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EUROPEAN CRIMINAL LAW AS AN EXERCISE IN EU ‘EXPERIMENTAL’ CONSTITUTIONAL LAW

ESTER HERLIN-KARNELL*

ABSTRACT

This contribution explores the evolution of European criminal law through the prism of EU constitutional law and its experimental elements. The paper charts the history of European criminal law by reflecting on the question of to what degree criminal law as an EU policy stands out from the other corners of EU law policies. The paper examines to what extent use of EU law sources in the domain of criminal law has been used in an innovative way and how, as well as to what extent, it differs from mainstream EU law. Furthermore, the paper discusses the issue of enforcement and how the enterprise of EU criminal law could possibly be modernized from the perspective of fundamental rights protection. The paper concludes by looking at the incoming tide of legislative proposals in the area of EU criminal law and how it all adds up to an increased understanding of the AFSJ.

Keywords: EU criminal law; effectiveness; enforcement; experimental; constitutional

§1. INTRODUCTION

I have been asked to reflect on the developments of criminal law policies over the last 20 years. Therefore, it is likely that the present article stands out from the other contributions in this edited collection in that it could be said that EU criminal law *stricto sensu* existed for only about 10 years. In the last decade, the concept of EU criminal law has been transformed from being largely of an intergovernmental nature to becoming a

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streamlined EU policy among others, albeit concerning sensitive nation state questions at its core, such as the protection of human rights and national sovereignty. Hence, in the last 20 years – the timespan and focus of this Anniversary issue – EU criminal law has gone from being a largely anonymous area of law to that of becoming a very dynamic test field for the credentials of the EU project and the establishment of the Area of Freedom, Security and Justice (AFSJ). While sanctions to protect EU interests always played a crucial role in the building and maintaining of the internal market, until fairly recently it was still at the discretion of the Member States to choose what kind of sanctions to impose, as long as the sanctions in question were effective, proportionate and dissuasive.¹ The EU has now created its own criminal law, and this contribution will explore this process and what it tells us about the EU integration project in a wider context.

In what follows, I will focus on what I consider to be the most important developments in European criminal law, which turned it into one of the most forceful EU policy areas at present. I will set out to analyse what have been the main sources of change in this area as well as the role played by the general principles of EU law here and the cross-pollination of those principles and the principles set out in the EU Charter of Fundamental Rights. In addition the paper will look at to what extent the story of EU criminal law has contributed to regulatory innovation for EU governance. In doing so the paper will ask to what extent this debate on governance has been reflected in the debate on the enforcement of EU law with regard to EU criminal law and procedure.

Specifically, the contribution is structured as follows. Section 1 offers a brief introduction of what it means to discuss EU criminal law in today's Europe. Section 2 offers a brief exposé of how EU criminal law came about, firstly by tracing the main Lisbon Treaty changes and thereafter focusing on the innovative use of EU law principles and how they have formed the concept of EU criminal law. Section 3 addresses the issue of whether it is justifiable to speak about 'EU regulatory innovation' with regard to criminal law and if the evolution of criminal law could be linked to EU experimentalist governance by focusing on the flexibility provisions in particular. Thereafter, section 4 places the role of criminal law in the context of the classic enforcement discussion in EU law and the debate on its modernization. Finally, section 5 briefly scans recent legislative practice in EU criminal law as an illuminating example of the interaction of mainstream EU law policies and those pertaining to the AFSJ, and why it represents an important test case of EU law and fundamental rights protection when brought together.

Before proceeding to look at these issues in further detail it seems fitting to begin by briefly setting out what it means to speak about EU criminal law and how we got here in the first place.

¹ Case C-68/88 *Commission v. Greece* [1989] ECR I-02965.

A. A SNAPSHOT OF THE AFSJ FRAMEWORK AND THE PLACE OF CRIMINAL LAW

The policy area of EU criminal law is now situated in Title V of the Treaty of the Functioning of the European Union (TFEU): Article 67 TFEU sets out the EU's mission to ensure an Area of Freedom, Security and Justice (AFSJ) and to combat crime effectively. Yet in order to understand the constitutional dynamics underpinning the notion of EU criminal law it is necessary to give a short reiteration of what is actually at stake when debating its evolution. After all, criminal law was initially of little interest to the EU legislator, who was more concerned with the fundamentals of free movement and the functioning and establishment of the internal market.² The area of criminal law was of interest to the EU in so far as it was needed to ensure and achieve other economic goals. With the Maastricht Treaty era starting in 1993, the famous 'third pillar' was established, which created a separate legal order for criminal law cooperation as well as civil law cooperation, and asylum and immigration law. The Amsterdam Treaty of 1999 clarified the EU's objectives with regard to the fight against crime and the concept of an AFSJ was generated. While asylum matters, immigration and civil law cooperation were moved to the former EC Treaty's Title IV, criminal law cooperation and security remained the hallmark of the third pillar regime under Amsterdam.³ However, the third pillar allowed for limited involvement by the European Parliament in the legislative process and could easily be criticized for having created a democratic deficit and for a lack of transparency in the law-making.

One of the problems with the third pillar was always the restriction of the Court of Justice's jurisdiction. It should be recalled that during the time of the third pillar any jurisdiction of the Court was based on a voluntary declaration by the Member States to confer such jurisdiction (ex Article 35 TEU).⁴ In tandem with the Treaty revisions and the creation of the Amsterdam Treaty, the Tampere Council of 1999 took the notion of European criminal law one step further by introducing the adoption of the internal market formula of 'mutual recognition' into the third pillar. The mutual recognition formula appeared to be a particularly important theme in the development of EU criminal law. The latest European Council on AFSJ issues is the Stockholm Programme which sets out a very ambitious AFSJ scheme. This Programme is important in its claim to be serving citizens while at the same time it illuminates a very strong focus on security in the current fight against crime and terrorism in the EU.⁵ The follow up to

² E.g. among recent books charting this journey, S. Mettinen, *EU Criminal Law Policy* (Routledge, London 2012).

³ See S. Peers, *EU Justice and Home Affairs* (Oxford University Press, Oxford 2011) for an extensive overview of the history of the third pillar, chapter 1.

⁴ *Ibid.*, chapter 2.

⁵ E. Herlin-Karnell, 'Is the citizen driving the EU's criminal law agenda?', in M. Dougan, N. Nic Shuibhne and E. Spaventa (eds.), *Empowerment and Disempowerment of the European Citizen* (Hart Publishing, Oxford 2012), chapter 9.

the Stockholm Programme with an agenda for 2014–2019 is currently in the making. In parallel to these institutional developments, the case law of the Court of Justice has turned out to be a particularly powerful player in the enterprise of securing a space for European criminal law.

The next section will address the question of the extent to which the development of EU law has been shaped by innovative sources of EU law. In doing so the paper will show that the EU legal principle of effectiveness in its capacity as a multifaceted principle has driven this whole area forward, and why understanding the core of this principle is crucial for understanding the narrative of EU criminal law.

