Sieps

Swedish Institute for European Policy Studies

2016:4

The EU and US criminal law as two-tier models

A comparison of their central axes with a view to addressing challenges for EU criminal law and for the protection of fundamental rights

Maria Kaiafa-Gbandi

THE EU'S POLITICAL AND CONSTITUTIONAL SYSTEM

Maria Kaiafa-Gbandi

The EU and US criminal law as two-tier models

A comparison of their central axes with a view to addressing challenges for EU criminal law and for the protection of fundamental rights

– SIEPS 2016:4 –

Report No. 4
April 2016

Published by the Swedish Institute for European Policy Studies

This publication is available at www.sieps.se
The opinions expressed in the publication are those of the author.

Cover design by LuxLucid
Printed by EO Grafiska AB

Stockholm, April 2016

ISSN 1651-8942
ISBN 978-91-86107-61-1

Preface

The EU gained new competences in the area of criminal law six years ago when the Treaty of Lisbon entered into force. Since then, SIEPS has published several reports regarding this topic, aiming at envisaging different implications of the reform. This is the third report, which presents a comparison between the evolution of criminal law in the EU and the United States.

A common denominator in the SIEPS publications is the critical tone of the authors who use different arguments to object to an increasing supranational character of criminal law. A basic line of argument in the critique is that the national criminal orders have been established throughout time, with respect paid for the fundamental criminal law ideologies embedded in each state. Such ideologies aim for example at counteracting incoherent use of criminal law and achieve proportionate sanctioning systems. The quest to define proportionate sanctions at a European level is however challenging considering the fact that Member States may have different views on what constitutes a proportionate sanction in relation to a criminal offence.

In this report, Maria Kaiafa Gbandi adds an interesting perspective to the debate on EU criminal law by comparing its evolution with the development of a federal criminal law regime in the US. Despite the wide differences found in EU and US governance the author finds several aspects in the comparison which contribute to deepening the understanding for EU criminal law.

Eva Sjögren
Director

About the author

Professor Maria Kaiafa-Gbandi graduated from the Law Faculty of the Aristotle University of Thessaloniki. She obtained her Ph.D. in Criminal Law from the Georg Augusta Universität zu Göttingen in Germany (1981). She was elected and appointed as a Lecturer of Criminal Law at the Law Faculty of the Aristotle University of Thessaloniki (1984) and serves as a Professor there since 1996. She is director of the Research Institute for Transparency, Corruption and Financial Crime, established at the Law Faculty of Thessaloniki in 2015.

Aknowledgements

This work began its life as a research project conducted during the winter term of 2012, which I spent at Harvard Law School as a visiting scholar and a Fulbright grantee. My subsequent work was completed in November 2015, after I had been assigned to write this report by the Swedish Institute for European Policy Studies.

I am truly indebted to my colleague Carol Steiker, Herny J. Friendly Professor of Law at Harvard Law School, who offered her generous academic support to my research throughout my stay in Cambridge. I am also grateful to my colleagues Sara Sun-Beale, Charles L. B. Lowndes Professor of Law at Duke Law School, and Jenia-Iontcheva Turner, Professor of Law at Dedman School of Law of the Southern Methodist University, for their insights on US federal criminal law, which they were willing to share with me.

Last but not least, I am thankful to Dr Anna Wetter for her excellent work of preparing the publication of this report on behalf of the Swedish Institute for European Policy Studies.

M. K.-G.
January 2016

Table of contents

Executive summary

Criminal law constitutes the most repressive mechanism of social control. Its aim is to protect the fundamental legal interests of individuals against serious violations by others, when milder means have proved ineffective. In order to reach its goal its concept (i.e. the acts it defines as criminal and the sanctions it proscribes) has to be as close to the people as possible. Thus, criminal law is by definition to be circumscribed on a national level. However, the last decades have witnessed a reconsideration of the exclusively national character of criminal law. The trend of internationalization, largely due to rapid technological development, and especially economic globalization, has triggered processes of external influence in a field of law that traditionally belonged to the hard core of national sovereignty.

EU criminal law, in particular, albeit 'quantitatively' confined to a handful of Member States, qualitatively presents the most dynamic system of internationalizing criminal law in existence today. This system is gradually acquiring characteristics akin to a multi-state structure where sovereign powers are exercised centrally in a process of measured 'quasi-federalization' that also manifests itself in the field of criminal law. Bearing in mind that the internationalization of criminal law is anything but 'risk-free' for the rights of citizens, especially in the EU context, the present contribution, based on the two-tier evolution of EU criminal law, which takes place on both the EU and the national level and bears structural traits similar to those inherent in the US federal criminal law system, tries to highlight the latter's development and function, in order to offer a useful groundwork enabling us to pose questions and try to give answers useful in view of the EU's prospects with regard to intervening in its Member States' criminal laws.

The report begins by providing a basis for the comparison of the EU and US criminal justice systems. Three axes are laid down, around which such comparison should revolve, namely: (i) the competence to proscribe various types of conduct in the context of the US federal and the EU supranational criminal law systems, respectively; (ii) fundamental criminal policy and criminal law principles applicable to proscribing criminal offences on the federal/supranational and the State/national level, respectively, with a view to exploring their possible mutual influence; and (iii) core procedural principles and fundamental procedural rights of individuals (especially suspects and defendants), in the context of the federal/supranational and the State/national level, addressing the question of whether to increase, maintain or reduce the level of their protection.

The second part delves into the aforementioned main axes by analysing each factor crucial to the comparison. It explores, first of all, the clear tendency of

expanding competence to enact criminal law on both the US federal and the EU level, and concludes that, in the modern era of globalization, the dynamics of politics and economics transcend the diverging structural configuration of state power, thereby ushering criminal law systems in similar paths, regardless of the distinct idiosyncrasies of each system. This is why identifying and strengthening the institutional limits of criminal law competence, particularly in the EU framework (within which the principle of conferral of powers is the main constituent element), bears even greater significance. In the framework of the second main axis of comparison, i.e. the key attributes of US federal substantive criminal law and their importance for the evolving criminal law system of the EU, an effort is made to highlight, first of all, the importance of associating the principle of legality with the principle of conferral of powers in EU criminal law. On the other hand, as far as the guilt principle is concerned, the higher standard of *mens rea* applied to US federal crimes compared with State crimes makes it clear that the complexity and proliferation of EU criminal law makes the process of finding the law extremely difficult for EU citizens, a difficulty which ought to be counterbalanced. The report also explores the field of criminal sanctions with regard to the principles of proportionality and coherence. Reviewing the history of the Federal Sentencing Guidelines and the doctrine of proportionality in US criminal law, it is concluded that harmonization and proportionality of sanctions in a federal criminal law system spanning so many States with different criminal laws and featuring areas of 'common interest' between federal and State criminal jurisdictions cannot be served by setting strict limits on sanction ranges. These findings are subsequently transposed to the field of EU criminal law. The third and last main axis of the comparison refers to procedural law. After identifying the questions worth addressing in the context of a comparison between the US federal and the EU systems of criminal procedure law, the focus shifts to the level of protection of individual procedural rights as a decisive element of supranational systems of criminal procedure. The need for a 'top-down' incorporation of guarantees is thus emphasized, namely guarantees set through clear rules reflecting pan-European standards of individual criminal procedural rights. At the same time, this part separates reality from myth as far as the function of optional national higher levels of protection for individual procedural rights is concerned.

The third part engages in an assessment of the conclusions arising out of the comparison with a view to improving the criminal law system of the EU. These conclusions, like the analysis that precedes them, give special attention to possible distinctions owing their existence to the fundamental attribute distinguishing the two criminal law systems (i.e. that the US is a federal State whereas the EU is a supranational organization comprised of sovereign Member States).

