member States to establish jurisdiction in cases where the offence was committed—in whole or in part—in their territory as well as when the offender is one of their nationals (this might potentially involve the assertion of jurisdiction beyond the EU’s territory).⁹²⁷

A Directive on the sexual exploitation of children, amending and expanding the provisions of the Framework Decision on the same topic, was also adopted.⁹²⁸ The Framework Decision categorised these offences in two main categories: those of ‘offences concerning the sexual exploitation of children’ and ‘offences concerning child pornography’.⁹²⁹ The Directive now categorises offences in four distinct categories: ‘offences concerning sexual abuse’, ‘offences concerning sexual exploitation’, ‘offences concerning child pornography’ and ‘solicitation of children for sexual purposes’.⁹³⁰ Besides these broader categorisations, the Directive requires Member States to criminalise more conducts than those required by the Framework Decision such as, for example, the causing a child who has not reached the age of sexual consent, to witness sexual activities or sexual abuse, for sexual purposes, even without being forced to participate.⁹³¹ Further examples are to knowingly attend pornographic performances involving the participation of a child,⁹³² and to knowingly obtain access, by means of information and communication technology, to child pornography.⁹³³ The Directive also lists a higher number of aggravating circumstances that Member States may consider than those listed in the Framework Decision. Examples of aggravating circumstances which were not mentioned in the Framework Decision are, for instance, the offence being committed against a child in a particular vulnerable situation, such as with a mental health or physical disability; the offence being committed by a member of the child’s family, a person cohabitating with the child or a person who has abused a recognised position of trust and authority; the offence being committed by several

⁹²⁵ See Article 3(2) of the Framework Decision and Article 4(2) of the Directive, *ibid.*.

⁹²⁶ Article 4 (2)(a) and(3) of the Directive, *ibid.*.

⁹²⁷ Article 10 (1) (a) and (b), *ibid.*.

⁹²⁸ 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, OJ L 335/1 [2011].

⁹²⁹ Articles 2 and 3 of Framework Decision 2004/68/JHA, *supra* note 414.

⁹³⁰ Articles 3, 4, 5 and 6 of the Directive, respectively. *Supra* note 928.

⁹³¹ Article 3 (2) and (3) of the Directive, *ibid.*.

⁹³² Article 4(4), *ibid.*.

⁹³³ Article 5(3), *ibid.*.

persons acting together; in the framework of a criminal organisation; or the offender having previously committed offences of the same nature.⁹³⁴

Beyond those mentioned above, other harmonisation measures are currently being proposed. The European Commission has already put forward a proposal for a Directive on attacks against information systems, which will replace the Framework Decision on attacks against information systems.⁹³⁵ Similarly to the previous two Directives mentioned, the scope of conduct that the Directive will require Member States to criminalise, is broader than that of the Framework Decision. For example, the proposed Directive calls for the criminalisation of new methods of committing cyber crimes—such as the use of bonnets.⁹³⁶

2.1.2. Protecting EU interests and policies via the criminal law

Harmonisation, in the context of Article 83(2) TFEU, is at the centre of ECL's development, currently. The article provides that, 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 that has been subject to harmonisation measures, directives may establish minimum rules regarding the definition of offences and sanctions, in the area at stake. This provision affords a clear competence for the Union to reinforce its policies via the use of criminal norms as well as the application of criminal sanctions. Article 325(4) TFEU also provides this competence in relation to the EU's financial interests.

As shown throughout the thesis, the narrative of protection of EC interests was for the most part, developed indirectly. This was so because, for a significant period of ECL's evolution, the EC did not have a recognised competence to seek the protection of its own interests and policies via criminal law. Nonetheless, this protection was sought indirectly via third pillar instruments as well as through the influence of the CJEU. This influence culminated in two important CJEU decisions in which the Court recognised competence for the EC to adopt criminal law measures in the context of its environmental and transport policies when these aimed at fighting serious environmental crime. The use of criminal law to protect EC policies was controversial at different levels, as it touched upon a number of difficult themes. The first of which related to the legitimacy and

⁹³⁴ Article 9 (a), (b), (c), (d) and (e), *ibid.*.

⁹³⁵ Proposal for a Directive of the European Parliament and of the Council on attacks against information systems and repealing Council Framework Decision 2005/222/JHA, COM(2010) 517 final, Brussels, 30.9.2010.

⁹³⁶ Article 6 of the Proposal, *ibid.*; 'Bonets are networks of private computers infected with malicious software and controlled, as a group, without the owners' knowledge; see also page 3 of the proposal for more details on what bonets are and how they operate.

competence of the EC to legislate in criminal matters. The different EC Treaties did not afford a competence to the EC to legislate in criminal matters and the fact that the third pillar provided for such competence was often understood as proof that the legislator intended to keep criminal law outside the realm of the EC. Regardless, concerns with the effectiveness of EC policies began to be felt very strongly and criminal law was increasingly envisaged by the Commission and the CJEU as a tool that could play an important role in improving the effective implementation and enforcement of EC goals. The *raison d'être* for the criminalisation of behaviour detrimental to EC policies and goals was (and is) very different from that initially offered for the existence of a criminal law of the EU. The initial EU criminal law was a direct consequence of the removal of internal borders and of a perceived crime increase and the opportunities for crime that could come with it. Accordingly, it was concerned with organised and other types of related criminality. Criminal law as a means to protect EC policies, however, began to be developed based on an idea of effectiveness of EC policies⁹³⁷ and this competence is acknowledged today by the TFEU. On the one hand, it seems natural that the Union would, sooner or later, seek the protection of its own goals via criminal law. This need could be said to be a natural urge of any legal order. On the other hand, however, this raises two sets of questions about the development of ECL. The first question relates to the expansion of criminal law from a substantive point of view. The EU is concerned *prima facie* with building and regulating a single market and securing the rights of free movement within that market. The use of criminal law to protect those values thus entails an expansion in the scope of ECL itself. Whilst substantive ECL was initially concerned with criminality associated with organised crime, now ECL is also concerned with other types of domains—those related to EU policies.

The potential future increase in the scope of ECL reflects, to some extent, tendencies also at the national level. Indeed, as seen in the introduction of this dissertation, national criminal law has, in the past century, moved from the protection of core fundamental values of society to assume a more regulatory role today and cover a significantly broader range of topics within its scope. This expansion of national criminal law has also revived normative debates on the criminal law about the functions of criminal law and the criteria for criminalisation. For example, if criminal law is increasingly being used as a regulatory tool, how can this accommodate principles such as the use of criminal law as *ultima ratio*. This leads to another question—that of the justification for the use of criminal law to protect EU policies. Before Lisbon, the effectiveness of EC

⁹³⁷ E. Herlin-Karnell, “Commission v. Council: Some Reflections on Criminal Law on the First Pillar”, *supra* note 479; E. Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (Oxford and Portland: Hart Publishing, 2012).

policies appeared as the main criteria for criminalisation.⁹³⁸ In the post Lisbon framework, the Commission is now trying to reconcile this goal with the principles of subsidiarity and of criminal law as *ultima ratio*.

2.1.3. The emergence of criteria for EU's criminalisation

The Commission issued a Communication in 2011 on the future of ECL and of a 'European Criminal Policy'.⁹³⁹ The Communication starts with the added value of ECL.⁹⁴⁰ This was something that thus far had not been addressed directly. According to Klip, the Commission's articulation of the need for a more consistent and coherent criminal policy reflects the fact that ECL, thus far, was far from coherent and consistent and that the necessity for certain measures in the field of criminal law was presented at self-evident.⁹⁴¹ In the Communication, the Commission offers four particular elements of added value of ECL, namely: the fostering of citizens' confidence in their right to free movement; the prevention of existence of 'safe havens' for criminals; the strengthening of mutual trust for a better functioning of mutual recognition; and finally, the prevention and sanction of serious offences against EU law in important policy areas.⁹⁴²

Furthermore, the Commission also clarifies which principles, in its opinion, should guide EU's criteria of criminalisation. It mentions, first, the principle of subsidiarity, noting that the EU should only legislate if, due to the scale and effects of a proposed measure, its goals cannot be achieved more efficiently at a national or regional level. Secondly, criminalisation should be in line with fundamental rights, as guaranteed in the CFR and ECHR, particularly given the sensitivity of criminal law measures.