§2. INNOVATIVE USE OF SOURCES OF EU LAW: HOW CONTEMPORARY EU CRIMINAL LAW CAME ABOUT

Criminal law offers an intriguing test case of innovative (as well as traditional) use of the EU general principles. Indeed, its very coming into existence at the supranational level has been largely thanks to an extensive reading of EU legal principles such as indirect effect (*Pupino* case)⁶ and the full effectiveness of EU law (*Environmental Crimes* case),⁷ discussed in further detail below. Therefore, the principle of effectiveness played a key role here. For this reason, this section will start by providing an overview of just how and why the principle of effectiveness shaped the current state of play. It could even be argued that the principle of effectiveness has become the main drive in the pursuit of the constitutional evolution of European criminal law and this contribution tries to map out and thereby paint this pattern. It will do so by placing it in the broader setting of how EU criminal law came about.

A. HOW EU CRIMINAL LAW DEVELOPED: EARLY DAYS

The phenomenon of EU criminal law developed as a series of parallel developments taking shape in the former third and first pillars respectively. In the period pre-Lisbon, the assumption was that orthodox principles of EU law did not apply outside the realm of the supranational EC. This assumption was soon to be revised. By now, the *Pupino* case represents one of the 'classics' in EU criminal law cooperation and EU constitutional law more broadly.⁸ In *Pupino* the national court asked the CJEU whether they were required to interpret Italian law in the light of a Framework Decision that enabled minors to give evidence on alternative means. Third pillar instruments such as framework decisions did not have direct effect (according to ex Article 34 EU) and supremacy was not an

⁶ Case C-105/03 *Pupino* [2005] ECR I-05285.

⁷ Case C-176/03 *Commission v. Council* [2005] ECR I-07879.

⁸ Case C-105/03 *Pupino*.

established notion in the third pillar. Nonetheless, *Pupino* made it clear that the principle of consistent interpretation and loyalty applied to the non-EC sphere, the former third pillar. The outcome of this case started a momentum in EU integration, which has seldom been seen. In the wake of the *Pupino* case a number of judgments were delivered, each adding to the understanding of the third pillar and demonstrating how EU legal principles were being imported to the former third pillar as a way of fixing problems which the unsuccessful Constitutional Treaty had failed to achieve.⁹

The European Arrest Warrant (EAW) turned out to be a particularly useful test case in this regard.¹⁰ Notoriously, the EAW replaced the traditional extradition procedures with ones securing ‘surrender’ in accordance with the theme of mutual recognition and where the previous requirement of dual criminality was abolished. The purpose of the EAW was to speed up criminal law cooperation and to fight terrorism more effectively. In short, the EAW litigation saga started with an assumption that mutual trust was the prevailing condition for upholding the legality of the EAW.¹¹ *Advocaten voor de Wereld*¹² was the first test case on the validity of the EAW that was brought before the Court of Justice. *Advocaten voor de Wereld* was a non-profit making association that started a claim in Belgium for annulment of the EAW Framework Decision. One of the questions asked by the national court¹³ was whether the EAW and its abolishment of dual criminality breached the principle of legality in criminal law. This judgment insisted that the underlying idea of the EAW and the rule to abolish the notion of dual criminality did not breach the principle of legality since the Framework Decision was concerned with procedural law and not substantive law. According to the Court of Justice, the main reason for such a conclusion was the high degree of trust and solidarity between the Member States.¹⁴

In these early days the Court sought to establish a European criminal law grid based on mutual trust as the managing principle for mutual recognition. The notion of trust in this area has in many ways worked as a panacea for a lack of uniformity and for

⁹ Many commentators have written on this phenomenon, see e.g. S. Peers, ‘Salvation outside the Church: Judicial Protection in the Third Pillar after the Pupino and Segi Judgments’, 44 *Common Market Law Review* 4 (2007), p. 883; A. Hinarejos, *Judicial control in the European Union: reforming jurisdiction in the intergovernmental pillars* (Oxford University Press, Oxford 2009).

¹⁰ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, [2002] OJ L 190/1.

¹¹ Among the many commentators, e.g. V. Mitsilegas, ‘The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU’, 43 *Common Market Law Review* 5 (2006), p. 1277; C. Rijken, ‘Re-balancing Security and Justice: Protection of Fundamental Rights in Police and Judicial Cooperation in Criminal Matters’, 47 *Common Market Law Review* 5 (2010), p. 1455; S. Peers, *EU Justice and Home Affairs*, chapter 9; M. Fichera, *The implementation of the European Arrest Warrant in the European Union Law, Policy and Practice* (Intersentia, Antwerp 2011).

¹² Case C-303/05 *Advocaten voor de Wereld VZW v. Leden van de Ministerraad* [2007] ECR I-03633.

¹³ The other questions asked were whether the EAW should have been adopted as a Convention rather than as a Framework Decision and whether the EAW breached the principles of equality and non-discrimination.

¹⁴ V. Mitsilegas, *EU Criminal Law* (Hart Publishing, Cheltenham 2009), p. 138–142.

subverting obstacles to the operation of the EAW by insisting on sufficient trust as a driver of integration. Yet, and perhaps needless to say, the strong emphasis on trust created by the Court, where mutual recognition was pushed forward without an adequate system of underlying fundamental rights protection, was highly problematic and not in harmony with the EU rule of law.

B. LISBON CHANGES: INSTITUTIONAL TRANSFORMATION

The Lisbon Treaty reshuffled the constitutional setting for how to understand EU criminal law, firstly by establishing a legal basis (in Title V of the TFEU) and secondly by abolishing the third pillar and thereby 'communitarizing' the sphere of the AFSJ. A great deal has been written about this constitutionalization process, and the present contribution will therefore not repeat this important journey.¹⁵ It should however be pointed out that for criminal law, the crucial provisions are Articles 82 TFEU (procedural criminal law) and 83 TFEU (substantive criminal law). These provisions, however, need to be read in the light of Chapter I of Title V of TFEU, which sets out the general goals to be achieved in this area. More specifically, Article 67 TFEU stipulates, inter alia, that the Union shall constitute an AFSJ with respect for fundamental rights and the different legal systems and traditions of the Member States. So the project of EU criminal law is part of a bigger venture to establish an AFSJ. Of particular importance here is Article 83(1) TFEU, which concerns the regulation of substantive criminal law. It stipulates that the European Parliament and the Council may establish minimum rules in directives concerning the definition of criminal law offences and sanctions in the area of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences; or from a special need to combat them on a common basis. Thereafter, this provision sets out a list of crimes in respect of which the EU shall have legislative competence, such as terrorism, organised crime, money laundering, counterfeiting of means of payment, and computer related crime. It also states that the Council may identify other possible areas of crime that meet the cross-border and seriousness criteria. Furthermore, Article 83(2) establishes that the possibility exists for approximation of national laws if a measure proves to be essential towards ensuring the effective implementation of a Union policy in an area that has already been subject to harmonization measures.