Based on the aforementioned analysis and the pertinent conclusions, the report makes a series of recommendations for EU criminal policy, the most significant of which are the following:

(I) Supporting and enhancing the proper function of institutional limits to the use of criminal law in the EU as a European 'Sympoliteia' (i.e. a union of sovereign states and peoples of Europe) is of utmost importance and, in particular, would require the EU:

- to accept that its competence to define the minimum content of the so-called 'euro-crimes', enumerated in Article 83 para. 1 TFEU, cannot extend to crimes featuring no European characteristics whatsoever;
- to define precisely the content of 'cross-border dimension' that the Treaty requires for the so-called 'euro-crimes', especially with regard to 'a special need to combat them on a common (European) basis';
- to include in the minimum content of every 'euro-crime' its requisite 'cross-border dimension', thereby expressly justifying and at the same time limiting its competence;
- to refrain from transforming merely administrative offences, which infringe on the implementation of its harmonized policies, to criminal conduct through the annex-competence of Article 83 para. 2 TFEU, and to pay due respect to the 'essentiality' required for the criminalization of a given conduct;
- to include as an element in the minimum content of every crime under Article 83 para. 2 TFEU the possible risk of a significant delay, obstruction or other impact to the effective implementation of an EU policy, emanating from the criminalized conduct.

(II) On the other hand, the EU, while reserving for itself a decisive role in determining the conduct to be criminalized by its Member States, should avert risks of contravening the fundamental principles which shape the very core of criminal law. In this perspective, the EU ought to:

- safeguard the principle of legality limiting arbitrary prosecutions and abiding by the principle of conferral of powers. After the Lisbon Treaty, co-defining crimes is not just a privilege, but also an obligation for clarity and self-restraint in criminalizing conduct, lest citizens' freedoms be overly constricted;
- introduce a defence of error concerning the illegality of the proscribed conduct, applicable in areas characterized by an exceptional proliferation or especially complex provisions, which are not easily grasped by the average citizen, provided the perpetrator has taken all possible and reasonable measures to avoid ignorance;
- define penalties in an open method suitable for serving variable proportionality and coherence, as this is the only way of taking into consideration a broad range of different legal orders without bringing them out of balance.

(III) Last but not least, the comparison with the US federal system reveals that both crucial parameters, i.e. the question of transposing procedural guarantees from one level to the other, as well as the adoption of a common mandatory standard of procedural rights, supplemented with the possibility to elevate the applicable standard of protection on the lower (State) level, are significant for the evolving EU criminal procedure as well. Thus, the EU ought to:

- avert the risks emanating from its three-layered system of fundamental rights guarantees (EU Charter of Fundamental Rights, European Convention on Human Rights, and guarantees emanating from the constitutional traditions common to Member States) by introducing pan-European standards of protection for fundamental procedural rights, especially those of suspects and defendants, which will raise the standard of protection afforded by the European Convention on Human Rights and the constitutional traditions common to Member States, thereby striking the right balance between effective criminal repression and individual due process rights;
- refrain from reliance on the theoretical possibility of a national higher level of protection as an 'excuse' for its own inaction in this field; and
- establish minimum rules for procedural rights of individuals defined on the basis of the essence of such rights. The latter, and especially those of suspects and defendants, are there to enable them to defend themselves against a potentially much more punitive state, and assist them in addressing the immense difficulties inherent in criminal processes developing in multiple legal orders, rather than to facilitate mutual recognition of decisions and judicial cooperation.

I Justifying the idea of a comparison between the EU and US criminal law systems and laying down its main axes

1 EU criminal law: a two-tier model comparable to the US criminal justice system

Criminal law constitutes the most repressive mechanism of social control. Its aim is to protect the fundamental legal interests of individuals against serious violations by others, by means of inflicting harm on the offender's liberty, property, etc.[1], when milder means have proved ineffective[2]. Thus termed, criminal law is by definition to be circumscribed on a national level: specifically, the choice of acts which should be criminally proscribed, thereby calling for punitive, i.e. 'stigmatizing', sanctions, is intrinsically correlated to the beliefs of a given society regarding the inherent wrongfulness of these acts, as well as the circumstances under which criminal responsibility may be ascribed to the perpetrator[3].

The last two decades have witnessed a reconsideration of the exclusively national character of criminal law, albeit rather belatedly compared with other fields of law. The trend of internationalization, which largely owes its existence to rapid technological development, advances in transportation and communication capabilities, and especially economic globalization, has triggered processes of external influence in a field of law that traditionally belonged to the hard core of national sovereignty[4]. At least one form of internationalization relevant to criminal law had manifested itself institutionally much earlier, however. This was the international recognition of human rights pertinent to criminal law and criminal procedure, a development which occurred after World War II, *inter*

---

1 See *I. Manoledakis*, General theory of criminal law (in Greek), 2004, 27-32.

2 On the *ultima ratio* principle see *C. Prittwitz,* Der fragmentarische Charakter des Strafrechts-Gedanken zu Grund und Grenzen gängiger Strafrechtspostulate, in H. Koch (ed.), Herausforderungen an das Recht: Alte Antworten auf neue Fragen?, 1997, 145 et seq.

3 See BVerfG, NJW 2009, 2267, 2287 and the English translation at http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.htlm

4 *M. Kaiafa-Gbandi,* Die allgemeinen Grundsätze des Strafrechts im Statut des Internationalen Strafgerichtsshofs: Auf dem Weg zu einem rechtsstaatlichen Strafrecht der Nationen? FS für H.-L. Schreiber, 199-200.

alia, by virtue of the European Convention on Human Rights (ECHR)[5]. The latter indeed brought about a degree of internationalization of criminal law by means of both broadening and deepening the rights of individuals affected by criminal repression. This development was a product of the experiences of World War II, which gave rise to a revisiting of the principles underlying European civilization, including the fundamental rights of citizens. At a subsequent stage, nonetheless, the internationalization of criminal law leaned towards repression[6], with a view to responding to crime beyond national borders and enhancing police and judicial cooperation between various states. During that stage, the central role was assumed – and is still played – by two kinds of instruments: on the one hand, international treaties, signed under the aegis of international organizations in order to achieve the aforementioned goals; on the other, legal instruments adopted by the EU, i.e. a *supra*national – as opposed to merely *inter*national – organization aiming at the progressive 'federalization' of its individual (sovereign) Member States. Typical examples of the former category are the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[7], as well as the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[8]; as regards the latter category, one might allude to practically every EU legal instrument adopted after the Maastricht Treaty in order to safeguard either the EU's own legal interests (see, e.g., the 'PIF Convention' on the Protection of the European Communities' Financial Interests) or various legal interests affected by cross-border crime within an ever-expanding EU 'common area'[9]. Of course, it should not be overlooked that EU instruments have a stronger binding effect on Member States than do international treaties, thereby ensuring a qualitatively more significant *impact* on national legal orders[10].

Despite their varying impact on national legal orders, both forms of 'internationalization' pose two focal questions. The first relates to the democratic legitimacy of the organs that retain the decisive role as to the content of the

---

5 See *I. Manoledakis*, The new internationalization of criminal law and the risk of undermining our legal civilization, in I. Manoledakis, Thoughts about the future of criminal law (in Greek), 2000, 16. Note, however, the development of customary international criminal law, which has been acknowledged by the ECHR.

6 *M. Kaiafa-Gbandi,* The development towards harmonization within criminal law in the European Union. A citizen's perspective, European Journal of Crime, Criminal Law and Criminal Justice 2001, 240-241, *N. Paraskevopoulos*, The influence of the modern criminal policy in criminal procedure law (in Greek), Poinika Chronika 2002, 584-588.

7 It is noteworthy that this treaty has been of interest to the US in its effort to maintain its role in the global market, given that the bribery of foreign officials in international economic transactions has traditionally been proscribed as a criminal offence in the US, unlike many other countries.

8 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, reg. no. 27627.

9 With regard to these EU legal instruments in the field of substantive criminal law see further *Ath. Giannakoula*, Crime and sanctions in the European Union (in Greek), 2015, 486-488.