The Commission, taking these two principles into account, proposes a two-step approach in criminal law legislation. A first stage when the EU should ask whether to adopt criminal law measures at all. In this regard, the Commission suggests the observance of the necessity and proportionality principles, i.e. the use of criminal law as '*ultima ratio*'. This requires the legislator to analyse whether measures other than

⁹³⁸ *Ibid.*

⁹³⁹ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, COM (2011) 573 final, Brussels, 20 September 2011. This focus was further reasserted in 2012 by European Commissioner Viviane Reding, see her speech "Crime and Punishment: Using criminal law to support growth and economic recovery", Speech to the Expert Group on EU Criminal Policy, Inaugural Meeting, Brussels, 19 June 2012.

⁹⁴⁰ European Commission, Communication 'Towards an EU Criminal Policy', *ibid.*, 2-5.

⁹⁴¹ A. Klip, "Editorial: European Criminal Policy" (2012) 20 *European Journal of Crime, Criminal Law and Criminal Justice* 3.

⁹⁴² European Commission, Towards an EU Criminal Policy, *supra* note 939. Klip argues that the first three reasons given by the Commission are without merit, *ibid.*, 5.

criminal sanctions, such as civil or administrative sanctions, will be sufficient to ensure policy implementation or whether criminal law would address the problems more effectively. The second stage in the adoption of EU legislation is the decision of which concrete measure to adopt when there is a demonstrated need for criminal law. Here, the Commission identifies four main elements to be taken into consideration. First, it reasserts the EU's competence to adopt minimum rules only, although these must be clear enough to respect the principle of legality. Second, it reasserts the criteria of 'necessity' and proportionality in the choice of criminal offences. Third, the need for clear factual evidence about the nature and effects of the crime in question as well as divergent legal situations in Member States which could jeopardise the effective enforcement of an EU policy. Finally, the Commission reasserts the need for effectiveness of the penalty applicable which might involve the 'tailoring of the sanction to the crime'. This could involve the use of sanctions such as confiscation, for example.⁹⁴³

The Commission's Communication makes a clear first attempt at the formulation of principles of criminalisation or criteria for such formulation at the EU level. Underlying this attempt, three main ideas become salient: *subsidiarity* (the EU should only intervene if it is shown to be necessary due to the scale and effects of the measures needed); criminal law as *ultima ratio* (the principle according to which criminal law should be of last resort); and *effectiveness* (the demonstrated need that a particular EU policy is not efficient without the help of criminal sanctions).⁹⁴⁴

How the EU in general, or the Commission in particular, will articulate these principles in practice is yet to be seen. Indeed, as seen in Chapter 3, the effectiveness of EC policies and interests was the strongest argument in the Commission and CJEU's reasoning for the need to adopt of criminal measures. Particularly in relation to the protection of EC's environmental policy via criminal law, there were arguments put forward that criminal law was not necessarily the most effective means to ensure compliance with environmental policies.⁹⁴⁵ However, the CJEU and the Commission both seemed to assume that criminal law could guarantee such effectiveness *per se*.⁹⁴⁶ This suggests that the Commission will have to seek a balance between the criteria of effectiveness and that of *ultima ratio*. The necessity for this balance is indeed indirectly voiced in the Communication when, the need for more 'factual evidence' is mentioned by the Commission. In particular, the Commission mentions 'Impact Assessments'

⁹⁴³ *Ibid.*, 7-8.

⁹⁴⁴ A. Klip, "Editorial: European Criminal Policy", *ibid.*, 6.

⁹⁴⁵ M. Faure, "European Environmental Criminal Law", *supra* note 480; and B. Lange, "Environmental Criminal Law in a European Context", *supra* note 481.

⁹⁴⁶ See chapter 3.

preceding any legislative proposal, as a means to provide for the necessary factual evidence in relation to particular policy areas, in order to determine whether the need for the use of criminal law is necessary or not.⁹⁴⁷

On a different level, in answering the question of in which EU policy areas might EU criminal law be needed, the Commission suggests that there a number of areas where it has been established that criminal law measures are required—namely, areas to fight serious damaging practices and illegal profits in economic sectors. These include the financial sector, in particular, measures concerning market manipulation and insider trading, the fight against EU fraud⁹⁴⁸ and the protection of the Euro against counterfeiting.⁹⁴⁹ Furthermore, the Commission voices its intention to reflect on how criminal law could contribute to economic recovery by tackling illegal economy and financial criminality. Finally, insofar as the subject-matter of ECL is concerned, the Commission asserts that it will further explore whether criminal law is a necessary tool to ensure the effective enforcement of other policy areas, such as road transport (and in particular, serious infringements of EU social, technical, safety and market rules for professional transports), data protection, customs rules, environmental protection, fisheries (policy where the EU has adopted a ‘zero tolerance’ campaign against illegal, unreported and unregulated fishing) and internal market policies (in order to fight illegal practices such as counterfeiting and corruption or undeclared conflict of interests in public procurement).⁹⁵⁰

The Commission’s Communication suggests that the narrative of protection of EC policies and interests via criminal law will, most likely, become central in the future of the field. Moreover, besides the increasing scope of ECL, the explanatory memorandums of specific measures proposed suggest that these new measures will also encompass an increase in formal criminalisation in some national legal orders. For example, the Commission has put forward a proposal for a Directive on criminal sanctions for insider dealing and market manipulation.⁹⁵¹ The Directive will be the first instrument in ECL to directly require Member States to criminalise conducts relating to insider dealing and market manipulation. The Commission notes in the explanatory memorandum to the proposal that Member States sanctioning regimes in this area are

⁹⁴⁷ Commission’s Communication, ‘Towards an EU Criminal Policy’, *supra* note 939, 7

⁹⁴⁸ To date the specific legislation in this regard remains the 1995 Convention on the protection of financial interests of the EU and its protocols, and the Council Regulation 2988/95, *supra* note 361.

⁹⁴⁹ Commission’s Communication, ‘Towards an EU Criminal Policy’, *supra* note 939, 10.

⁹⁵⁰ *Ibid.*, 10-11.

⁹⁵¹ Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation, COM(2011)654 final, Brussels, 20.10.2011.

weak and heterogeneous.⁹⁵² Existing national sanctions to fight market abuse offences are lacking impact and are not sufficiently dissuasive, whilst national definitions of market abuse and insider dealing offences diverge considerably from Member State to Member State. In addition, five Member States do not provide for criminal sanctions for disclosing inside information by primary insiders and eight Member States do not do so in relation to secondary insiders. In addition, one Member State does not currently impose criminal sanctions for insider dealing by a primary insider and four do not do so for market manipulation.⁹⁵³ Therefore, the correct implementation of the Directive is, once again, likely to increase formal criminalisation in some Member States.

Finally, the Commission has also put forward a Proposal for a Directive on the fight against fraud to the Union's financial interests by means of criminal law.⁹⁵⁴ The explanatory memorandum notes that despite developments in this area, Member States have adopted diverging rules and consequently, often diverging levels of protection of the Union's financial interests within their national legal systems. Again, the Directive requires Member States to criminalise more broadly than its predecessor—the 'PIF' Convention—does.⁹⁵⁵ It will do so by no longer requiring that the prohibited conduct be 'in breach of official duties' and by including in its scope 'misappropriation', which covers conduct by public officials that does not constitute fraud *stricto sensu* but which consists of misappropriation of funds or assets with the intention to damage the Union's financial interests.⁹⁵⁶ Moreover, the Directive also introduces *minimum* penalties to be applied (previously ECL measures would only refer to *minimum maximum* penalties).⁹⁵⁷

2.2. Recent developments in mutual recognition in criminal matters

The second dynamic of ECL—the one brought about by mutual recognition—is also solidified and expanded. As seen in Chapter 3 and earlier in this chapter, Article 82 (1) of the Treaty of Lisbon formalises the role of mutual recognition as the hub of judicial cooperation in criminal matters in the EU. This dynamic was the most expansive until Lisbon, as it incorporated potentially all criminality under its umbrella and touched upon an increasing number of domains in the domestic criminal justice systems. Its endorsement in the Treaty as the cornerstone of judicial cooperation in criminal matters

⁹⁵² *Ibid.*, 2.