Apart from the abolition of the third pillar as well as the specific EU competences in criminal law, there are several important novelties that need to be considered. For example, the emergency brake provisions (where Member States can pull a brake if the proposed legislation is sensitive to the national criminal law system), and the notion of expedited procedures for persons in custody. Article 267 TFEU provides that if a question

¹⁵ E. Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (Hart Publishing, Oxford 2012), chapter 2; V. Mitsilegas, *EU Criminal Law*; S. Mettinen, *EU Criminal Law Policy* (Routledge, London 2012).

is raised in a case pending before a court or tribunal in a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with minimum delay.¹⁶ That said, the Court of Justice's jurisdiction to govern the former third pillar introduced by the Lisbon Treaty does not extend unreservedly. For example the Court still does not have the power to review the validity or proportionality of operations carried out by the police or 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 (Article 276 TFEU).

This section will now turn to the most obvious use of innovative sources of EU law in the context of contemporary EU criminal law: that of the use of the effectiveness principle as the leading principle in this area.

C. EU CRIMINAL LAW IN THE BROADER CONTEXT: USE OF EFFECTIVENESS

This subsection demonstrates the various ways that the effectiveness principle has been used in EU criminal law.¹⁷ In particular, it seeks to demonstrate the force of this principle and how much of the development of EU criminal law has been shaped by the unusually broad contours of 'effectiveness' reasoning. The classic principle of effectiveness is often held to stem from the more general loyalty obligation, Article 4(3) TEU (formerly Article 10 EC), and has played a crucial role in shaping the contours of the effectiveness of EU law.¹⁸ For example, the doctrines of indirect effect, state liability, and supremacy are also embedded with 'effectiveness' thinking.¹⁹ In addition, the Lisbon Treaty has introduced an explicit legal basis for effective judicial protection, so use of the principle of effectiveness in the area of judicial protection is more legally settled. This is the new provision of Article 19 TEU which codifies existing case law and states that Member States shall provide sufficient remedies to ensure effective legal protection in the fields covered by EU law. In addition, Article 47 of the EU Charter of Fundamental Rights ('the Charter') states that everyone has the right to an effective remedy. Therefore, it seems clear that the contextualization is the important aspect here and where the effective function of EU law might differ a lot depending on the policy area in question, and where criminal law appears particularly delicate.

¹⁶ The procedure is governed by Article 23a of the Protocol on the Statute of the Court of Justice and Article 104b of its Rules of Procedure.

¹⁷ See E. Herlin-Karnell, *The Constitutional Dimension of European Criminal Law*, ch. 4.

¹⁸ For an overview, e.g. J. Temple Lang, 'The Developments of the Court of Justice on the Duties of Cooperation of National Authorities and Community Institutions Under Article 10 EC', 31 *Fordham Int'l L.J.* 6 (2008), p. 1483.

¹⁹ P. Craig, *EU Administrative Law* (Oxford University Press, Oxford 2012); Case C-106/89 *Marleasing* [1990] ECR I-04135.

Against the backdrop of the broader framework of European law, the question that needs to be asked is to what extent 'effectiveness' is more than a mere assertion of supremacy and why it is different in EU criminal law from more classic areas of European law. Indeed, effectiveness has been given many expressions in EU law and criminal law, and offers an excellent example of the elasticity of this concept.

1. *Different shades of effectiveness: the legacy of the Environmental Crimes case*

The principle of effectiveness has in many ways been the driving principle for the evaluation of EU criminal law. The story of the environmental crimes case, Case C-176/03, is interesting, and started with an initiative by Denmark for a proposal for a Framework Decision on the protection of the environment through criminal law.²⁰ The Commission did not agree and made a proposal for a directive that would oblige Member States to take criminal law action for the protection of the environment.²¹ This Directive was noteworthy because it challenged the previous assumption that the EU has no legislative competence in the field of criminal law. In the context of a challenge against the validity of the Directive, the Court of Justice made it clear 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, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that rules which it lays down on environmental protection are fully effective.

So a lot of weight was loaded onto the full effectiveness of the EU when asserting the EU's competence.²² In the subsequent *Ship Source Pollution* case²³ the Court confirmed this view but left the level of the penalty to be applied for the Member States to decide, as it fell outside of the EU's competence. As noted above, the EU had of course, early on, insisted on effective sanctions against breaches of EU law (the effective, proportionate and dissuasive criteria stipulated in *Greek Maize* and other cases),²⁴ but in the *Environmental Crimes* case, the EU legislator concluded that criminal law could fall within the EU sphere of competence if it was necessary for the full effectiveness of EU law.

²⁰ Framework Decision on combating environmental crime, [2000] 383/JHA, OJ L39/4.

²¹ Proposal for a Directive on the Protection of the Environment through Criminal Law, [2001] OJ C 180/238 and amended proposal, [2003] OJ C 20/284.

²² Relevant here was also ex Article 47 TEU that stated that if something could be done by the first pillar it should be done by that pillar.

²³ *Ship Source Pollution* case concerning Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and the introduction of penalties for infringement, [2005] OJ L 255/11, based on Article 80(2) EC, and amended by Directive 2009/123/EC of the European Parliament and of the Council on 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements, [2009] OJ L 280/52.

²⁴ Case C-68/88 *Commission v. Greece* [1989] ECR I-02965, para. 24.

a. Effectiveness and mutual recognition

In the recent case of *Da Silva Jorge*, the Court of Justice stretched the reach of the classic effectiveness test to the EAW cases.²⁵ In the *Da Silva Jorge* case the full effectiveness of EU law played an important role where the Court of Justice emphasized the importance of it as a pre-condition of the operation of the EAW. Particularly, the Court stated that where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.²⁶ Moreover in *Melloni*,²⁷ on the validity of the amendments made to the EAW,²⁸ the Court of Justice held that an overly broad interpretation of the EU Charter of Fundamental Rights (Article 53), with the effect of granting extra rights and thereby safeguarding national constitutions, would not only undermine the principle of the primacy of EU law but also the effectiveness of EU law. Hence, the principle of effectiveness is a powerful tool, which does not seem to fade away that easily.

When discussing effectiveness in EU criminal law, an obvious question is to what extent it represents something new at all? In other words, could one see a similar pattern in other corners of EU law? The frequent use of effectiveness in everyday EU law vocabulary is far from new. The principle of 'effectiveness' as referred to by the Court is an umbrella term, which, generally speaking, requires that national remedies and procedural rules must not, in practice, render their beneficiaries' enjoyment of Community rights excessively difficult.²⁹

The argument here is that 'effectiveness' is used slightly differently in EU criminal law, where it has been utilized not only to enforce existing EU legislation but also to 'discover' new competences. Some would argue that this has turned the principle of effectiveness into a constitutional competence-parameter for deciding the EU's competence in the first place. Such an argument goes hand in hand with the view that over-use of effectiveness is dangerous as there are not many constraints in place when trying to monitor its reach.³⁰

²⁵ Case C-42/11 *Joao Pedro Lopes Da Silva Jorge*, Judgment of 5 September 2012, not yet reported; for an analysis E. Herlin-Karnell, 'From Mutual Trust to the Full Effectiveness of EU law: 10 Years of the European Arrest Warrant', 38 *European Law Review* 1 (2013), p. 79-91.