10 See *M. Kaiafa-Gbandi*, European criminal law and the Lisbon Treaty, 2011, 13 et seq. (in Greek), *H. Satzger,* International and European criminal law, 2012, 61 et seq.

substantive or procedural rules enshrined in an international treaty or an EU legal instrument; the second has to do with the actual impact of such 'internationalized' criminal repression on the rights of suspects and defendants. In particular, the organs of international organizations, though entrusted with the serious task of identifying the acts to be criminally proscribed, do not enjoy a democratic legitimacy akin to national parliaments[11]. Besides, even in the EU context, as will be discussed below, the European Parliament has only become active in the enactment of legislative instruments of criminal law interest since 2009, without being able to impose its own views exclusively as to their content[12]. Thus, it becomes apparent that the internationalization of criminal law has thus far been accompanied by a *slackening* of its democratic legitimacy. Individual states ought to compensate for such deficit upon incorporating international treaties or EU instruments into their domestic order, by cautiously reviewing their compatibility with fundamental principles inherent in their national law, as well as those deriving from international and European law, respectively. Moreover, the intensification of criminal repression, as evidenced in instruments derived from both the European and the broader international context[13], ought to be counterbalanced by virtue of a consonant reinforcement of the position of suspects and defendants in processes featuring cross-border elements, even – where necessary – by virtue of institutions specifically designed to address rights of defendants[14]. Such reinforcement would be justified, given that these individuals are now required to defend themselves against judicial authorities that are often able to avail themselves of the repressive mechanisms of multiple states, without being able to obtain adequate representation or even comprehend the law applicable in each case.

It should already be clear that the internationalization of criminal law is anything but 'risk-free' for the rights of citizens, especially in the EU context. Indeed, the binding effect of EU instruments is virtually absolute in nature[15], while the mechanisms ensuring compliance are much more vigorous compared with those present in international organizations. Put differently, EU criminal law, albeit 'quantitatively' confined to a handful of Member States, qualitatively presents the most dynamic system of internationalizing criminal law. This system is gradually acquiring characteristics akin to a multi-state structure where sovereign powers

---

[11] See the relevant discussion with regard to international treaties referring to corruption in *I. Androulakis,* Die Globalisierung der Korruptionsbekämpfung, 2006, 356-357.

[12] On the still persisting democratic deficit in the framework of the EU's legislative process concerning criminal law see *Kaiafa-Gbandi,* European criminal law and the Lisbon Treaty (in Greek), 13-14 and n. 34, with further citations; also see *Giannakoula,* Crime and sanctions in the EU (in Greek), 55 et seq. and nn. 175-177, with further citations.

[13] See, e.g., the process of extradition, and especially the Framework Decision on the European Arrest Warrant, i.e. a simplified judicial process for surrendering individuals that has replaced extradition in the relations between EU Member States (FD 2002/584/JHA, 13.6.2002, EE L 190, 18.7.2002, 1-27).

[14] See indicatively *European Criminal Policy Initiative (ECPI),* A manifesto on European criminal procedure law, 2014, 13-14, 19, 20-25, 44-47.

[15] See the 'emergency brake' clause in Art. 82 para.3 and Art. 83 para.3 TEU.

are exercised centrally in a process of measured 'quasi-federalization' that also manifests itself in the field of criminal law.

More to the point, the EU started out as a coalition of Member States with a purely economic orientation. However, it progressively expanded to cover a multitude of other key sectors. In the course of its expansion, the EU gradually transformed into a supranational organization, with the ability to co-designate the actions of its Member States in a binding fashion, at least within the areas where such competence was conferred on it, including the field of criminal law[16].

After the Treaty of Amsterdam entered into force (bringing criminal law to the forefront of EU competence) and up until the Treaty of Lisbon (i.e. in the period of 1999–2009), EU activity in the field of criminal law engendered serious conundrums. These were primarily associated with the fact that all pertinent EU interventions aimed at unilaterally expanding criminal repression, without at the same time upholding a set of guarantees of the liberties of citizens who might face criminal charges[17]. On the other hand, the EU's criminal legislation was characterized by a deep democratic deficit, to the extent that it was generated without the meaningful participation of the European Parliament. These core deficits persisted under the Treaty of Amsterdam, especially taking into account that, throughout this period, the EU resolved issues pertaining to criminal policy in the absence of a cohesive model driven by fundamental principles of the European legal culture.

Following the Treaty of Lisbon (December 2009 to date), some of the aforementioned deficits were, to a large extent, institutionally addressed. The democratic deficit was significantly reduced via the participation of the European Parliament in the drafting of European legislative instruments – binding on Member States – in the field of criminal law. The EU Charter of Fundamental Rights was given binding legal effect, while the EU decided to accede to the ECHR[18]; the pertinent improvements in the EU lawmaking process are all but self-evident.

Conversely, it is also evident that the new institutional framework delineated by the Treaty of Lisbon has amplified EU criminal competence both in 'breadth'

---

[16] On the historical development see *U. Sieber*, Einführung: Entwicklung, Ziele und probleme des Europäischen Strafrechts, in Sieber/Satzger/v. Heintschel-Heinegg (eds.), Europäisches Strafrecht, 139 et seq.

[17] See *Kaiafa-Gbandi*, The development towards harmonization within criminal law in the European Union, *M. Kaiafa-Gbandi*, Aktuelle Strafrechtsentwicklung in der EU und rechtsstaatliche Defizite, ZIS 2006, 521-536, with further citations.

[18] The accession has yet to take place; on the still ongoing procedure see Opinion 2/13 of the Court (Full Court) (ECJ), 18 December 2014.

and in 'depth'[19]. For the first time, the EU was granted some sort of (restricted) competence to enact criminal statutes in order to safeguard its financial interests ('genuine' European criminal law) without the participation of Member States[20]. Besides, even in fields where the EU retains the competence to intervene in the enactment of criminal statutes by Member States (by virtue of Directives stipulating a binding, minimum content of substantive rules as well as a minimum level of sanctions), it is only apparent that Member States are bound by the EU's choices, mainly owing to the fact that they may not prevent the EU from exercising its competence at will (with the single – and rather narrow in scope – exception of the so-called 'emergency brake', Art. 82 para. 3 and Art. 83 para. 3 TFEU). This means that the EU utilizes its statutes in effect to determine the threshold of 'punishability' to be applied by national legal orders. Besides, the fields of such EU competence are extremely broad and multi-faceted, covering not only particularly serious cross-border crime (e.g. trafficking in human beings, drug trafficking, organized crime, terrorism, etc.) but virtually every area of EU policy, thereby subjecting it to more invasive EU activity in the field of criminal matters in the future. Adding to the picture, according to the Treaty of Lisbon, decisions for EU intervention in the field of criminal law are now reached on the basis of the principle of majority (as opposed to unanimity, which applied under the previous regime), while their binding effect is enhanced, as Member States may face sanctions in the event of failure to transpose EU legislative instruments into their domestic legal orders.

---

[19] Cases in point are the documents adopted by the Council, by the Commission and by the European Parliament on the way the EU should introduce substantive criminal law rules ((a) Council conclusions on model provisions, guiding the Council criminal law deliberations, 2979th Justice and Home affairs, Council meeting, Brussels, 30 November 2009, (b) COM (2011) 573 final, 20 September 2011, (c) European Parliament resolution of 22 May 2012 on an EU approach to criminal law-2010/2310 (INI), which are regarded by some authors as basic 'European criminal policy documents' (*P. de Hert/I. Wieczorek*, Testing the principle of subsidiarity in EU criminal policy, NJECL 2012, 394. See a critical approach to these documents by *M. Kaiafa-Gbandi*, Approximation of substantive criminal law provisions in the EU and fundamental principles of criminal law, in F. Galli/A. Weyembergh (eds.), Approximation of substantive criminal law in the EU. The way forward, 85 et seq., *C. de Jong*, The European Parliament Resolution of 22 May 2012 on an EU approach to criminal law, in F. Galli/A. Weyembergh (eds.), Approximation of substantive criminal law in the EU. The way forward, 37 et seq., *A. Weyembergh*, Approximation of substantive criminal law: The new institutional and decision making framework and new types of interaction between EU actors, in F. Galli/A. Weyembergh (eds.), Approximation of substantive criminal law in the EU. The way forward, 20 et seq.