⁹⁵³ *Ibid.*, 3.

⁹⁵⁴ Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, COM(2012)363 final, Brussels, 11.7.2012.

⁹⁵⁵ Convention for the Protection of the European Communities financial interests, *supra*, note 298.

⁹⁵⁶ Article 4 of the Proposal; see also pages 8-9 of the explanatory memorandum, *supra* note 954.

⁹⁵⁷ *Ibid.*, 19.

suggests that mutual recognition will almost certainly continue to be an area of development.

Similar to the case of harmonisation, directives have also been proposed in this domain, such as the Proposal for a Directive on a European Investigation Order—which will replace the Framework Decisions on the European evidence warrant (EEW) as well as the execution of orders freezing property and evidence.⁹⁵⁸ The European Investigation Order will have a significantly wider scope than the previous two measures. First, the Framework Decision on orders freezing property and evidence solely covers the freezing of evidence or property and not its transfer; second, the Framework Decision on the EEW only covers evidence that already exists and, in any case, only documents, objects and data. The proposed European Investigation Order applies to nearly all investigative measures, with the exception of the setting up and gathering of information within a Joint Investigation Team and the interception with immediate transmission and interception of satellite telecommunications. The European Investigation Order, should it come into force, will represent a significant strengthening of the State's capacity to investigate beyond national borders. Similarly, the Proposal for a Directive on the freezing and confiscation of proceeds of crime in the EU, should it come into force, will also broaden the scope of existing instruments.⁹⁵⁹ For example, it will introduce provisions on non-conviction-based confiscation in limited circumstances, with a view of addressing cases where criminal prosecution cannot be exercised; allow for third-party confiscation; and introduce the possibility of freezing powers in urgent cases in order to prevent asset dissipation in situations where, waiting for an order issued by a court, would jeopardize the possibility of freezing.⁹⁶⁰

2.3. A more effective implementation

Finally, another reason pressing towards the assertion of the features of the two present dynamics of ECL is the fact that the Treaty of Lisbon has created the conditions for the merger of the three pillars, bringing police and judicial cooperation in criminal matters into the 'mainstream Union framework'. This will have a direct impact in the field by granting the European Commission the capacity to bring infringement proceedings against Member States who do not implement or incorrectly implement directives in this

⁹⁵⁸ Initiative (...) for a Directive of the European Parliament and of the Council of... regarding the European Investigation Order in criminal matters, OJ C 165/02 [2010]. Note that the Framework Decision on the EEW was adopted but did not come into force. See chapter 5. Council Framework Decision 2008/978/JHA, *supra* note 700.

⁹⁵⁹ European Commission, Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union, COM(2012) 85 final, Brussels, 13.3.2012.

⁹⁶⁰ Articles 4, 5, 6 and 7 of the proposed draft, *ibid.*

domain.⁹⁶¹ This increased ‘policing power’ by the European Commission will very likely encourage better domestic compliance - and hence more effective implementation and functioning of the ECL mechanisms - given that implementation rates have been generally poor in particular in relation to mutual recognition.⁹⁶² Furthermore, in relation to the EAW, this might imply that the protectionist measures that some Member States have adopted vis-à-vis dual criminality, the protection of human rights or the protection of their nationals, can be brought into question by the Commission. It was shown in chapter 5 how these national qualifications to mutual recognition brought about a degree of moderation to the punitive emphasis of mutual recognition. Hence, if Member States are forced to make these changes and withdraw these national qualifications mutual recognition instruments will become more efficient, thus streamlining their punitive features.

3. ECL’s punitiveness in context: national responses and specificities

It was seen in chapter 4 and 5 that the increase in scope of ECL is leading to more formal criminalisation at national level and increasing the States capacity to investigate, prosecute and punish. The trend in upwards punitiveness in ECL is, nevertheless, not without important caveats and limitations. Although ECL has indeed set in motion the conditions that can lead to a more severe criminal justice, its actual impact has limitations and remains in flux. These limitations were point out earlier in the thesis and remain valid in the post Lisbon framework. They were identified first in relation to the harmonisation of national criminal law, particularly in the fact that there is a substantial amount of national law that is left untouched by harmonisation measures—making the ultimate outcome of national implementation uneven if not unpredictable. This takes place because the focus on harmonisation is on legislative measures alone and does not account for practices of policing, prosecution and practices of sentencing at the national level. These, nonetheless, have a strong influence in the actual domestic levels of substantive criminalisation. Hence, a wider scope of formal criminalisation, such as the one set in motion by ECL, will not always translate into more substantive criminalisation or harsher practices of punishment. These will be equally dependent on national penal cultures and policies, which still vary significantly across the European Union.⁹⁶³

Likewise, in relation to mutual recognition, it was shown how domestic legal orders reacted very differently to its introduction in criminal matters. This was particularly

⁹⁶¹ Article 267 TFEU.

⁹⁶² See chapter 5.

⁹⁶³ Chapter 4, section 4. See also below.

clear in relation to the EAW. In fact, whilst the abolition of the principles of non-extradition of nationals, dual criminality and refusal to extradite based on human rights raised concerns throughout the European Union, Member States reacted differently. Some willingly changed their constitutions and secondary legislation in order to comply with the Framework Decision. Others nonetheless set extensive conditions as to whether and how they were to accept the surrender of individuals to other Member States. Many of these conditions guaranteed additional protection to individuals; others maintained or introduced dual criminality as grounds for refusal to surrender.⁹⁶⁴ This suggests first, that not all Member States will make an intensive use of tools such as the EAW simply because they are at their disposal; and, second that many national legal orders have *de facto* introduced additional safeguards. Hence, the punitive and prosecutorial bias of some of the mutual recognition measures will not always translate into enhanced practices of prosecution and punishment (although, as noted in the previous section, this autonomy will be more constricted due to the Commission's possible use of its new 'policing competencies' under the Treaty of Lisbon).

Certainly, national responses to ECL will always vary. First, because as just seen ECL leaves room for this; second, because there is a great diversity of penological approaches and trends among EU countries. Hence, on the hand, the proliferation of ECL measures that almost exclusively expand criminalisation and enhance the State's punitive apparatus emphasise themes and trends of increasing punishment in national legal orders across the West. Garland notes how, from the 1970s onwards, 'penal welfarism' which combined liberal legal ideals of due process and proportional punishment with a belief in rehabilitation, welfare and criminological expertise began to favour of a rebirth of retributive and punitive approaches to crime control.⁹⁶⁵ In an historical, sociological and penological analysis, Garland maps out the history of these changes which have, in the author's opinion, led to the emergence of a 'culture of control' involving a combination of repressive and managerial criminal justice strategies (mostly in the USA and the UK). These changes were reflected in certain features of crime control structures, such as, among others, the massive expansion of criminal justice systems in terms of caseload, employment, expenditure and use of custodial sentences to the detriment of alternative sentences such as fines and community supervision;⁹⁶⁶ the highlighting of the figure of the victim which epitomised the move from a primary concern with the causes of crime

⁹⁶⁴ See national constitutional and supreme courts reactions to the EAW and national implementation of the Framework Decision, Chapter 5, sections 2.1 and 2.1.1.

⁹⁶⁵ D. Garland, *The Culture of Control*, *supra* note 42, 27-51. For a critical overview of the new trends, see also J. Faria Costa, "A criminalidade em um mundo globalizado: ou plaidoyer por um direito penal não-securitário" (2005) 135 *Revista de Legislação e Jurisprudência* 26.