²⁶ Case C-399/11, *Criminal proceedings against Stefano Melloni*, Judgment of 26 February 2013, not yet reported, para. 60.

²⁷ Opinion of Advocate General Bot in Case C-399/11 *Criminal proceedings against Stefano Melloni*.

²⁸ Council Framework Decision 2009/299/JHA of 26 February 2009 amending Decision 2002/584/JHA 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 trial, [2009] OJ L 81/24.

²⁹ Similarly, see M. Accetto and S. Zleptnig, 'The Principle of Effectiveness: Rethinking Its Role in Community Law', 11 *European Public Law* 3 (2011), p. 375; M. Ross, 'Effectiveness in the European Legal Order(s): Beyond Supremacy to Constitutional Proportionality', 31 *ELRev* 4 (2006), p. 476.

³⁰ E. Herlin-Karnell, *The Constitutional Dimension of European Criminal Law*.

b. Effectiveness concern and anti-money laundering legislation

The recent ruling in *Jyske Bank* represents a 'mixed' example of use of criminal law and old-fashioned market integration based on effectiveness concerns.³¹ The question posed to the Court of Justice was whether Spain's interpretation of the Third Money Laundering Directive³² was going too far. The Directive is based on the internal market provision of Article 114 TFEU as well as on the services provision of Article 56 TFEU. *Jyske Bank*, a Danish credit institution based in Gibraltar, operated in Spain under the rules on the freedom to provide services. It challenged the Spanish law implementing the Third Money Laundering Directive on the basis of (in effect) 'gold plating' or over-implementation in Spanish law of the Money Laundering Directive. The Directive requires each Member State to establish a central financial intelligence unit (FIU) responsible for receiving, analysing and disseminating information to the competent authorities on potential money laundering or terrorist financing. In addition, the Directive provides for that information to be forwarded to the FIU of the Member State in whose territory the institution is situated. Yet Spanish legislation required that all information was gathered in Spain regardless of where the institution in question was legally located. *Jyske* challenged this on the basis of the free movement of services.

The Court in its recent judgment again focused on the effectiveness of the EU measure. It held in paragraph 49 of the ruling that the Directive:

could not preclude Member States legislation which requires credit institutions carrying out activities in its territory under the rules on the freedom to provide services to forward the required information directly to its own FIU, in so far as such legislation seeks to strengthen, in compliance with European Union law, the effectiveness of the fight against money laundering and terrorist financing.

The Court added however that the effectiveness of the measure in question could not be disproportionate. It is a judgment on the borderline of criminal law and internal market law, and confirms the importance – or fashion – of the principle of effectiveness as a key principle which unites competing interests. Accordingly, the principle of effectiveness in EU criminal law has come a long way from its simple assertion of dissuasive, effective and proportionate sanctions to protect EU law interests.³³ It is argued that 'effectiveness' as indicated in the area of criminal law has developed to a chameleonic principle and that it finds expression not only as an enforcement principle, but also as a legislative principle for deciding on competence in EU law. In addition it forms part of the Court of Justice's reading into and insistence on mutual trust.

³¹ Case C-212/11 *Jyske bank*, Judgment of 16 April 2013, not yet reported.

³² Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, [2005] OJ L 309/15.

³³ Case C-68/88 *Commission v. Greece* [1989] ECR I-2965.

Whilst acknowledging and asserting the general effectiveness ratio in this area, the present paper moves on to investigate to what extent criminal law at the EU level fits the emerging pattern of constitutional ‘experimentalism’ in EU law.³⁴

§3. REGULATORY INNOVATION? EU CRIMINAL LAW AS A TEST CASE IN ‘EXPERIMENTALISM’

This section will try to place the above developments in context and assess to what extent the concept of EU criminal law/and the AFSJ more broadly can be said to represent experimentalist governance. For one thing, criminal law represents expressive governance in that it implies a symbolic statement by the legislator that some conduct is wrong and thereby penalized.³⁵ While the function of the EU as a norm exporter to the Member States is far from new and formed part of how much of EU law was developed, its involvement in criminal law is still embryonic. Yet allowing the EU to claim a ‘symbolic’ role in criminal law would arguably be a step too far in the current state of play. There is a clear lacuna with regard to the democratic credentials in the AFSJ, and where notions such as citizenship and state liability will improve individuals’ rights but where the legitimacy is still a work in progress.

The present section will focus on the concepts of flexibility and differentiation in the context of EU criminal law and try to link these notions to the recent debate on EU governance and alternative readings of EU law such as the experimental model in EU law. Indeed, the enhanced cooperation mechanisms as well as the challenges caused by the tangled web of what could be labelled as ‘flexibility’ offer an interesting example of regulatory practice in EU criminal law. Arguably it represents new governance despite its limited ‘newness’.³⁶ However the question of what is – and should be – considered as ‘good governance’ or what is truly ‘reflective’ and ‘experimental’ governance is a difficult one.³⁷ According to Kumm, an experimentalist understanding of EU constitutional law can be deduced from that of the flourishing theories of pluralism in EU law.³⁸ It means that there may be alternative ways of understanding EU law and that that very understanding may insist on the provision of national identity, where Article 4(2) TEU

³⁴ See J. Zeitlin and C. Sabel, *Experimentalist Governance in the European Union: Towards a New Architecture* (Oxford University Press, Oxford 2010).

³⁵ See J. Turner, ‘The Expressive Dimension of EU criminal law’, 60 *The American Journal of Comparative Law* (2012), p. 555.

³⁶ E.g. K. Armstrong, ‘Law after Lisbon: Legalization and Delegalization of European Governance’, 64 *Current Legal Problems* 1 (2011).

³⁷ See E. Herlin-Karnell, ‘Enhanced Cooperation and Conflicting Values: Are New Forms of Governance the same as Good Governance?’, in E. Herlin-Karnell, M. Trybus and L. Rubini (eds.) *After Lisbon: The Impact of the New Treaty on European Union and the Treaty on the Functioning of the European Union* (Edward Elgar Publishing, Cheltenham 2012).

³⁸ M. Kumm, ‘Constitutionalism and experimentalist governance’, 6 *Regulation and Governance* 3 (2012), p. 401.

is a key aspect for successful management of the European process. Indeed, a novelty as offered by the Lisbon Treaty is the national (and constitutional) identity clause as set out in Article 4(2) TEU. Arguably, this national identity clause is connected to the subsidiarity principle, as it insists on respecting Member State values.

In the setting of EU criminal law, the expression of 'experientialism' is perhaps most evident in the landscape of flexibility or differentiation in EU law. The notion of flexibility or differentiation is generally described as the facilitation or accommodation of a degree of difference between states or regions in relation to what would otherwise be 'common' Union rules.³⁹ In any case, the general rule is that the Commission and the Council give their permission for enhanced cooperation to take place within the framework of the Lisbon Treaty. However, in the criminal law field there is no need to fulfil the last resort requirement as the Lisbon Treaty provides possibilities of establishing 'automatic' enhanced cooperation in criminal law should nine Member States wish to move further than the Member State(s) which pulled the 'emergency brake'. As will be explained below, there is a possibility for Member States, as set out in Articles 82–83 TFEU to pull an 'emergency brake' – or quasi opt-out – if the legislation in question would interfere with fundamental aspects of the national criminal law system at issue. Arguably the establishment of enhanced cooperation within Title V Part I of the TFEU raises many questions as it emphasizes conflicting rationalities in this area between moving forward and restraining action. The next section of this contribution will attempt to explain why.