[20] See *Satzger*, International and European criminal law, 81; cf., however, the strongly supported opposite opinion of *P. Asp*, Criminal law competence of the EU, 2012, 153-154, *E. Herlin-Karnell,* The Lisbon Treaty. A critical analysis of its impact on EU criminal law, 2010, 61 and *Th. Weigend*, Strafrecht der Europäischen Union nach dem Vertrag von Lissabon – Eine deutsche Perspective, in P. Kardas/T. Sroka/W. Wrobel (eds.), Ksiega Jubileuszowa Profesora Andrzeja Zolla, 209. See also *J. Vogel*, Die Strafgesetzgebungskompetenzen der EU nach Art. 83, 86, and 325 AEUV, in K. Ambos (ed.), Europäisches Strafrecht post-Lissabon, 2011, 48 et seq., who rightly excludes Art. 86 TFEU as a legal basis for the substantial criminal law protection of the EU's financial interests.

One may thus derive from the above discussion the conclusion that the criminal law of the 28 Member States is now broadly and decisively influenced by the respective EU initiatives to the effect that the development of the so-called 'European criminal law' now occurs on both the EU and the national level. The contours of the interplay between these two levels, and especially the structural traits of their interaction, have yet to be scrutinized by legal doctrine[21]. Even at first glance, however, it is apparent that *with respect to the so-called 'European criminal law', understanding federal systems of enacting criminal law statutes becomes ever-more significant*. In particular, *the US model* attracts the foremost attention, since (contrary to other federal systems, such as the German one) criminal law competence accrues not only to the federal legislator, but also to the various States. *The central axes of a federal criminal law system which subscribes to a two-tier criminal policy, such as the US model, and the manner and especially the principles underlying the interplay between these two tiers become of pivotal importance with a view to improving the institutional traits and the structure of the emerging EU criminal justice system*.

The principal idea underlying this contribution is that the two-tier evolution of EU criminal law features similar – though not identical – structural traits asthose inherent in the US federal and State criminal law systems, respectively, hence comprehending the latter's development and function, including its advantages and disadvantages, offers *a useful groundwork enabling us to pose questions and try to give certain answers useful in view of the EU's prospects*.

One might, of course, question the choice of the US federal system for a comparison, given the existence of a similarly structured system (i.e. featuring criminal law competence on both the federal and the local level) in Europe, specifically in Switzerland[22]. This choice is due, first of all, to the fact that substantive criminal law at cantonal level is of minor importance, as the federal Constitution of Switzerland stipulates, in Article 123 para. 1, that legislation in the field of substantive criminal law falls mainly within the powers of the Confederation. The cantons retain the power to legislate with respect to conduct that is not the object of federal legislation, and may only threaten sanctions for offences against cantonal administrative (e.g. tax law) or procedural law[23]. On the other hand, the Confederation is also competent to legislate in the field of criminal procedure and there exists a single code of criminal procedure (applicable to the whole country), while the cantons remain responsible for the organization of the courts and the administration of justice in criminal cases, unless the law states otherwise (as is the case with the particular prosecution

---

[21] Cf. a historic overview of multi-level systems by *Sieber,* in Sieber/Satzger/v. Heintschel-Heinegg (eds.), Europäisches Strafrecht, 83-85 and the analysis of the interplay between regulative levels in EU criminal law by *Asp*, Criminal law competence of the EU, 213 et seq.

[22] See indicatively *A. Petrig/N. Zurkinden*, Swiss criminal law, 2015, 12 et seq. The cantons represent therein the local level being the member states of the Swiss Confederation.

[23] Ibid., 12.

model to be adopted by the cantons, with certain exceptions in different fields of crimes, e.g. organized crime, white collar crime, etc.)[24]. Thus the minor practical importance of cantonal substantive criminal law, combined with the presence of a single criminal procedure (even in matters of organization and administration of criminal justice), makes it evident that Swiss criminal law does not subscribe to a fully-fledged two-tier model to the extent that the US system does. This explains the choice of the latter in terms of engaging in a fruitful comparison with EU criminal law. Besides, as will be analysed below, the ambit of US federal criminal law has been expanded beyond the letter of the law in actual practice (both through its application by federal agencies and by virtue of the pertinent case law of the Supreme Court) to the effect of largely overlapping with State criminal law, a circumstance closely resembling the overlap between EU and national criminal law. Last but not least, a meaningful comparison is not just a process of identifying similarities but also noting the divergences between the two systems. This is yet another aspect fueling the theoretical debate, and rendering the US system an ideal counterpart for a comparison with EU criminal law[25].

2 The disparity of the two systems: Is a meaningful comparison even possible?

A comparison between the US and EU criminal justice systems also reveals – as already suggested – notable differences. First of all, US federal and State criminal law have emerged as independent, parallel systems *on the legislative level*[26]. Congress enacts federal criminal statutes, while States enact their own. *On the enforcement level*, however, it is possible for the same conduct – constituting a criminal offence under both federal and State (criminal) law – to evoke their parallel application[27]. In contrast, the EU system features a kind of 'subordination' relationship between the Union and its Member States, based on the conferral of criminal law powers to the former. Specifically, the Union can intervene by setting minimum rules concerning the criminalization of certain types of conduct, the delineation of procedural rights, the establishment of rules of evidence and, last but not least, the facilitation of judicial cooperation. Accordingly, Member States are then bound *to transpose such rules into their*

[24] Ibid., 13.

[25] Cf. the analysis by *Carlos Gómez-Jara Díez*, European federal criminal law. The federal dimension of EU criminal law, 2015, 5-8, 60-64, having a different starting point (i.e. the comparison between 'horizontal' and 'vertical'), as well as a different objective (i.e. to reinforce the 'vertical federalization' of EU criminal law). Also see interesting thoughts by *A. Nieto Martín*, Americanisation or Europeanisation of corporate crime?, in M. Delmas-Marty/M. Pieth/U. Sieber (eds.), Les chemins de l'harmonization pénale/Harmonizing criminal law, Société de Législation Comparée, Paris 2008, 352 et seq., arguing that the so-called 'europeanization' of European corporate crime has for the greater part undergone a process of 'Americanization', thereby providing an additional incentive for the pertinent comparison.

[26] *N. Abrams/S. S. Beale/S. R. Klein,* Federal criminal law and its enforcement, 6th Ed., 2015, 1-18.

[27] Ibid., 99 et seq.

domestic legal order[28]. In certain fields (fraud affecting the financial interests of the EU) the Union can even introduce criminal law rules by itself (an option that has yet to be activated), which its Member States would then have to apply directly[29].

The presence of such disparities between the two systems seems to render a possible comparison less than promising to begin with. Still, a closer look at the US criminal justice system reveals a rather different picture. Federal and State criminal law are separate systems which, in principle, remain independent of each other, but only to a certain extent[30]. They can both be applied to the same conduct, but this also holds true only to a certain extent[31]. On the other hand, the independence of the two systems does not entail a lack of influence of federal criminal law on State criminal law, or even *vice versa*[32]. Nor does it connote that the aforementioned 'independence' holds true in all fields of criminal law or to their full scope, as one can easily see, for instance, in the case of procedural rights that are enshrined in the US Constitution itself[33].