⁹⁶⁶ D. Garland, *The Culture of Control*, *supra* note 42, 168.

to the consequences of crime;⁹⁶⁷ in the policing sector, a shift towards more proactive policing techniques and towards a more intensive policing of disorder, incivilities and misdemeanours, and the introduction of technology and new management techniques to produce more directed problem solving approaches and tighter control of resources. In particular, police forces began to develop flexible links with other partners.⁹⁶⁸ These transformations led to a paradoxical outcome according to which, Garland states,

*“...the State strengthens its punitive forces and increasingly acknowledges the inadequate nature of this sovereign strategy. Alongside an increasingly punitive structure, one also sees the development of new modes of exercising power by which the state seeks to ‘govern at a distance’ by forming alliances and activating the governmental powers of non-state agencies.”*⁹⁶⁹

Transformations towards more repressive criminal justice systems have also been seen in other countries, although changes were more moderate. These transformations are primarily visible in a generalised increase in national imprisonment figures. Cavadino and Dignan, in their comparative study of criminal justice systems around the world, including a significant number of European countries, found this upwards trend in punishment in eleven out of twelve countries between 1986 and 2002/3.⁹⁷⁰ This trend was also seen in countries not included in Cavadino and Dignan’s sample. Poland⁹⁷¹ and Spain,⁹⁷² for example, have also experienced a significant increase in imprisonment rates in the last 30 years and, during the same period, Eastern European countries’ rates were always considerably higher (more than double) than those in Western Europe.⁹⁷³

⁹⁶⁷ *Ibid.*, 121, 169.

⁹⁶⁸ *Ibid.*, 169-171.

⁹⁶⁹ *Ibid.*, 173.

⁹⁷⁰ The authors look at developments in England and Wales, The Netherlands, Italy, Germany, France, Sweden, Finland, USA, South Africa, New Zealand, Australia and Japan. The USA was the most extreme example with a 400 per cent increase in the prison population from the mid-1970s to the 2000s. But also in Europe, many countries followed this trend, although in a more moderate scale than the USA. In England and Wales for example, the prison population had risen from about 40,000 in 1975 to more than 75,000 in 2002/3; in the Netherlands it rose from 4,906 in 1986 to 16,239 in 2002/3; in Italy from 43,685 to 56,574 respectively and in France from 4,649 in 1986 to 55,382 in 2002/3 (the authors also make these numbers available in terms of numbers of prisoners per 100,000 population finding the same trend); see M. Cavadino and J. Dignan, *Penal Systems*, *supra* note 78, 43-49.

⁹⁷¹ Krajewski notes how Poland underwent a wave of liberal and reformist policies after the end of communism but how, in the late 1990s, the ‘liberal optimism’ was clearly over and law and order policies were on the rise. K. Krajewski, “Crime and Criminal Justice in Poland (Country Survey)” (2004) 1 *European Journal of Criminology* 403. Today Poland ranks 5th amongst EU countries with the highest imprisonment rates (6th if Gibraltar is included) below Estonia, Latvia, Lithuania and the Czech Republic (data from prison studies, see http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=europe&category=wb_poprat)

⁹⁷² Spain more than tripled its imprisonment rate from 1985 to 2005, see T. Lappi-Seppala, “Trust, Welfare and Political Culture: Explaining Differences in National Penal Policies” (2008) 37 *Crime and Justice* 316.

⁹⁷³ *Ibid.*.

It is beyond the scope of this thesis to draw comparisons between national and EU trends. Yet, this short overview provides some context to ECL, which appears to share some themes of this emerging ‘culture of control’:⁹⁷⁴ the sheer volume of penal measures, the emphasis on ‘safety’ and ‘security’ in the Treaty itself as well as secondary legislation, the often nearly populist tone of some policy documents (mostly the action plans on organised crime⁹⁷⁵), the importance given to the victim, and the secondary place given to the objective of rehabilitation, amongst some other characteristics.⁹⁷⁶ More significant to the main argument of this dissertation is the fact that, as shown in chapters 4, 5 and above on this chapter, ECL, in its present form, is capable of potentially accentuating some of the trends of increasing punitiveness at the national level by contributing to more formal criminalisation and by facilitating prosecution, investigation and sentence enforcement across the EU.

On the other hand, however, although trends towards increasing severity are seen nowadays in many national penal orders, not all EU countries have taken that punitive turn. Hence, some countries have managed to escape this rise in penal severity or at least to maintain important levels of moderation and commitment to due process. Lacey points out how some ‘coordinated market economies’ (in opposition to ‘liberal market economies’ such as the US and the UK) although also enduring important transformations,⁹⁷⁷ have managed to sustain relatively moderate penal policies, and

⁹⁷⁴ Garland mentions twelve main indices of changes to crime control in the UK and USA in the past 30 years, including the decline of rehabilitative ideal, the emergence of punitive sanctions and expressive justice, changes to the emotional tone of crime policy, the return of the victim, obedience to new mottos such as ‘above all, the public must be protected’ (this places emphasis on imprisonment – incapacitation – and has led to a relaxation of concerns about the suspects’ civil liberties and prisoners’ rights), politicisation and populism of crime control, the reinvention of the prison, the transformation of criminological thought, the expanding infrastructure of crime prevention and community safety, the commercialisation of crime control in civil society, new management styles and working practices, and a perpetual sense of crisis, D. Garland, *The Culture of Control*, supra note 42, 5-26. For an analysis on how these new cultures of crime control can help to explain some features of EU’s governance in the context of the area of freedom, security and justice, see E. Baker, “Governing Through Crime – the case of the European Union”, supra note 568.

⁹⁷⁵ See mostly chapter 3.

⁹⁷⁶ Possibly, the most striking commonalities are to be found in the domain of policing, not covered by this thesis. Very briefly, the EU has built for the past decades, a significant apparatus of databases for information sharing on individuals, between different national authorities and national and EU authorities. For an overview of EU developments see V. Mitsilegas, “Databases in the area of freedom, security and justice: Lessons for the centralisation of records and their maximum exchange” in C. Stefanou and H. Xanthaki (eds) *Towards a European Criminal Record* (Cambridge: Cambridge University Press, 2008) 311. This echoes US trends towards a police culture of information gathering and information sharing which have been accentuated particularly after the 9/11 attacks, see, for example, P. P. Swire, “Privacy and Information Sharing in the War on Terrorism” (2006) 51 *Villanova Law Review* 951.

⁹⁷⁷ As noted in chapter 4, section 3.2. some of these changes were a result of the implementation or direct influence of ECL harmonisation instruments, see in particular T. Elholm, “Does EU Criminal Cooperation Necessarily Mean Increased Repression?”, supra note 637.

particularly so in the case of the Scandinavian Social Democracies.⁹⁷⁸ Indeed, many Western European democracies, even if coping with changes towards more restrictive penal laws and practices, have managed to sustain relatively moderate criminal justice systems in particular if compared to other Western democracies such as the US or other regimes around the world.⁹⁷⁹ These differences in national penological approaches and trends suggests that an increase in formal criminalisation in consequence of implementation of EU harmonisation measures and an enhanced capacity to investigate, prosecute and secure punishment as a result of the operability of the mutual recognition principle will not always and not necessarily translate into a harsher penalty at national level.

4. The emergence and development of more moderate nuances in ECL

4.1. A more central role for fundamental rights

The moderation of the ECL's punitive tone in recent years is also seen in the significant improvement of the narrative of protection of fundamental rights in ECL. Indeed, fundamental rights—and particularly procedural rights in criminal procedure—have taken a more visible place with the entry into force of the Treaty of Lisbon. First and foremost, because Article 6(2) TEU(L) holds that the EU should accede to the ECHR.⁹⁸⁰ The accession will bring added guarantees, the most obvious one being that EU acts will be challengeable before the EcHR. Moreover, as voiced by the Commission, accession will help to develop a common culture of fundamental rights in the EU; it will reinforce the credibility of the EU's human rights' system; it will show that the EU puts its weight behind the Strasbourg system of fundamental rights; and it will ensure that there is an harmonious development of CJEU and the EcHR's case law.⁹⁸¹

⁹⁷⁸ N. Lacey, *The Prisoners' Dilemma* (Cambridge: Cambridge University Press, 2008) 3-54, 55; see also T. Lappi-Seppala, "Trust, Welfare and Political Culture", *supra* note 972, 313-316. In the English speaking world, where the adoption of more repressive penal policies was strongly felt, Canada, for example, has also been highlighted as an example of relative moderation regardless of remaining a considerably punitive system, see, for example, D. Moore and K. Hannah-Moffat, "The liberal vein: revisiting Canadian penalty" in J. Pratt et al. (eds) *The New Punitiveness* (Portland: Willan Publishing, 2005) 85-100.