An example of differentiation in criminal law is the emergency brake provisions and the enhanced cooperation mechanisms as provided by Articles 82 and 83 TFEU.

EMERGENCY BRAKES AND FLEXIBILITY IN A MULTI-SPEED EUROPE

In the context of EU criminal law, the question of enhanced cooperation is tied to the 'emergency brake' provisions. Enhanced cooperation under the Lisbon Treaty means that some Member States can choose to establish a closer cooperation between themselves and is set out in Article 20 TEU and Articles 326–334 TFEU, regrouping the previous four sets of rules on enhanced cooperation into two groups.⁴⁰ Thus, the general framework is set out in the TEU while the TFEU sets out the specific criteria and details. Hence, the TEU and TFEU have to be read in conjunction when analysing the possibilities of the establishment of enhanced cooperation. In short, Articles 82 and 83 TFEU respectively permit Member States to 'apply the brakes' if the legislation in question would affect fundamental aspects of their criminal law legislation. Regardless of whether a single Member State pulls such an 'emergency brake', the Lisbon Treaty

³⁹ G. de Búrca, 'Legal Principles as an Instrument of Differentiation?', in B. de Witte, D. Hanf and E. Vos (eds.), *The Many Faces of Differentiation in EU Law* (Intersentia, Antwerp 2003), p. 131.

⁴⁰ J.-C. Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge University Press, Cambridge 2010).

provides nonetheless for the possibility of enhanced cooperation for the remaining nine (or more) Member States. Articles 82 and 83 TFEU of the Lisbon Treaty respectively, state:

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 a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329 of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

Briefly, this means that there is no obligation as set out in Article 329 TFEU of the Lisbon Treaty to address a request to the Commission, specifying the scope and objectives of the enhanced cooperation in question. Neither is there an obligation (as Article 20(2) TFEU of the Lisbon Treaty reads) that the Council shall, as a last resort, adopt the decision at issue. In addition, there is no obligation to consult the European Parliament. I have previously argued that the mere fact that the Member States do not need to show the last resort requirement as stated in Article 20(2) TFEU could be regarded as not being in harmony with the sensitive character of criminal law as the *ultimo ratio*, where EU criminal law appears a *primo ratio*, id est, a short cut solution without any underlying criminal law policy.

Perhaps this worry was overemphasized: so far there has been no establishment of enhanced cooperation in EU criminal law, despite the high amount of legislative proposals that are currently being drafted (the ordinary legislative procedure being one of the novelties in the AFSJ as a result of Lisbon). Nonetheless, in other areas the occurrence of enhanced cooperation is slowly taking shape.

Recently, enhanced cooperation was granted in the area of unitary patent. Such an authorization was challenged in *Spain and Italy v. Council*.⁴¹ The question was whether a unitary patent fell within the exclusive competence of the Union or if it was a shared one. Only shared competences may be the subject of closer cooperation. The decision was challenged on the ground that a unitary patent was not a matter governed by the shared competence of the Union, which is one of the criteria for relying on Article 20(2) TEU and Article 326 TFEU. However, the Court upheld the decision to establish closer cooperation.⁴² In doing so, the Court made it clear that by creating a unitary patent applicable in the participating Member States only (while being open to all Member States) and not in the EU, the contested decision did not damage the internal market or the economic, social and territorial cohesion of the EU. Arguably this demonstrates a low threshold for the Member States wishing to establish such cooperation. It is likely that,

⁴¹ Joined Cases C-274/11 and C-295/11 *Spain and Italy v. Council*, Judgment of 16 April 2013, not yet reported.

⁴² *Ibid.*

should enhanced cooperation be granted in criminal law in future, the threshold will be even lower bearing in mind that such an authorization in criminal law is 'automatic', id est, granted directly.

Opting in and opting out: a challenge to established regulatory practice

The UK and Irish opt-out is one of the hottest topics in AFSJ law as these Member States have negotiated a unique approach to the AFSJ project which in essence means a pick and choose approach. The opt-out regime poses challenges in particular for the Court of Justice when asked to monitor EU constitutional principles in this area. Specifically, the UK and Ireland have the opportunity to opt out of any criminal law cooperation measure concluded within the framework of the AFSJ as stipulated in Protocol No. 21 of the Lisbon Treaty. Needless to say, this is bound to be a political decision and will be the cause of further complexity in the legal discussion of the AFSJ. Future case law must clarify what this tells us with regard to the scope of the Charter of Fundamental Rights. The position of Denmark in particular, and Protocol No. 22, appears to be even more challenging. Denmark offers an exceptional test case for the feasibility of the AFSJ project when some Member States remain outside. More concretely, Protocol No. 22, attached to the Lisbon Treaty, grants Denmark a special position by granting it the right to remain outside the project. This Protocol means that Denmark participates in Schengen related measures and pre-Lisbon third pillar instruments on the basis of international law which continue to be binding and applicable to Denmark as before, even if these acts are amended. Denmark may however notify the other Member States that it wishes to join the EU criminal law venture.

It remains to be seen to what extent the Court of Justice will develop the principles as recognized in the Charter to cover situations where the UK has opted out. The most intriguing example would be that of legal safeguards. After all, Articles 47–50 of the Charter, which guarantees not only effective judicial protection but also compliance with the principle of legality and so on, could be interpreted as a codification of general principles of EU law and hence applicable to the area at stake regardless of any opt out. Arguably, the opt-out area offers a fascinating yet complicated test case of just what constitutional principles apply and how they work in the AFSJ. The opt-out area and the concept of a multi-speed Europe is a delicate testing ground of the emerging and divergent field of the AFSJ policy field, and the scope and function of the classic EU constitutional principles to this area.⁴³ Given that the main theme within EU criminal

⁴³ For a recent analysis, E. Herlin-Karnell, 'Denmark and the European Area of Freedom, Security and Justice: A Scandinavian Arrangement', *Amsterdam Law Forum* (2013), p. 95. For an early analysis of differentiation D. Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces', 30 *Common Market Law Review* 1 (1993), p. 17.

law cooperation is still mutual recognition, it could be argued that the opt-outs pose a real challenge to the credibility of the EU project and the striving for consistency.⁴⁴

In conclusion, the area of EU criminal law offers a delicate albeit good test case of experimentalism in terms of innovation in EU constitutional law, and perhaps more importantly, in EU legal practice. The innovative use of the principle of effectiveness aside, it was argued that the notion of differentiation and the function of the emergency brake as well as the complex opt out provisions offer examples of an alternative model of EU integration not based on the traditional one-size-fits-all model of harmonization. Moreover, the debate on innovative use of EU law is obviously connected to the discussion on how to modernize enforcement of EU law.