In particular, a closer look indicates, first of all, that under the US federal system, criminal law competence lies primarily with the States. Congress only possesses the authority to enact criminal legislation in those areas where such competence is conferred on it by the US Constitution[34]. Thus, the authority of Congress to enact criminal law rules is *special* and *limited*, i.e. it must derive from a specific clause established in the Constitution and may not extend further than the scope of the latter. Although the situation *prima facie* appears different in the context of the EU, considering that its powers (including those in the field of criminal law) are *delegated* by Member States through a Treaty[35] and given that these Member States stand for different nations, featuring different constitutional, legal and cultural traditions[36], it remains a fact that both structures (the US as a federal state, and the EU as a supranational organization) are obliged, as far as criminal law is concerned, to act within the confines of certain delegated powers, as well as to have good grounds for assuming action – in the form of enacting criminal law statutes or other legal instruments – in each particular case.

---

[28] According to*Satzger,* International and European criminal law, 61 et seq., national criminal law is 'under the influence' of EU law.

[29] See above note 20, and also note the already existing sanctions at the Union level, which may be classified as criminal law sanctions according to the case law of the ECtHR, *Satzger*, International and European criminal law, 48-50.

[30] *Abrams/Beale/Klein*, Federal criminal law, 2-3.

[31] Ibid., 99-102, 105, 116.

[32] Ibid., 2-4.

[33] *St. Salzburg/D. Carpa/A. Davis*, Basic criminal procedure, 9th Edition (2009), 83 et seq.

[34] *Abrams/Beale/Klein,* Federal criminal law, 19.

[35] Art. 4 and 5 TEU.

[36] See acknowledgment of this diversity, e.g. in Art. 6 para 3 TEU.

There is yet another significant difference between the EU and the US *on the legislative level* that is worth noting. In the US criminal law system States may retain their own criminal laws in a given field even when Congress decides to enact a particular criminal law statute. In the context of the EU, in contrast, Member States are bound to amend their domestic criminal law based on the Union's decisions, at least with respect to the minimum threshold of 'punishability' of a certain type of conduct, even if they already have relevant criminal law provisions in place. Thus, there is not in practice a double set of criminal law rules addressing the same criminal conduct in the EU. Ultimately, it is the criminal law rules of the Member States that apply in punishing criminal conduct. Even if the EU decides to enact criminal law rules by itself (in the specific fields foreseen by the EU Treaty) by means of regulations, the above state of affairs is not going to change in actual practice. Even then Member States will have to apply the Union's criminal law provisions directly, setting aside their own pertinent rules. Consequently, according to the EU's system, as it has developed thus far (and also as it is expected to develop in the foreseeable future), there is – and most likely will be – only one set of criminal law rules to be applied for particular criminal conduct, either national – albeit co-designed by the EU – or entirely European. On the other hand, the enforcement of such rules is – and will be – taking place before national criminal courts, at least for the time being and as long as no European criminal court exists. On the contrary, according to the US criminal justice system, a certain conduct can at the same time constitute a federal and a State criminal offence alike, while dual prosecution or even punishment is not precluded.

Although the aforementioned divergence of the two systems is significant, one should not overlook that an interesting comparison could still take place based on their similarities. First of all, identifying the fields of competence for enacting criminal law provisions, given their different function in the overall framework of the two systems, seems to offer a promising prospect. Such a comparison could reveal the essence of areas of competence available to enact criminal law rules in the framework of 'multi-state entities' and their limits, as well as their enforcement in actual practice. This procedure could allow for certain conclusions on a normative level, given that a main governing principle is idiosyncratic to both systems: the power of Congress in the US criminal law system and that of the EU is *subsidiary* to that of States or Member States, respectively[37]. Thus, it has to be based on a given, special and restricted competence, while its exercise must rely on ample grounds. Apart from contributing in a better understanding of the essence of the competence to enact criminal law rules in the context of 'multi-state entities', such a comparison, through an examination of the actual exercise of such competence in the US federal and the EU systems, can also lead to

[37] With regard to subsidiarity, which is termed as the 'federal power principle', see *D. Halberstam*, Federalism: a critical guide, in Michigan Law, Public Law and Legal Theory Working Paper Series, No. 251, September 2011, 49-50.

interesting conclusions about the reasons underlying the concept of subsidiarity, which lies behind drafting criminal law rules on different levels. It can also assist in identifying what sort of influence arises between this two-tier development of criminal law, even if the institutional framework supports the independence of the levels involved in a given system, as is the case with the criminal justice system of the US. Last but not least, a comparison can reveal whether there are also differences to be traced among distinct areas of criminal law, and especially among substantive and procedural criminal law rules, as far as the independence or mutual influence of the two levels is concerned.

A second level for comparison is that of *criminal law enforcement*, which was briefly mentioned above. According to the institutional design and practice of EU criminal law, criminal law enforcement lies virtually exclusively with Member States, including the investigation, prosecution and trial stages. Nonetheless, such primarily national processes are supplemented by certain European organs involved in the suppression of crime (Europol and Eurojust), which are specifically designed to support the police, prosecutorial and judicial cooperation of the Member States, especially in cases that bear transnational characteristics[38]. Even assuming a European Public Prosecutor's Office (EPPO) were to be established in the future for the purpose of investigating and prosecuting cases of fraud affecting the financial interests of the EU, as foreseen in the Lisbon Treaty (Article 86 TFEU) and proposed by the European Commission[39], these cases will be tried by national criminal courts based on the existing distribution of authority[40]. However, the goal of a common area of freedom, security and justice throughout the EU has already led to a Union-wide recognition of the *ne bis in idem* principle, which was until recently applied only on a national level[41]. Accordingly, it is not possible to punish someone for the same criminal conduct twice or try a case twice in the EU, even if the first (final) judgment was passed by *another* Member State's criminal court. The same holds true if the person was not found guilty and was thus acquitted for the same conduct by another Member State. There is indeed a current effort in the EU to find a way to avoid even double prosecution in cases of transnational character, so that the alleged

[38] *F.-H. Brüner/H. Spitzer,* Besondere Einrichtungen zur Unterstützung der Europäischen Strafverfolgung, in Sieber/Satzger/v. Heintschel-Heinegg (eds.), Europäisches Strafrecht, 768 et seq.

[39] Proposal for a Council Regulation of the European Parliament and the Council on the European Public Prosecutor (COM (2013) 534 final, 17 July 2013).

[40] However the Treaty itself does not preclude the establishment of a European Criminal Court as a special court under the existing Court of Justice of the European Union, see Article 257 TFEU.

[41] *A. Eser*, Konkurrierende nationale und transnationale Strafverfolgung-Zur Sicherung von „ne bis in idem" und zur Vermeidung von positiven Kompetenzkonflikten, in Sieber/Satzger/v. Heintschel-Heinegg, Europäisches Strafrecht, 2. Aufl., 648 et seq. and *Satzger,* International and European criminal law, 132 et seq.

perpetrator does not have to bear the burden of multiple criminal processes, and can claim a right to be tried only by one Member State's legal order instead[42].

On the contrary, in the US criminal justice system the enforcement of federal and State criminal law is in principle distinct. Federal courts try federal cases, while State courts try cases arising out of State criminal law. The same is true for the stages of investigation and prosecution. In practice, however, the two systems cooperate to such an extent that the federal criminal law enforcement system not only avails itself of the resources of State and local authorities in order to achieve its goals, but also constantly makes decisions on whether to prosecute a case on the federal level or to leave it in the hands of State authorities, while common task forces for certain fields of criminality exist with the cooperation of both systems as well[43]. On the other hand, it is true that there is often a certain antagonism between federal and local authorities concerning the question of prosecution. In most cases, however, if a given conduct constitutes both a federal and a State criminal offence and the case is prosecuted on a State level, no prosecution takes place on the federal level (and *vice versa*)[44]. That is not to say, of course, that there have not been cases of federal prosecution even after an offence has been tried on a State level. Such situations, albeit not precluded from the principle of double sovereignty that determines the relationship between US federal and State criminal law, have been an object of severe criticism on the basis of the principle of double jeopardy, and in any event they do not constitute the norm. As practice indicates, they normally arise when the case draws special social or political attention on the federal level, and the Department of Justice is not satisfied with decisions taken on the State level[45]. Though criticized and even challenged before the US Supreme Court under the double jeopardy principle, such double prosecutions and convictions for the same conduct have been upheld by the Court as constitutional[46].