⁹⁷⁹ N. Lacey, *The Prisoners' Dilemma*, *ibid.*, 26-28; M. Tonry, "Parochialism in U.S. Sentencing Policy" (1999) 45 *Crime and Delinquency* 48, 50. Tonry explores how the use of cost-effective sanctions such as prosecutorial fines, community service orders and day fines have proliferated in Europe, in contrast with symbolic policies and rhetoric such as 'three strikes and you're out', 'boot camps' etc., which have been used extensively in the US, used to some extent in the UK, but not in other European countries.

⁹⁸⁰ See also Article 218 TFEU. The Commission began negotiations over accession with the Council of Europe in July 2010. On November 2012, negotiations were ongoing, see Council of the European Union, Note from the Presidency on the Stockholm Programme mid-term review, Document 15921/12, Brussels, 13 November 2012, 6-7.

⁹⁸¹ European Commission, Brussels, 17 March 2010, http://ec.europa.eu/commission_2010-2014/reding/pdf/echr_background.pdf

Furthermore, Article 6 TEU(L) confers binding legal force to the Charter of Fundamental Rights of the European Union (CFR).⁹⁸² The Charter was drafted in order to codify fundamental rights and principles existent at the EU level and to grant them more visibility.⁹⁸³ It enshrines the right to a fair trial, presumption of innocence, effective judicial remedies, and legality and proportionality of criminal offences.⁹⁸⁴ Fundamental rights of the CFR are binding on the institutions and bodies of the EU and on Member States when they act within the scope of application of EU law.

As noted by Marguery, regardless of these changes, the value of the Charter seems to be tempered for two reasons. First, because it establishes a distinction between rights and principles; second, because some Member States have signed a protocol concerning the Charter's application. The distinction between 'principles' and 'rights' is made in Article 52(5), although it is not always clear which provisions of the Charter refer to principles and which refer to rights. According to the author, the most immediate consequences of this distinction are that only rights can be invoked before a court whilst principles can be invoked for interpretation and control of the legality of acts adopted by Institutions or bodies of the Union to implement these principles or by Member States when implementing EU law.⁹⁸⁵ Second, the CFR cannot be invoked against Poland and the UK as these two Member States signed a Protocol concerning the application of the Charter (the provisions of the Protocol have also now been extended to the Czech Republic).⁹⁸⁶ Article 2 of the Protocol provides that,

“To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom [or the Czech Republic] to the extent that the rights or principles that it contains are recognised in the law and practices of Poland or the United Kingdom [or the Czech Republic].”

However, the effects of the Protocol, in practice, have been doubted. In particular, the CJEU has recently held in *N.S.* that the Protocol

⁹⁸² Article 6 (1) TFEU and Articles 47 to 49 CFR, OJ C 364/1 [2000]. Fundamental rights were previously guaranteed at EU level by the CJEU through its unwritten general principles of EU law, see chapter 3.

⁹⁸³ Presidency Conclusions, Cologne European Council, 3 and 4 of June 1999, para 44-45.

⁹⁸⁴ Articles 47 to 50 CFR. Beyond the realm of criminal law the Charter also provides protection to economic and social rights not covered by the ECHR.

⁹⁸⁵ T.P. Marguery, “The protection of fundamental rights in European criminal law after Lisbon: what role for the Charter of Fundamental Rights?” (2001) 37 *European Law Review* 450.

⁹⁸⁶ Protocol 30 on the application of the Charter of fundamental rights of the European Union to Poland and the United Kingdom, OJ C 83/313 [2010]; Protocol on the application of the Charter of fundamental rights of the European Union to the Czech Republic, Council Document 15265/1/09 REV1, 1 December 2009, 14.

“(…) does not call into question the applicability of the Charter in the United Kingdom or in Poland (…) Article 6 TEU requires the Charter to be applied and interpreted by the courts of Poland and of the United Kingdom (…)”⁹⁸⁷

Similarly, Craig and de Búrca, note that it is unlikely that the Protocol will have any significant effect in practice. This is because it does not overturn the CJEU’s earlier case law on fundamental rights, which was based on general principles of EU law, which are in turn, also not overturned by the Charter.⁹⁸⁸ Likewise, this is also the opinion of the House of Lords who noted that the Charter will apply in the UK and the Protocol may serve as an interpretative guide to the former.⁹⁸⁹

4.2. The development of criminal procedure

The relationship between the EU and procedural rights in criminal matters - at the core of many criticisms of imbalance in ECL⁹⁹⁰ - is also significantly improved by the TFEU, which grants clear competence for the EU to legislate in procedural criminal law (even if limited to facilitation of mutual recognition).⁹⁹¹

This has, in fact, been a dynamic domain of ECL ever since the entry into force of the Treaty of Lisbon. The Council has laid down the EU’s plan of action in this domain through two main resolutions, establishing road maps for the adoption of future measures on suspects’ and defendants’ rights as well as on victims’ rights.⁹⁹²

In relation to the rights of victims, the Council’s Roadmap for strengthening the rights and protection of the victims, particularly in criminal proceedings,⁹⁹³ planned the revision of previous measures and some further recommendations on guidance and best practices and the protection of victims also in civil proceedings.⁹⁹⁴ A Directive on the European protection order has already been adopted.⁹⁹⁵ This instrument expands the protection of victims by allowing a judicial or equivalent national authority in a Member State—in which a measure protecting a person against a criminal act by another person

⁹⁸⁷ Case C-411/10 and C-493/10, *supra* note 735, 119-120.

⁹⁸⁸ P. Craig and G. De Búrca, EU Law, 395, *supra* note 500.

⁹⁸⁹ House of Lords – European Union Committee, The Treaty of Lisbon: an impact assessment, *supra* note 552, 102.

⁹⁹⁰ See chapter 3.

⁹⁹¹ Article 82 (2) TFEU.

⁹⁹² Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C 295/1 [2009]; and Resolution of the Council of 10 June 2011 on a Roadmap for strengthening the rights and protection of victims, particularly in criminal proceedings, OJ C 187/1 [2011].

⁹⁹³ Resolution on a Roadmap for strengthening the rights and protection of victims, *ibid.*.

⁹⁹⁴ *Idem.*.

⁹⁹⁵ Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order, OJ L 338/2 [2011].

that may endanger his or her life, physical integrity, dignity, personal liberty or sexual integrity—to issue a European protective order to protect the endangered person in another Member State.⁹⁹⁶ A second Directive establishing minimum standards on the rights, support and protection of victims of crime—thus replacing the Framework Decision on the standing of victims in criminal proceedings—was also adopted, establishing minimum standards of legal protection, as well as support and access to justice for victims in EU Member States.⁹⁹⁷ The Directive covers a vast number of rights including: the right to receive information from the first contact with a competent authority, the right to interpretation and translation, the right to access victim support services, as well as several rights of participation in criminal proceedings such as right to be heard, to legal aid, to reimbursement of expenses, to return of property, to safeguards in the context of restorative justice services, and to avoid contact between victim and offender, among many others.⁹⁹⁸

The expansion of victims' protection was also undertaken by the new Directive on trafficking in persons, which now provides Member States with the possibility of not prosecuting or imposing criminal penalties on victims of trafficking for their involvement in criminal activities, which they have been compelled to commit.⁹⁹⁹ The Directive further provides for assistance and support to victims before, during and after the criminal proceedings,¹⁰⁰⁰ as well as for special protection in criminal investigation and proceedings, which can range from legal representation to, as far as possible, avoiding secondary victimisation by, giving evidence in open court or unnecessarily concerning the victim's private life (for example).¹⁰⁰¹ Furthermore, special protection is envisaged to child victims including, for instance, physical and psycho-social recovery support, the appointment of a guardian or representative when necessary, the provision of assistance and support for the family when they are in the territory of the Member State.¹⁰⁰²

In relation to defendants, the 2009 Road map for strengthening procedural rights of suspected or accused persons in criminal proceedings envisages action in six different areas: translation and interpretation, information on rights and charges, legal advice and legal aid, communication with relatives, employers and consular authorities, special

⁹⁹⁶ Article 1, *ibid.*

⁹⁹⁷ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315/57 [2012].