§4. KEY DEBATES ON HOW TO MODERNIZE ENFORCEMENT IN EU CRIMINAL LAW

There has been surprisingly little debate in EU criminal law on to how to modernize its enforcement. To the extent that there has been such a discussion, the debate on enforcement in the EU criminal law setting has been very focused on the Stockholm Programme's agenda⁴⁵ and the stipulation of the future objective of the EU in this area and the importance of the creation of trust in the AFSJ as well as the instance on security dominated measures.⁴⁶ However, it could be argued that enforcement in this context has not, as in the classic EU law domain, been concerned with individual rights in national courts but rather on the enforcement of coercive measures in the name of security concerns. A crucial task for the future is consequently to modernize the current model of enforcement in making sure that not only the security agenda is being pursued in accordance with Article 67 TEU and the EU's ambition to maintain a high level of security but also to make sure that individual rights are respected in this European process of establishing an AFSJ and where criminal law plays a key role.

The Commission's recent Communication 'Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law' is particularly interesting as it offers a concrete example of a nuanced debate in the EU institutions

⁴⁴ For a more extensive analysis, E. Herlin-Karnell and T. Konstadinides, 'The Rise and Expressions of Consistency in EU Law: Legal and Strategic Implications for European Integration', 15 *Cambridge Yearbook of European Legal Studies* (2013), forthcoming.

⁴⁵ Council of the European Union, The Stockholm Programme – An open and secure Europe serving and protecting the citizen, Brussels 2 December 2009, www.se2009.eu/polopoly_fs/1.26419!menu/standard/file/Klar_Stockholmsprogram.pdf (last visited 20 June 2010).

⁴⁶ On enforcement and EU criminal law, M. Dougan, 'From the Velvet Glove to the Iron Fist: Criminal Sanctions for the Enforcement of Union Law', in M. Cremona, *Compliance and the Enforcement of EU Law* (Oxford University Press, Oxford 2012).

in the sphere of EU criminal law.⁴⁷ This Communication explicitly mentions not only the need to develop a coherent system of EU criminal law policy, but also highlights the concerns of EU citizens. Part of the justification for this Communication is, therefore, the added value of EU criminal law, in line with the wishes of the EU citizens. It seems clear that the enforceability of the Charter plays an important role in the context of the rights of the citizens. For this reason this section will focus on recent developments in EU criminal law enforcement by discussing the reach of the Charter with regard to fundamental rights protection in this area.

ENFORCING THE CHARTER? *MELLONI*, *ÅKEBERG FRANSSON* AND ALL THAT

This section will focus on a number of recent cases where the question of modernized enforcement in EU criminal law seems inexorably linked to the Charter of Fundamental Rights. It is here that the enforcement of EU law in criminal law matters is put to the test. At the outset it should be reiterated that the Charter applies to the EU institutions and to the Member States when they implement EU law, in accordance with Article 51 of the Charter. Nonetheless, the Charter has always had an important function as a source of interpretation in EU law. As for criminal law, Articles 47 to 49 of the Charter have a huge influence, as they set the framework for the EU's action in this area. It is, therefore, likely that the binding status of the Charter will have a real impact on criminal law. It could, therefore, be argued that the Charter not only underlines and clarifies the legal status and freedoms of the EU's citizens facing the institutions of the Union,⁴⁸ but also gives the Union and, in particular, the policies regarding the AFSJ, a new normative foundation. Yet, one difficulty with the Charter is its enforcement, and indeed the legitimacy of it, in those cases where it is not so obvious that we are dealing with implementation of EU law.

A recent example of use of the Charter in the context of sanctions is the recent case of *Åkerberg Fransson* concerning the compatibility with the *ne bis in idem* (Article 50 of the Charter) principle of a national system involving two separate sets of proceedings to sanction the same wrongful conduct.⁴⁹ Advocate General Cruz Villalón stated in his Opinion that Article 50 of the Charter did not preclude the Member States from bringing criminal proceedings relating to facts in respect of which a final penalty has already been imposed in administrative proceedings relating to the same conduct, provided that the national criminal court was in a position to take into account the prior existence of

⁴⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, COM (2011) 573 final.

⁴⁸ I. Pernice, 'The Treaty of Lisbon and Fundamental Rights', in S. Griller and Z. Ziller (eds.), *The Lisbon Treaty EU Constitutionalism without a Constitutional Treaty?* (Springer, New York 2008), p. 235.

⁴⁹ Case C-617/10 *Åkerberg Fransson*, Judgment of 26 February 2013, not yet reported.

an administrative penalty for the purposes of mitigating.⁵⁰ The Court of Justice in turn did not elaborate on this aspect of proportionality, but adopted a very broad reading of the Charter.⁵¹ It held that although the national rules in questions did not *stricto sensu* involve any implementation, it was clear from Article 325 TFEU that the Member States are required to fight fraud against the EU and thereby supply the same level of sanctions for EU fraud and domestic fraud respectively. Moreover, such an obligation could be deducted from the general obligations to punish tax fraud as stemming from the VAT Directive (2006/112/EC).⁵² From this it followed, according to the Court, that Sweden was ‘implementing’ EU law as it was under an established obligation to supply the same level of penalties for EU fraud and domestic fraud respectively. Besides, the Court observed that EU law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter conditional upon that infringement being clear from the text of the Charter or the case law relating to it. According to the Court such an interpretation would withhold from the national court the power to assess fully whether that provision in question is compatible with the Charter.⁵³ On the one hand the Court constructed a very narrow definition of *ne bis in idem*. On the other hand it expands the reach of the Charter, which could have important repercussions for the future of fundamental rights protection in EU law.

In the recent decision of *Stefano Melloni*,⁵⁴ on the validity of the amendments made to the European Arrest Warrant (EAW) by Framework Decision 2009/299/JHA,⁵⁵ and addressing the application of the principle of mutual recognition to trial *in absentia*, Advocate General Bot provided an interesting account of the relationship between the EAW and the Charter of Fundamental Rights. The Advocate General focused on Article 53 of the Charter, which provides for the highest relevant human rights standard to be applied. In doing so, he argued that the Charter is not, in any event, a primacy-restricting measure and does not empower the Member States to ‘opt-out’ from EU law. The Court of Justice agreed and held that such an interpretation of Article 53 of the Charter would undermine the principle of the primacy of EU law. Specifically, the Court stated that where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not

⁵⁰ Opinion of Advocate General Cruz Villalón in Case C-617/10 *Åkerberg Fransson*.

⁵¹ *Ibid.*

⁵² Case C-617/10 *Åkerberg Fransson*, para. 27–28.

⁵³ *Ibid.*, para. 48.

⁵⁴ Opinion of Advocate General Bot in Case C-399/11 *Criminal proceedings against Stefano Melloni*.

⁵⁵ Council Framework Decision 2009/299/JHA.

thereby compromised.⁵⁶ Without guessing too wildly, it seems safe to predict that this area is set for important developments in the future.