The aforementioned differences could be summarized in a distinction between the two criminal justice systems under discussion pointing, on the one hand, to a criminal justice system which rather clearly upholds its two-level character even in the field of enforcement (the criminal justice system of the US) and, on the other hand, to another criminal justice system (that of the EU), which relinquishes its two-tier character (evident in its legislative process) when it comes to enforcement, making use of the Member States' (national) law enforcement mechanisms, with occasional assistance by organs of the supranational

---

[42] See, in this respect, the proposal of the Greek EU Presidency for a Council Framework Decision concerning the application of the *ne bis in idem* principle, C 100, 26.4.2003, 24 and the Council Framework Decision 2009/948/JHA on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, L 328, 15.12.2009, 42.

[43] *Abrams/Beale/*Klein, Federal criminal law, 81 et seq.

[44] Ibid., 110 et seq.

[45] Ibid., 117-118.

[46] Ibid., 99 et seq.

(European) level. This latter system seems to be laying less importance on questions of sovereignty, favouring at the same time the rights of the accused. However, the sovereignty of Member States remains an important issue within the EU framework, especially when different Member States are involved, which might have jurisdiction for prosecuting and trying the same criminal conduct.

Despite these differences on the enforcement level, it is interesting that in the proposed comparison one in fact identifies the same principal problems, which appear to arise in all criminal justice systems structured on more than one level. Specifically, in such systems the following two problems arise: (i) whether one and the same conduct can be prosecuted, tried and punished on more than one level/jurisdiction (the latter is not the case if the system reverts to the national level, i.e. that of the Member States, for enforcement purposes), and (ii) whether and how the enforcement mechanisms of the different levels/jurisdictions interact when dealing with the same case. The answers to both questions evidently affect not only the effectiveness of a criminal justice system, but also the fundamental rights of the persons accused, and they should therefore be examined in light of both perspectives.

3 Main axes of comparison in light of the disparity of the two systems

Having established that a comparison of the EU and US criminal justice systems is both possible and meaningful, one has to define its main axes.

In order to learn from the identification of the advantages and disadvantages of a criminal justice system, and especially from the comparison of criminal justice systems that are designed and developed as two-tier models (albeit with different modes of interaction between the two levels), one has to focus on the main questions that can actually lead to useful conclusions concerning the issues at stake. Taking into consideration that the institutional system of the EU is mainly focused on the level of drafting criminal law rules (both substantive and procedural) in the absence of an autonomous mechanism of criminal law enforcement, the main issues discussed will be related to the axis of legislating. This does not mean that matters of enforcement shall not be discussed at all, especially since procedural rules refer to the enforcement of criminal law. Since the European criminal law system relies on the mechanisms of its Member States for enforcement purposes (confining itself merely to assisting them), the issues that will be discussed under this perspective will also focus on the art of designing enforcement (procedural) rules, with particular regard to those that are important for legal systems which operate on different levels. These issues have to do, for example, with rules pertaining to procedural rights. These are not only of pivotal importance to every criminal law system, but are also of particular

interest to systems which, despite their different levels, develop in some sort of unison, institutionally subjecting themselves to a given degree of human rights protection, as well as adopting varying rules of prosecuting and trying the same case in the framework of different levels/jurisdictions of such a unison. In other words, even in the field of enforcement, the focus will be on matters that claim special importance for systems of criminal law developing on different levels (federal and State or supranational and national), also representing key issues for the systems discussed here.

Last but not least, it should be clear from the outset that these issues will be discussed in the light of fundamental criminal policy and criminal law principles, which underlie every criminal law system. In particular, the main axes of the analysis to be undertaken in the second part are the following:

- (I) The characteristics of competence for proscribing different types of conduct in the context of the US federal and the EU supranational criminal law systems, as well as the rationale and limits of such competence. The essence of preserving restricted competence and the need to safeguard subsidiarity, as well as proposals for improvement, will be discussed in this section.
- (II) Fundamental criminal policy and criminal law principles applicable to proscribing criminal offences on federal/supranational and State/national level: exploring the possible mutual influences and the eventual character of the federal/supranational (union) criminal law rules.
- (III) Core procedural principles and fundamental procedural rights for individuals, especially for suspects and defendants, in the context of the federal/supranational and the State/national level, respectively: the question of raising, maintaining or reducing the binding level of protection.

Last but not least, an assessment of the conclusions arising out of the comparison with a view to improving the criminal law system of the EU will be presented in the third part of this work.

In the course of the whole analysis, special attention will be given, of course, to possible distinctions that have to be made due to the fundamental attribute that distinguishes the criminal law systems being compared, which is the fact that the US is a federal state, as opposed to the EU, which is a supranational organization comprised of sovereign Member States.

II Three main axes underlying the comparison

A) The expansion of competence to enact criminal law rules in practice: a clear tendency on both the US federal and the EU level. The essence of preserving restricted competence and proposals towards its preservation

1 Special and restricted competence for making use of criminal law on the US federal and the EU supranational level. Justifying the primacy of individual States in introducing criminal law rules

As already mentioned, both in the US and in the EU the use of criminal law relies on *specifically delegated*, hence *by definition restricted*, powers as far as the federal state and the union are concerned. These powers are demarcated by the US Constitution and the EU Treaty, respectively. Despite the overall differences of the systems in question, this common governing principle applies for a good reason. Aside from the particular idiosyncrasy of a federal or a supranational system of states, which gives priority of action to individual states (at least in matters that do not necessarily have to be handled on the broader federal or supranational level), this tendency can also be traced back to the characteristics of criminal law itself. The latter indeed constitutes the sternest mechanism of social control for actions that seriously violate fundamental social, personal or even State legal interests (and thus call for criminal punishment), and should be applied by that power, which enjoys the maximum degree of direct democratic legitimation and lies nearer to the people based on the democratic principle[47].

Having this common groundwork in mind, the attention will now focus on the competence to employ criminal law on the US federal level as well as on that of the EU, not only in terms of the institutional basis of such competence but also in terms of how it is actually exercised in practice.

[47] *N. Androulakis*, Criminal law, general part. A theory of crime (in Greek), 2000, 95.

2 Focusing on the criminal protection of non-direct US federal or EU legal interests

It is important to mention from the outset that the focal point in the analysis that follows will be the competence of the US Congress or the EU to enact federal criminal statutes or European legal instruments, respectively, to protect *non-direct*[48] *US federal or EU legal interests*. As regards direct[49] ones, on the other hand, as in the example of addressing fraud affecting US federal property or the EU's financial interests[50], acknowledging the competence of the broader *multi-state entity* to enact criminal law is rather clear from an institutional point of view, and can hardly be placed in doubt. Indeed, it is only reasonable for a federal state or a supranational organization to be able to adopt criminal law measures (insofar as criminal power is recognized to it in principle) to protect its own legal interests. On the other hand, the need for action on such a level is also normally recognized, based on the ability of the US as a federal state or the EU as a union to conceive the 'whole picture' and act accordingly, which enables them to achieve a better protection of their own interests than the states themselves.

The authority of Congress to enact criminal law statutes to protect the direct interests of the US federal state is derived from certain of the enumerated powers set forth in Article I Section 8 of the US Constitution[51], e.g. the power 'to provide for the Punishment of counterfeiting the Securities and current Coin of the US', as well as the power 'to provide for the general Welfare of the United States'. This is supplemented by the final paragraph of Section 8, according to which 'Congress shall have the power to make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other powers vested by this Constitution in the Government of the US, or in any Department or Officer thereof'.

In the EU context, on the other hand, the power of the Union to co-draft or even enact binding criminal law rules for the protection of its own legal interests is provided in Article 325 para. 4 of the Treaty on the Functioning of the EU (TFEU)[52]. According to the said provision: 'The European Parliament and the

---

[48] For the distinction between direct and non-direct federal interests see *Abrams/Beale/Klein,* Federal criminal law, 19. According to that distinction, direct federal interests are the ones that involve the protection of federally owned property, persons employed by the federal government, federal programmes, the federal purse, immigration policy, piracy, as well as offences against the laws of the nation.