⁹⁹⁸ Articles 4 to 24 of the Directive, *ibid.*

⁹⁹⁹ Article 8, of the Directive, *ibid.*

¹⁰⁰⁰ Article 11, *ibid.*

¹⁰⁰¹ Article 12, *ibid.*

¹⁰⁰² Articles 13-16, *ibid.*

safeguards for suspected or accused vulnerable persons, and the issue of a green paper on pre-trial detention.¹⁰⁰³

Of these, some measures have already been put forward. A Directive on the right of information in the course of criminal proceedings was very recently adopted.¹⁰⁰⁴ The Directive envisages a number of information rights from the moment a person is made aware by the competent authorities that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings.¹⁰⁰⁵ These information rights include the right of information about rights, such as the right of access to a lawyer, entitlements to free legal advice, the right to be informed of the accusation, the right to interpretation and translation and the right to remain silent.¹⁰⁰⁶ Suspects or accused persons shall also be provided with a written Letter of Rights, which they are allowed to keep in their possession whilst in detention. Besides the rights mentioned above, the Letter shall also provide information about the application of rights under national law such as, *inter alia*, the right of access to the materials of the case and the maximum number of hours or days suspects or accused persons may be deprived of liberty before being brought before a judicial authority.¹⁰⁰⁷ The Directive also envisages the provision of an ‘appropriate’ Letter of Rights to persons who are arrested for the purpose of the execution of an EAW, although it does not provide further details on the type of information that should be provided in those cases.¹⁰⁰⁸ Additional rights covered by the Directive are the rights of information on the accusation and on the access of materials of the case.¹⁰⁰⁹ Likewise, a Directive on translation and interpretation rights has also been adopted,¹⁰¹⁰ covering the right to interpretation and translation in criminal proceedings and proceedings for the execution of a EAW, which shall apply to persons from the time they are made aware that they are suspected or accused of having committed a criminal offence until conclusion of the proceedings and, if applicable, sentencing and resolution of any appeal.¹⁰¹¹ Furthermore, a Proposal for a Directive on the right to access a lawyer and on

¹⁰⁰³ *Idem*.

¹⁰⁰⁴ Directive 2012/12/EU, *supra* note 727.

¹⁰⁰⁵ Article 2 (1), *ibid.*.

¹⁰⁰⁶ Article 3, *ibid.*.

¹⁰⁰⁷ Article 4, *ibid.*.

¹⁰⁰⁸ Article 5, *ibid.*.

¹⁰⁰⁹ Articles 6 and 7, *ibid.*.

¹⁰¹⁰ Directive 2010/64/EU, *supra* note 729.

¹⁰¹¹ Articles 1, 2 and 3, *ibid.*.

communication upon arrest¹⁰¹² is under negotiation whilst other measures feature in the Commission's working programme for 2012.¹⁰¹³

These recent developments relating to individual, procedural and fundamental rights brought about by the TEU(L), the TFEU and the post-Lisbon reforms, considerably developed what this thesis called "the narrative of fundamental rights in ECL". To be sure, albeit significant improvements, some criticisms are still being voiced in relation to some lacunas that remain in the protection of individual rights in ECL. Rijken, for example, noted in 2010, that many of the new legislative measures adopted largely mirror existent procedural rights as developed by the ECHR and, in doing so, do not provide an adequate response to the specific fundamental rights concerns that have emerged out of the application of mutual recognition in criminal matters and enhanced judicial and police cooperation. The author mentions in particular, rights of information for data subjects, rights of information for house owners of their rights to be present during searches and of subjects of the reasons for an EEW or EAW as examples of special rights that ought to be created in response to the enhanced judicial and police techniques used.¹⁰¹⁴ Ever since, rights on information at least in relation to the EAW have been improved (although as seen the Directive on information rights does not detail which information exactly should be offered in the Letter of Rights in case of EAWs).

Regardless of any remaining gaps, the general framework is clearly more balanced at a legislative level than that existing before the Lisbon reforms. As Mitsilegas notes, the entry into force of the TEU(L) and TFEU has the potential to address concerns over fundamental rights within the AFSJ. In particular, the author notes that the new framework brings the position of the individual and the protection of their fundamental rights to the fore in three ways:

"by strengthening the effects and extending the general reach of general fundamental rights instruments (in particular by granting binding status to the Charter of Fundamental Rights and enabling the accession of the European Union to the ECHR) – the impact of the Charter on the Area of Freedom, Security and Justice has already been felt in the landmark N.S. ruling; by prioritising the adoption of secondary legislation related to the protection of fundamental rights (the Treaty of Lisbon includes an express

¹⁰¹² Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM(2011)326final, 8 June 2011.

¹⁰¹³ See for an overall picture House of Lords, European Union Committee, The European Union's Policy on Criminal Procedure, 30th Report of Session 2010-12, Authority of the House of Lords, 26 April 2012.

¹⁰¹⁴ C. Rijken, "Re-Balancing Security and Justice: Protection of Fundamental Rights in Police and Judicial Cooperation in Criminal Matters" (2010) 47 *Common Market Law Review* 1490.

*– albeit functional – legal basis enabling the adoption of EU measures on the rights of the defendant (...); and by creating a momentum for revisiting the existent third pillar enforcement measures.”*¹⁰¹⁵

5. The CJEU post Lisbon: an exercise of balance between punitiveness and the protection of the individual

In defining the future of ECL and in constructing a balance between punitiveness and individual rights, the CJEU will be of central importance. As seen in Chapter 3, the Lisbon Treaty brought ECL under the full jurisdiction of the Court. The Commission is now able to bring infringement proceedings for Member States’ failure to fulfil their obligations under Title IV TFEU.¹⁰¹⁶ Furthermore, the Court now has full jurisdiction to hear preliminary rulings which should be given with minimum delay in cases involving individuals in custody;¹⁰¹⁷ to hear actions regarding compensation for damages;¹⁰¹⁸ review the legality of legislative acts;¹⁰¹⁹ review the compliance of legislative acts with the principle of subsidiarity;¹⁰²⁰ and review the legality of acts of the European Council and bodies, offices and agencies of the Union intended to produce legal effects in relation to third parties.¹⁰²¹

This is not say that the CJEU’s jurisdiction has no limitations. First, regardless of the significant increase in the Court’s jurisdiction post-Lisbon, the CJEU still cannot review the validity or proportionality of operations carried out by the police and other law enforcement agencies of a Member State or the exercise of responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.¹⁰²² Second, Article 10 of Protocol 36 to the Treaty of Lisbon holds that the CJEU’s powers remain the same—including preliminary rulings—with regard to acts adopted in the field of police and judicial cooperation for a transitional period of five years (the transition period ends on 30 November 2014).

Although the transitional period is still on-going, the Court has already delivered a number of decisions on ECL related matters or on topics of direct interest to ECL that provide some guidance on how the Court will adjudicate on the balancing of different

¹⁰¹⁵ V. Mitsilegas, “FIDE General Report The Area of Freedom, Security and Justice from Amsterdam to Lisbon. Challenges of Implementation, Constitutionality and Fundamental Rights” XXV Congress Tallinn 2012, available at http://www.fide2012.eu/index.php?doc_id=90.

¹⁰¹⁶ Articles 258 – 260 TFEU.

¹⁰¹⁷ Articles 267 TFEU.

¹⁰¹⁸ Article 268 TFEU.

¹⁰¹⁹ Article 263 TFEU.

¹⁰²⁰ Article 8 of Protocol N°2 on the Application of the Principles of Subsidiarity and Proportionality.

¹⁰²¹ Article 263(1) TFEU.

¹⁰²² Article 276 TFEU.

penal values in the future. Similar to the legislative developments described above, the CJEU appears to be conducting its own dialogue between punitiveness and the protection of the individual.