Furthermore, in the *Radu* case Advocate General Sharpston went as far as suggesting that the Charter should constitute the template for deciding on the scope of mutual recognition.⁵⁷ According to Advocate General Sharpston, the attribution of binding force to the Charter is an expression of a political move towards enhancing the visibility of human rights and merely confirms the human-rights oriented approach which had already been enshrined in the Framework Decision in question (the EAW in this case) prior to the entry into force of the Treaty of Lisbon.⁵⁸ The Court of Justice in its recent judgment did not elaborate on this aspect either.⁵⁹ Accordingly, while mutual recognition plays a key role in the establishment of an AFSJ it is no longer a blind insistence of mutual trust, but such trust has to fit within what is acceptable from a fundamental rights perspective.

An important issue in the present context is the exact impact of the principle of proportionality to these cases. As noted above, the Charter is addressed to the EU institutions and the Member States when they are implementing Union law.⁶⁰ Nevertheless, there is good reason to believe that the Charter will have a wider impact in the area of EU criminal law. It could be argued that it is exactly in this balancing exercise of new legislation that the Charter has a huge impact when deciding on the content of new legislation.⁶¹ Nevertheless, future cases must clarify to what extent it is desirable to extend the scope of the Charter and increase rights against the possible will of the Member States. As explained above, the development of EU criminal law has so far mostly been concerned with the insistence on effectiveness. In future, the principle of proportionality will perhaps take over as a driving principle in this area by balancing that of the Member States' interests and the obligations set by the Charter.

The final section of this contribution will turn to two concrete areas in EU criminal law: that of financial crimes and procedural safeguards. This section seeks to demonstrate the force of EU criminal law in legal practice.

⁵⁶ Case C-399/11 *Criminal proceedings against Stefano Melloni*, para. 60.

⁵⁷ Opinion of Advocate General Sharpston in Case C-396/11 *Radu*, Judgment of 29 January 2013, not yet reported.

⁵⁸ *Ibid.*

⁵⁹ Case C-396/11 *Radu*.

⁶⁰ For an overview see M. Dougan, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts', 45 *CMLRev* 3 (2008), p. 617.

⁶¹ See E. Herlin-Karnell, *The Constitutional Dimension of European Criminal Law*.

§5. THE INCOMING TIDE OF LEGISLATIVE PROPOSALS: FINANCIAL CRIMES AND LEGISLATION FOR PROCEDURAL SAFEGUARDS

As explained, the Lisbon Treaty has significantly changed the structure of the allocation of powers between the EU and the Member States with regard to EU criminal law. Article 83(2) TFEU appears particularly important as it provides for criminal law legislation in an area which has already been subject to the EU's harmonization programme – if it is essential for the effective implementation of an EU policy. It is argued that it represents a codification of the Case C-176/03 approach, that criminal law can be harmonized in order to ensure the full effectiveness of EU law.⁶² The proposal for a directive on criminal sanctions for insider dealing and market manipulation is instructive as the first concrete example of the use of Article 83(2) TFEU.⁶³ The proposed Directive argues that market integrity is needed for the smooth functioning of the internal market. Accordingly, it seems as if the same EU legislative justifications are at work here, such as regarding the market rationale and the need for harmonization in criminal law that are often used under Article 114 TFEU.⁶⁴ The proposed Directive creates a new framework for the purposes of fighting crime while it regroups the previous market abuse regime into a separate regulation to increase the effectiveness of the system. The proposed Directive is a prime example of the invocation of criminal law to guarantee the effectiveness of European policies in this area.⁶⁵ Hence, there is reason to believe that the Court will take at face value the claims of the EU legislator just as it has done in the internal market context.⁶⁶

A. CONFISCATION OF PROCEEDS OF CRIMES

A further recent example of activity in the field of substantive criminal law legislation at the EU level is the recent proposal for a directive on the confiscation of the proceeds of crimes.⁶⁷ The aim of this proposal is to make it easier for Member States' authorities to confiscate and recover the profits which criminals make from serious and organized cross-border crime. Interestingly the proposal is based on both Articles 82(2) and 83(1)

⁶² See §2.C above.

⁶³ Proposal for a Directive on criminal sanctions for insider dealing and market manipulation, COM (2011) 654 final; Proposal for a Regulation on Insider Dealing and Market manipulation, COM (2011) 651 final.

⁶⁴ S. Weatherill, 'The Limits of Legislative Harmonisation Ten Years after Tobacco Advertising: How the Court's case law has become a "drafting guide"', 12 *German Law Journal* (2011), p. 827.

⁶⁵ See E. Herlin-Karnell, 'White-Collar Crime and European Financial Crises: Getting Tough on EU Market Abuse', 37 *European Law Review* 2 (2012), p. 487.

⁶⁶ S. Weatherill, 12 *German Law Journal* (2011), p. 827.

⁶⁷ Proposal for a Directive on the freezing and confiscation of the proceeds of crime in the EU, COM (2012) 36 final.

of the TFEU. Article 82(2) makes it clear that any legislation adopted under this provision must aim to facilitate mutual recognition. With this requirement it is perhaps difficult to see how the proposal in question facilitates mutual recognition. The reason why the Commission might have chosen this dual approach with regard to legal basis is perhaps the fact that the confiscation of the proceeds of crime is not listed in Article 83(1). For this reason, the Commission argues that the confiscation of the proceeds of crime should fall under the umbrella labelled 'organized crime' which is listed in Article 83 TFEU. More specifically, the Commission argues that existing provisions of EU rules on confiscation should remain in place in order to maintain a degree of harmonization with regard to activities that fall outside the scope of the proposed Directive.

Moreover, the confiscation issue is closely related to that of combating dirty money and terror financing. The Commission has recently proposed a new Money Laundering Directive, the Fourth Money Laundering Directive properly so called.⁶⁸ The proposed Directive offers a very impressive and ambitious attempt by the Commission to address some of the criticism that it received in connection with the Third Money Laundering Directive, by a more elaborated scheme for risk assessment. Still, the extended duty of risk assessment now relocated to the Member States poses the question to what extent the Member States are fit to do this job.

In any case, the area of procedural criminal law offers then a more positive picture of what is needed to improve EU criminal law.

B. DIRECTIVE OF PROCEDURAL SAFEGUARDS AND ACCESS TO A LAWYER

The EU is currently very active in the field of procedural protection, which is a welcome development and a result of the extended competences granted by the Lisbon Treaty. The first step in this process is Directive 2010/64/EU on the right to interpretation and translation, which has already entered into force (though the implementation deadline is in 2013).⁶⁹ More recent legislative initiatives are the proposal for a directive⁷⁰ on the right to information in criminal proceedings. And the third step is the proposal for a directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest.⁷¹ These initiatives follow the Roadmap for the strengthening of procedural rights of suspects and accused persons in criminal law proceedings appended to the Stockholm Programme as discussed above. These instruments, based

⁶⁸ Proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, COM (2013) 45 final, p. 3.

⁶⁹ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, [2010] OJ L 280/1.

⁷⁰ Ibid.