[49] See also a different terminology, alluding to 'genuine' legal interests, in *N. Bitzilekis/M. Kaiafa-Gbandi/E. Symeonidou-Kastanidou,* Theory of the genuine European legal interests, in B. Schünemann (ed.), A programme for European criminal justice, 2006, 467 et seq.

[50] Note, however, that the distinction between direct and non-direct US federal and EU legal interests is not always clear. For the protection of Direct Federal Interests in the US Constitution, also containing a historical overview, see also *Gómez-JaraDiez*, European federal criminal law, 85-89.

[51] *Abrams/Beale/Klein*, Federal criminal law, 19-20.

[52] See above note 20.

Council, acting in accordance with the ordinary legislative procedure, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union's institutions, bodies, offices and agencies'[53]. When it comes to combating fraud affecting the financial interests of the EU, the TFEU provides, in Article 86, the possibility of establishing a European Public Prosecutor's Office, which will be responsible for investigating, prosecuting and bringing to judgment the perpetrators of offences against the financial interests of the EU, exercising functions of prosecutor in the competent courts of the Member States in relation to such offences.

Thus, the institutional framework concerning the competence to criminalize offences violating direct US federal and EU interests is rather clear-cut. This is why, in what follows, attention will be focused on the competence to enact federal criminal law statutes or EU legal instruments aimed at protecting *non-direct* US federal or EU legal interests, respectively, which inevitably pose the pivotal question of not overstepping the limits of such competence. It is exactly in this field that the states could be primarily competent to introduce criminal law rules, and additionally be more suitable to address criminal acts.

3 The scope of competence to introduce federal criminal law rules in the US

In the American literature, it is widely accepted that, in the course of time, federal criminal law has gained increased importance[54]. This is not only because of the major changes designed after 9/11 (2001) in response to the challenge of terrorism but also because the areas of crime attracting federal interest in terms of penal repression have steadily been expanding, covering not only organized crime and political corruption of federal agencies, but also white collar and business crime in general, as well as drug trafficking.

Those so-called 'auxiliary', 'local' or 'non-federal interest' crimes raise important questions, including questions of competence, given that they have traditionally been handled at the State level[55]. Attention is focused on the justification of the federal criminal competence for them and on the rationale behind it, because in such cases no direct federal interest is violated. In the federal system of the US, it is indeed a strong tradition that the primary responsibility for criminal enforcement rests with State and local governments rather than with the national

[53] See also the analysis under 5.1 below.
[54] *Abrams/Beale/Klein*, Federal criminal law, 1-2.
[55] Ibid., 2-3.

one. Congress does not possess plenary authority to enact crime legislation[56]. The constitutional and statutory basis for the exercise of federal authority in the field of criminal law is thus restricted by definition.

Addressing jurisdictional questions related to federal criminal law in the US, it should be mentioned, first of all, that the authority of Congress to enact criminal statutes not aimed at protecting direct federal interests is – or rather *should* be– invariably based on one of the powers enumerated in the Constitution[57]. The grounds of such legislative power of Congress most frequently cited include the commerce, the postal and the taxing powers[58].

Focusing on the commerce power, which appears to be the foremost basis relied upon by Congress to enact criminal statutes[59], it is worth examining how Congress has used it in actual practice and what has been the Supreme Court's stance on this practice to date. The commerce power is described in Article I, Section 8 para. 3 of the US Constitution, which reads: 'The Congress shall have power to regulate commerce … *among the several states*'. A historical overview reveals that the exercise of power to pass criminal laws based on this power has changed a great deal over time[60]. At the beginning of the twentieth century, the Supreme Court (in *Champion v. Ames*, 188 U.S. 321 (1903)) upheld a federal statute barring the interstate transportation of lottery tickets. The effects of intrastate transactions could not be regulated by federal criminal law. However, in the 1930s and 1940s this situation started changing. According to Stuntz and Hoffmann, the scope of federal power increased substantially during that period, as the federal government sought to tackle the Great Depression and fight World War II[61]. This state of affairs lasted for about 60 years. During that period, any crime that had an economic effect appeared to fall within the scope of federal power to regulate interstate commerce[62], and the Supreme Court never once invalidated a federal statute that was based on a congressional assertion of the interstate commerce power[63]. Things appeared to start changing with the Supreme Court's decision in *United States v. Lopez* (514 US 545 (1995)). In that decision, the Court explained that most of the federal statutes upheld in previous years had involved regulation of an 'economic activity'. However, the

---

56 Ibid., 19.

57 See Article I para 8 of the US Constitution; cf also the presentation of *Gómez-Jara Diez*, European federal criminal law, 96-99.

58 *Abrams/Beale/Klein*, Federal criminal law, 20.

59 See *M. Tushnet*, The Constitution of the United States of America. A contextual analysis, 2009, 162, who points out: 'The motor of constitutional development in the United States has been the economy, which means that Congress's power to regulate 'commerce … among the several states' was the provision most often invoked. Cf. *Gómez-Jara Diez*, European federal criminal law, 109 et seq.

60 See, for the following description, *W. Stuntz/J. Hoffmann*, Defining crimes, 2011, 212.

61 Ibid.

62 See *Perez v. United States*, 402 U.S. 146 (1971).

63 *Stuntz/Hoffmann*, Defining crimes, 212.

Gun Free School Zones Act did not allude to such an activity, because it applied to all gun possessions. In this decision, the Supreme Court identified three broad categories of activity that Congress may regulate under its *commerce power*: (i) the use of *channels of interstate commerce*, (ii) the *instrumentalities* of interstate commerce or *persons or things in interstate commerce*, even when the threat arises out of intrastate activities, and (iii) those activities having a substantial relation to interstate commerce, i.e. those activities that *substantially affect interstate commerce*. The Court thus tried to limit any broader reach of the commerce power in the field of federal criminal law.

With reference to the first two of the aforementioned categories, one should note that, in the course of time, there has been a shift in the scope of federal jurisdiction, moving from cases involving the direct crossing of an interstate boundary by transporting an object or by a person travelling from one place to another to a more 'intangible' approach[64], involving, e.g., the transportation of pornographic material involving children; at the same time, the contemporary exercise of jurisdiction is also based on the transportation in commerce of items or parts of items that are not themselves prohibited, as, for example, in the electronic surveillance statute (18 U.S.C. §2511 (1), (b),(iii)), which is deemed to be based on the fact that the accused knows or has reason to know that the electronic device being used (or a component thereof) has been transposed in commerce. Jurisdiction based upon the commerce clause has been expanded to apply also to the crossing of a State boundary by communications and electronic signals or – even more broadly – to cover the mere use of a communications facility[65], as for example in cases of a telephone call, involving communication across a State border in aiding or abetting a special criminal activity (18 U.S.C. § 1952).

With reference to the third category of jurisdictional power operating under the commerce clause, allowing for the criminalization of conduct that has an 'effect' on commerce, or conduct that 'affects' interstate commerce, it is interesting totrace federal criminal statutes which *include the jurisdictional element in the definition of the crime itself*, as for example in the Hobbs Act (18 U.S.C. § 1951(a): 'Whoever in any way or degree obstructs, delays, or affects commerce by robbery or extortion'). The jurisdictional approach of the Hobbs Act has been used in a number of other crimes[66] (credit card fraud 15 U.S.C. § 1644, RICO (18 U.S.C. §§ 1961-68), the electronic surveillance statute 18 U.S.C. §2511 (1), (b) (iv)), while the Supreme Court was initially prepared to uphold federal rules on local matters, provided that there was ample proof of the effects of the intrastate activities on interstate commerce[67]. The main issues arising from this

[64] *Abrams/Beale/Klein*, Federal criminal law, 22.
[65] Ibid., 23.
[66] Ibid., 25.
[67] *United States v. Green*, 350 U.S. 415, 420-21(1956), *Stirone v. United States*, 361 U.S. 212 (1960).

jurisdictional basis relate to the question how much 'effect' is constitutionally required in order to establish jurisdiction[68]. The prevailing view is that a minimal ('de minimis') effect on commerce is sufficient[69].