One of the main areas of judicial development has been the interpretation of the Framework Decision on the EAW, namely the interpretation of some of the provisions that allow executing authorities to refuse to surrender the requested person. National implementation of these clauses and issues of how much can Member States discriminate between their own nationals and non-nationals have been important points of discussion. To be sure, this line of case law had its origins in the pre-Lisbon period, which needs to be briefly revisited. As seen in Chapter 5, at least two important cases provided guidance in regard to Article 4(6) of the Framework Decision on the EAW which allows Member States to refuse the surrender of the requested person in cases where the EAW was issued in respect to a person who is staying in, is a resident or a national of the executing State, and the latter undertakes to enforce the sentence himself. The first of those cases was *Kozłowski* in which the CJEU clarified the concept of ‘staying in’ the executing State, noting that it should not be read broadly and that ‘staying in’ entails a level of integration in the society of the executing States similar to that of residence. This, the Court further noted, should be assessed according to objective factors such as the length, nature and conditions of the presence as well as the family and economic conditions which the requested person enjoys in the executing State.¹⁰²³ Subsequently, in *Wolzenburg*, the CJEU held that national legislation implementing Article 4(6) of the Framework Decision requiring nationals of other Member States to have lawfully resided for a continuous period of five years in the Member State of execution, in order to benefit from the non-execution exception, is not disproportionate and hence does not go beyond what was necessary to attain the objective of ensuring that nationals of other Member States achieve a degree of actual integration into the Member State of execution.¹⁰²⁴ This threshold of five years had been directly derived from the Directive on the rights of Union citizens and their family members to move and reside freely within the EU. Recital 17 of the Directive’s preamble and Article 16 of the Directive determine a continuous period of five years as the length of time beyond which Union citizens acquire a permanent right of residence in the host Member State.¹⁰²⁵

¹⁰²³ Case C-68/08, *supra* note 762, in particular at 48.

¹⁰²⁴ Case C-123/08, *supra* note 767.

¹⁰²⁵ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158/77 [2004].

In the post Lisbon period, the CJEU gave further guidance on the interpretation of the grounds for non-execution of an EAW. It did so in *Lopes da Silva*.¹⁰²⁶ The facts of the case are as follows: Mr Lopes da Silva, a Portuguese national, was living in France, was employed by a French company since February 2008 as a long-distance lorry driver under an open-ended contract and had married a French national in 2009. On 14 September 2006, the Court of Appeal of Amiens (France) was seised of proceedings relating to the execution of an EAW issued by the Lisbon Criminal Court in respect to Mr Lopes da Silva, who had been sentenced in Portugal to five years' imprisonment for drug trafficking. He did not consent to his surrender and asked to be imprisoned in France, relying on Article 4(6) of the Framework Decision and on his right to private and family life as enshrined in the ECHR. However, the French legislation, which transposes the Framework Decision on the EAW, restricted the power not to execute an EAW on the grounds provided by Article 4(6) solely to French nationals. The Court of Appeal of Amiens decided to stay national proceedings and refer to the CJEU whether the French legislation limiting the possibility of refusal of the EAW's execution to nationals only—thus absolutely excluding nationals from other Member States who are staying in, or a resident of its territory—was compatible with the Framework Decision.

In its decision, the CJEU pointed out that although Member States are, in principle, obliged to act upon an EAW, they may allow their national authorities to decide that a sentence imposed can be enforced in the territory of the executing Member State in some circumstances, namely in the cases provided for in Article 4(6) of the Framework Decision. In this regard, the CJEU noted that this ground for non-execution has the objective of enabling the judicial authority to give particular weight to the possibility of increasing the requested person's chances of reintegrating into society when his sentence expires. That objective is legitimately pursued when a certain degree of integration in the society of that Member State is demonstrated. The Court went on to note that it had already held in *Wolzenburg*¹⁰²⁷ that a Member State may limit the benefit of that ground for non-execution of an EAW to its own nationals or to the nationals of the other Member States who have lawfully resided within the national territory for a continuous period of five years or more. That condition is justified in that it ensures the requested person is sufficiently integrated in the Member State of execution. Accordingly, in *Lopes da Silva*, the Court found that the Member States cannot, without undermining the principle that there should be no discrimination on the grounds of nationality—as enshrined in Article 18 TFEU—limit the non-execution of a warrant on the ground in question, solely to their own nationals, by automatically and absolutely excluding nationals of other Member States who are staying in or a resident of the territory of the

¹⁰²⁶ Case C-42/11, *supra* note 770.

¹⁰²⁷ Case C-123/08, *supra* note 767.

Member State of execution, irrespective of their connections with that Member State (the terms ‘resident’ and ‘staying in’ having to be defined uniformly by the Member States). The Court further clarified that this did not mean that national authorities were under obligation to refuse to execute an EAW issued in respect to a person staying in or a resident of its territory. However, in so far as there is a demonstrated degree of integration into the society, comparable to that of a national, the executing authority must be able to assess whether there is a legitimate interest which would justify the sentence imposed in the issuing Member States being enforced within the territory of the executing Member State.¹⁰²⁸

The case *I.B.*, concerning the execution of an EAW and trials *in absentia*, also provided further guidance in relation to the grounds for non-execution of an EAW. At stake were, once again, Article 4(6) of the Framework Decision as well Article 5 (1) and (3). Article 5(1) of the Framework Decision stipulates that where the EAW has been issued following a decision rendered *in absentia*, and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered *in absentia*, surrender may be subject to the condition that the issuing judicial authority gives an adequate assurance to guarantee the subject of the EAW will have an opportunity to apply for a retrial; in turn, Article 5(3) holds that the execution of an EAW, for the purposes of prosecution, may be subject to the condition that the national or resident in the executing State, after being heard, is returned to the executing Member State in order to serve the custodial sentence or detention order passed against him in the issuing State. In its decision, the Court emphasised the importance of granting some discretion to Member States in how they choose to implement the grounds for non-execution of an EAW (in case they choose to implement these optional grounds at all). In doing so, the Court reaffirmed that Member States ought to take into account the objective of enabling the possibility of increasing the requested person’s chances of reintegrating into society. The Court thus found that where the executing Member State has implemented Articles 4(6) and 5(1) and (3) of the Framework Decision, the execution of an EAW issued for the purposes of enforcement of a sentence imposed *in absentia*, may be subject to the condition that the person concerned, who is a national or resident of the executing Member State, should be returned to the executing State in order to serve the sentence passed against him, following a new trial, with his presence, in the issuing State.¹⁰²⁹

¹⁰²⁸ Case C-42/11, *supra* note 770, 49-60.

¹⁰²⁹ Case C-306/09 *Proceedings concerning the execution of a European arrest warrant against I.B.* ECR I-10345 [2010] see, in particular, at 61.

These decisions reflect the increasing importance given to different penal values—such as the reintegration of the offender—as the CJEU reasserts the need for Member States to give weight to the person’s chances of reintegrating into the society with which the offender has stronger bonds. In doing so, however, the CJEU does not make it the primary priority, but rather develops a dialogue between the needs of the individual at stake and the obligations of the executing State. Hence, on the one hand, in setting, for example, the principle of non-discrimination between national and residents or persons ‘staying in’ in particular territory, when Member States implement grounds for refusal provided for in the Framework Decision (as the Court did in *Lopes da Silva*), the CJEU extends the protection afforded by the national legislation to a broader class of individuals. However, ruling on the proportionality of the five year requirement before a Member State has to take into consideration the possibility of allowing a national of another Member State to serve a sentence in the territory of the executing Member State, the Court is also excluding the possibility of some people which might already have a considerable connection and level of integration into the society of the executing State from serving a sentence in the place where they are currently living (as seen for example in *Wolzenburg* and indirectly in *Lopes da Silva*). In the context of the *Wolzenburg* case, Herlin-Karnell suggests that the five-year residence requirement—before an individual can fully benefit from host State’s prisons—appears to be a reasonable decision that fully recognises the free movement dimension to the EAW and the burden undertaken by national tax payers.¹⁰³⁰

Yet, if in the context of the EAW, the CJEU is beginning to strike a balance between reintegration of the offender into his or her State of residence and the rules of free movement and punishment, this equilibrium becomes less clear in two recent cases on citizenship matters. The cases are not concerned with instruments of ECL directly, but give an important insight into how far the CJEU is willing to impose values of reintegration of offenders upon Member States, namely when considering expulsion from their territory. The cases were both in context of the already-mentioned Directive on the rights of the Union citizens and their family members to move and reside freely within the EU.¹⁰³¹ The preamble of the Directive notes that it establishes a system of protection against expulsion measures which is based on the degree of integration of Union citizens in the host Member State, so that the higher the degree of integration, the greater the degree of protection they are afforded. In turn, Article 28 of the Directive concerns decisions of expulsion on grounds of public policy and security and notes that, when taking such decisions, Member States shall take into account considerations such

¹⁰³⁰ E. Herlin-Karnell, “European Arrest Warrant Cases and the Principles of Non-discrimination and EU citizenship” (2010) 73 *Modern Law Review* 835.