⁷¹ Proposal for a Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM (2011) 326 final.

on Article 82(2) TFEU, aim to promote mutual trust in cross-border cases and represent an example of the EU's emphasis on the procedural rights side of the coin instead of (as previously) having mostly focused on the question of enforcement of coercive measures.

Arguably, the proposed Directive on access to a lawyer is the most far-reaching of any piece of EU criminal law legislation in procedural criminal law thus far.⁷² In line with the mandate set out in the Roadmap for the strengthening of procedural rights, this Directive lays down minimum requirements at EU level governing the rights of suspected and accused persons and their right to have access to a lawyer. It thus promotes application of the Charter, and in particular Articles 6, 47 and 48 therein, by building upon Article 6 ECHR and the notion of a fair trial.⁷³ Interestingly, the Directive points out that 'Any derogation must be justified by compelling reasons pertaining to the urgent need to avert danger for the life or physical integrity of one or more people'. In addition, any derogation must comply with the principle of proportionality, which implies that the competent authority must always choose the alternative that least restricts the right of access to a lawyer and must limit the duration of the restriction as much as possible. Furthermore, the proposed Directive states that in accordance with ECHR case law, no derogation may be based exclusively on the type or seriousness of the offence, and any decision to derogate requires a case-by-case assessment by the competent authority.

It should also be mentioned that the Charter grants exceptions to the rule of absolute fundamental rights protection. It is to be hoped that this is how the derogation granted in Article 52 of the Charter of Fundamental Rights is to be interpreted in the future as well. According to this provision, Member States can derogate from Charter obligations on the basis of what is proportionate. Therefore, in criminal law it seems that what is needed here is a strict application of proportionality.

The latest step in the direction of establishing a European framework for the protection of the victim is the proposed Directive on the protection of the victim.⁷⁴ This proposal aims to ensure that the wide ranging needs of victims of crime, which cut across a number of other EU policies, are respected and met. In particular, the protection of victims' rights is an essential part of a range of EU policies and/or instruments related to human trafficking, sexual abuse and the sexual exploitation of children, violence against women, terrorism, organized crime, and the enforcement of road traffic offences. It has been on the agenda of the Council of Europe, the Commission and the Parliament since the 1970s. But until recently with the entry into force of the Lisbon Treaty, there was no

⁷² See the discussion in House of Lords, *30th Report, The European Union's policy on criminal procedure*, 30th report session 2010–2012.

⁷³ On the notion of a fair trial see e.g. A. Ashworth et al., *Human Rights and Criminal Justice* (Thomson Sweet & Maxwell, London 2007).

⁷⁴ Proposal for Directive on establishing minimum standards on the rights, support and protection of victims of crime, COM (2011) 275 final, adopted by Council, 4 Oct. 2012; Directive 2012/29/EU, OJ L315/57.

legislative competence at the supranational level in this area. Instead the EU produced a Framework Decision partly dealing with the issue.⁷⁵

However, the Framework Decision for the protection of victims applies only to witnesses or parties to the process. With regard to the implementation aspect it has furthermore been pointed out that it left too much discretion to the Member States and that it was therefore difficult to assess the exact implications of this Framework Decision.⁷⁶ The Stockholm Programme sought to remedy this by linking the need for the protection of the victim with the general wave of increased participation of the citizens. The current 'weak' status of the victim in EU law is perhaps confirmed by the recent cases of *Gueye* and *Sanchez* concerning the interpretation of Framework Decision 2001/220/JHA on the protection of the victim.⁷⁷ In these cases the Court of Justice stated that not only did this Framework Decision leave a large margin of appreciation to the Member States in their implementation but also that the Framework Decision does not impose any obligation on Member States to ensure that victims will be treated in a manner equivalent to that of a party to proceedings. Thus, the proposed Directive on the protection of the victim would represent an important symbolic gesture of the EU on the global criminal justice stage.⁷⁸

§6. CONCLUSION – EU CRIMINAL LAW AND THE DECONSTRUCTION OF THE AFSJ

The phenomenon of EU criminal law has largely taken shape in the last decade, starting with the anti-terrorist measures adopted in the wake of 9/11, and travelling into the hard core EU constitutional law landscape. As explained above, much of this development has been centred on the principle of effectiveness, the *Environmental Crimes* case being the trendsetter. One would have thought that the legal setting post-Lisbon would have matured now and that the use of the effectiveness principle was not as urgent. Yet the recent cases of *Melloni* and *Da Silva Jorge* prove otherwise, emphasizing the importance of the full effectiveness of EU criminal law. Hence, the effectiveness of EU law is still a strong principle.

It seems clear that EU criminal law will become an important testing field for the management and balancing of a multi-speed Europe. Its harmonization programme, built around the possibilities for Member States to apply an emergency brake, represents

⁷⁵ Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, [2001] OJ L 82/1.

⁷⁶ *Ibid.*

⁷⁷ Case C-483/09 and C-1/10 *Gueye and Sanchez*, Judgment of 15 September 2011, not yet reported; Case C-507/10 *Criminal proceedings against X*, Judgment of 21 December 2011, not yet reported.

⁷⁸ Discussed further in, E. Herlin-Karnell, 'Recent Developments in the Area of Substantive and Procedural EU criminal law: Challenges and Possibilities', in M. Bergstrom and A. Cornell, *EU Criminal law and Police Cooperation, Swedish Studies in EU law* (Hart Publishing, Oxford 2013, forthcoming).

an interesting case of flexibility. It is as yet unclear what role, if any, effectiveness will play here. Nevertheless, the opt-outs and opt-ins by the UK and Ireland as well as the restrictive approach as adopted by Denmark (in saying no to EU criminal law in its entirety), pose difficulties in the future and promise a Court-led era as to the practical meaning of these opt-outs. The added value of the Charter will largely depend on the willingness of the Court to interpret the wording 'implementation of EU law' in a liberal fashion. Irrespective of this, it serves as an important benchmark in the discussion on EU criminal law and the development of a consistent regime in this area.

For all these reasons, it seems pertinent to finish with the same conclusion as the present author wrote in the Maastricht Journal in 2007, just at the beginning of the development of EU criminal law. Back then I concluded that the EU was very much in need of a constitutional compass and that this compass also had to be working. In 2013 the EU is *still* very much in need of such a constitutional compass.⁷⁹ But unlike then, this compass needs not only to be working but also the super power of sidestepping the EU-*Hegelian owl of Minerva* who spreads its wings at dawn. It is perhaps a truth in EU integration that reality is best understood in hindsight, and as the EU project continues to evolve, we will only truly understand it retroactively.⁸⁰ Yet the AFSJ and EU criminal law offers an example of where it, for once, would be better to pile up the facts before hitting the (wrong) target.

⁷⁹ E. Herlin-Karnell, 'Recent Developments in European Criminal Law', 15 *MJ* 1 (2007).

⁸⁰ P.F. Kjaer, 'The Metamorphosis of the Functional Synthesis: A Continental European Perspective on Governance, Law and the Political in the Transnational Space', 2 *Wisconsin Law Review* (2010), p. 489–533.