¹⁰³¹ Directive 2004/38/EC, *supra* note 1025 .

as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic condition, social and cultural integration into the host Member State and the extent of his/her links with their country of origin. Furthermore, the second paragraph of the same Article holds that the host Member State may not take a decision of expulsion against Union citizens, or their family members, who have the right of permanent residence in its territory, except on grounds of public policy and public security; whilst the third paragraph holds that a decision of expulsion may not be taken against Union citizens except if the decision is based on imperative grounds of public security or if they have resided in the host Member State for the previous ten years.

The first case in question concerned Mr Tsakouridis, a Greek national, raised and born in Germany, who was convicted and sentenced to six years and six months imprisonment by the Regional Court of Stuttgart on eight counts of illegal dealing in substantial quantities of narcotics as part of an organised crime group. Consequently, the Regional Administration of Stuttgart determined that Mr Tsakouridis had lost his right of entry and residence in Germany and was liable to be subject of expulsion to Greece.¹⁰³² In appeal, the interpretation of the Directive on citizenship was raised. The CJEU found that dealing with narcotics as part of an organised crime group is a ‘diffuse’ type of crime with impressive economic and operational resources and frequently with transnational connections. Furthermore, it noted that in view of the devastating effects of crimes linked to drug trafficking, this type of criminality poses a threat to health, safety and quality of life for citizens of the Union, and to the legal economy, stability and security of Member States. It further noted that trafficking in narcotics as part of an organised crime group, could reach a level of intensity that might directly threaten the calm and physical security of the population as a whole, or a large part of it.¹⁰³³ Hence the CJEU found that despite Mr Tsakouridis’ level of integration into German society, his dealing with narcotics as part of an organised crime group is capable of being covered by the concept of ‘imperative grounds of public security’ and might justify a measure of expulsion from Germany.¹⁰³⁴

This line of reasoning was confirmed in *P.I.*, a case concerning a decision of expulsion of an Italian national who had lived in Germany since 1987 and was convicted in 2006 to a term of seven years and six months imprisonment for sexual assault, sexual coercion and rape of a minor (member of his family) between 1990 and 2001. Consequently,

¹⁰³² Case C-145/09, *supra* note 855, 11-13.

¹⁰³³ *Ibid.*, 46-47.

¹⁰³⁴ *Ibid.*, 55.

Germany sought his expulsion to Italy.¹⁰³⁵ The CJEU held that in order to determine whether the offences committed by Mr I were covered by the concept of ‘imperative grounds of public security’, a number of factors needed to be taken in consideration: namely, that Article 83(1)TFEU provides that sexual abuse and sexual exploitation of children constitute one of the areas of particularly serious crime with a cross-border dimension in which the EU legislature must intervene. The Court further notes that the recently adopted Directive on combating sexual abuse and sexual exploitation of children¹⁰³⁶ states that such crimes constitute serious violations of fundamental rights. Thus, the CJEU held that Member States may regard criminal offences such as those referred to in the second subparagraph of Article 83(1) TFEU as constituting a particularly serious threat to one of the fundamental interests of society, which in turn, may pose a direct threat to the calm and security of a population and can thus be covered by the concept of ‘imperative grounds of public security’ capable of justifying an expulsion order.¹⁰³⁷ In doing so, however, the Member State ought to also take into consideration conditions such as how long the individual has resided in its territory, age, health, family and economic situation, social and cultural integration and whether the manner in which such offences were committed discloses particularly serious characteristics as well as whether the personal conduct of the individual concerned represents a genuine, present threat affecting one of the fundamental interests of society or of the host Member State, such as the propensity of the concerned offender to act in the same way in the future.¹⁰³⁸

Strikingly, in *P.I.*, the CJEU furthers the possibility of Member States to expand the concept of ‘public security’, as embedded in the Directive on citizenship, with the list of Euro-crimes of Article 83(1)TFEU. This link makes these crimes immediately eligible for consideration of expulsion, should all the other requirements be verified as well. Hence, it appears that, contrary to the cases on the EAW where the Court seemed to be reconciling values of reintegration and punishment, in these citizenship cases, the Court accommodates the goal of reintegration in society of the individuals at stake to a significantly lesser degree.

¹⁰³⁵ Case C-348/09 *P.I. v Oberbürgermeisterin der Stadt Remscheid*, not yet published; 9-11.

¹⁰³⁶ Directive 2011/92/EU, see *supra* note 928.

¹⁰³⁷ Case C-348/09 *P.I.*, *supra* note 1035, 25-28.

¹⁰³⁸ *Ibid.*, 29-32.

6. A renewed challenge for coherence

Whilst ECL architecture seems now to be more balanced with the changes brought about the Treaty of Lisbon and the post Lisbon reforms, a closer look at the most recent developments in ECL highlights the future challenge in the field – that of avoiding fragmentation. As seen in chapter 3, the Treaty of Lisbon provides for emergency brakes, opt-outs and enhanced cooperation in ECL. At the time of this writing, Ireland and the UK have already exercised their right not to opt in to the Directive on access to a lawyer, for example.¹⁰³⁹ The UK in particular has objected that the proposal would be disruptive to its criminal justice systems as it provides for the right to access to a lawyer too soon in the course of criminal proceedings, limits evidence admissible and allows no exceptions to the confidentiality of communications even in cases when the lawyer was involved in criminal activity, amongst other issues.¹⁰⁴⁰ The UK and Irish opt-outs on this measure are the first practical examples of the Lisbon trade-off between further cooperation and maintaining ECL's coherence. Furthermore, there are increasing signs that the UK might choose to opt out of all previously adopted in criminal matters under Protocol 36 of the Lisbon Treaty.¹⁰⁴¹ The exercise of these rights of non participation however does not necessarily prevent other States from going ahead and adopting the measure amongst themselves.¹⁰⁴²

Hence, Lisbon appears to leave ECL at the heart of several divides, yet again. A first divide between calls for more criminal law (and its increasing severity) and some moderation in its adoption, particularly by affording a more significant role to the protection of fundamental and individual rights and by the articulation of criteria for criminalisation such as the principle of subsidiarity and *ultima ratio* in the adoption of ECL measures. However, the compromise that Lisbon proposes to overcome this tension between punitiveness and individuals rights, appears to be one that leaves significant room for fragmentation in ECL, in particular by leaving behind States which see no conditions to pursue further integration. This second divide between fragmentation and

¹⁰³⁹ Proposal for a Directive COM(2011)326 final, *supra* note 1012.

¹⁰⁴⁰ See, for more details House of Lords, The European Union's Policy on Criminal Procedure, *supra* note 1013, 31-34. Belgium, France and The Netherlands have also voiced serious reservations about the Commission's proposal, noting it would present "substantial difficulties for the effective conduct of criminal proceedings by their investigating, prosecuting and judicial authorities", Note from Belgium, France, Ireland, The Netherlands and the United Kingdom to the Proposal for a Directive of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, Doc 14495/11, Brussels, 22 September 2011, 2.

¹⁰⁴¹ A. Hinarejos, J.R. Spencer and S. Peers, "Opting Out of EU Criminal Law: What is actually involved?", CELS Working Papers, University of Cambridge, New Series, N°1, September 2012; See also, The Guardian, "Theresa May takes first step to opting out of EU law and order measures", on 14 October 2012: <http://www.guardian.co.uk/uk/2012/oct/14/theresa-may-law-and-order-measures>

¹⁰⁴² See chapter 3.

further integration in criminal matters could have a significant toll on legal certainty across the EU. The future coherence of European Union Criminal law will thus depend on how much the different actors are willing to keep new initiatives in a middle ground which would allow Member States and the EU to remain committed to a common idea of ECL. Future research in the field will certainly have to focus on the dialectic between these different strains.

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