However, there are other federal criminal law statutes which, albeit based on the commerce power, do not contain a jurisdictional commerce element. The pertinent shift emerged with the Consumer Credit Protection Act (18 U.S.C. § 891 et seq. 1964), while other important acts followed suit (the Comprehensive Drug Abuse Prevention and Control Act and the Illegal Gambling Business Statute), especially after 1990 (the Gun Free Zones Act, the Child Support Recovery Act, the Freedom of Access to Clinic Entrances Act, etc.)[70]. The important element about these acts is that, by not containing a jurisdictional commerce element, they do not require the government to prove an effect on commerce in each individual case[71], while no *mens rea* (i.e. a guilty mind) covering such an element is required either[72].

The first of these federal criminal law statutes that was challenged before the Supreme Court for its constitutionality was the Gun Free School Zones Act, which employed the so-called 'class of activities' jurisdictional basis emanating

[68] *Abrams/Beale/Klein*, Federal criminal law, 25.

[69] Ibid., 26; cf. also *Gómez-Jara Diez*, European federal criminal law, 124 et seq.

[70] *Abrams/Beale/Klein*, Federal criminal law, 26, 29.

[71] In *Perez v. United States*, 402 U.S. 146 (1971), the Supreme Court, judging on the Consumer Credit Protection Act of 1964, found that: 'Organized crime is interstate and international in character … A substantial part of its income is generated by extortionate credit transactions … Even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce.'

[72] *Abrams/Beale/Klein,* Federal criminal law, 29.

from the commerce clause[73]. According to this approach, the power of Congress to regulate purely local activities is recognized when such activities are part of an economic class of activities that have a *substantial* effect on interstate commerce. In the aforementioned *Lopez* case (*United States v. Lopez*, 514 U.S. 549 (1995)), which is very significant since it marked the first time that the Supreme Court struck down a federal criminal statute for having exceeded congressional authority[74], the Court argued: 'The Act neither regulates a commerce activity nor contains a requirement that the possession be connected in any way to interstate commerce. We hold that the Act exceeds the authority of the Congress

[73] For the 'class of activities' jurisdictional basis see *Perez v. U.S.* (1971), where the Court cited *United States v. Darby*, 312 U.S. 100, a decision 'sustaining an Act of Congress which prohibited the employment of workers in the production of goods "for interstate commerce" at other than prescribed wages and hours, a class of activities was held properly regulated by Congress without proof that the particular intrastate activity against which a sanction was laid had an effect on commerce', In *Darby*, at 120-121, the Supreme Court had decided unanimously that: 'Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce, as in the Sherman Act. It has sometimes left it to an administrative board or agency to determine whether the activities sought to be regulated or prohibited have such effect, as in the case of the Interstate Commerce Act, and the National Labor Relations Act, or whether they come within the statutory definition of the prohibited Act, as in the Federal Trade Commission Act. And sometimes Congress itself has said that a particular activity affects the commerce, as it did in the present Act, the Safety Appliance Act and the Railway Labor Act. In passing on the validity of legislation of the class last mentioned the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power.' The judgment in *Perez* continued, 'That case is particularly relevant here because it involved a criminal prosecution, a unanimous Court holding [402 U.S. 146, 153] that the Act was "sufficiently definite to meet constitutional demands." Id., at 125. Petitioner is clearly a member of the class which engages in "extortionate credit transactions" as defined by Congress 4 and the description of that class has the required definiteness. It was the "class of activities" test which we employed in *Atlanta Motel v. United States*, 379 U.S. 241, to sustain an Act of Congress requiring hotel or motel accommodations for Negro guests. The Act declared that "any inn, hotel, motel, or other establishment which provides lodging to transient guests affects commerce per se." Id., at 247. That exercise of power under the Commerce Clause was sustained. In emphasis of our position that it was the class of activities regulated that was the measure, we acknowledged that Congress appropriately considered the "total incidence" of the practice on commerce. Id., at 301. Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power "to excise, as trivial, individual instances" of the class. *Maryland v. Wirtz*, 392 U.S. 183, 193. Extortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce. In an analogous situation, Mr. Justice Holmes, speaking for a unanimous Court, said: "[W]hen it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so." *Westfall v. United States*, 274 U.S. 256, 259. In that case an officer of a state bank which was a member of the Federal Reserve System [402 U.S. 146, 155] issued a fraudulent certificate of deposit and paid it from the funds of the state bank. It was argued that there was no loss to the Reserve Bank. Mr. Justice Holmes replied, "But every fraud like the one before us weakens the member bank and therefore weakens the System." Id., at 259. In the setting of the present case there is a tie-in between local loan sharks and interstate crime. So in some instances the argument is that in order to regulate something that is clearly within Congress' powers, it may regulate the whole class.' See also *Gonzales v. Raich*, 545 U.S. 1 (2005), where the focus was on how the class should be defined.

[74] *Abrams/Beale/Klein*, Federal criminal law, 29.

"to regulate Commerce … among several states….".'[75]. Although the federal government argued that 'possession of a firearm in a school zone may result in violent crime and violent crime can be expected to affect the function of the national economy', the Court overturned these arguments, because:

> To uphold the government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States … The statute now before us forecloses the States from experimenting and exercising their own judgement in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of the term.

Nevertheless, the 'Lopez approach', which was deemed revolutionary because the expansive jurisdictional reach of the commerce power clause was scaled back[76], did not last for long. In the 2005 case of *Gonzales v. Raich* (545 U.S. 1 (2005)), the Supreme Court sustained the application of the commerce power to a local activity related to the possession or manufacturing of marijuana for personal medical use regulated by federal drug laws. The Court stressed in this case:

> Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce … Even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by congress, if it exerts a substantial economic effect on interstate commerce. We have never required Congress to legislate with scientific exactitude. When Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class … Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.[77]

This change in the position embraced by the Supreme Court has led scholars to allude to 'a revolution that wasn't'[78]. During the last few years, however, the Supreme Court has often steered clear of rendering a constitutional decision under the commerce clause through its interpretation of the federal statutes, i.e. it has interpreted federal statutes in favour of defendants in order to avoid

---

[75] According to *Tushnet* (A contextual analysis, 170), the underlying theme in the Supreme Court's decision mentioned in the text is the 'commercial activity' rule: 'the New Deal approach of upholding regulations of local activities, if in the aggregate, those activities have a significant or substantial effect on interstate commerce can be used only when the local activity is a commercial one'.

[76] *Abrams/Beale/Klein*, Federal criminal law, 39.

[77] See also *United States v. Bowers*, 594 F. 3d 522, 527-528 (6th Cir. 2010) and *United States v. Poulin*, 631F. 3d 17 (1st Cir. 2011).

[78] *Abrams/Beale/Klein*, Federal criminal law, 44.

'commerce clause' decisions[79]. All the same, the main conclusion that could be drawn from the developments described above is that the competence for criminally proscribing conduct on the US federal level, though institutionally restricted as such, has been applied in such a way as to allow Congress more room to prescribe criminal law rules than *prima facie* envisaged in the actual provisions of the Constitution from which such power stems[80].

This should not come as a surprise. Almost every institution exercising a given power tends to expand it, even by overstepping its defined limits. What is noteworthy is the endorsement of such expansion of congressional power on the part of the Supreme Court, which has allowed Congress to proscribe types of conduct as criminal and restrict citizens' freedoms even in cases of violations of non-direct federal interests which only present an indirect – if any – association with the power relied upon to introduce criminal law statutes.

Tushnet's analysis is quite illuminating of the broader picture as well as of the Supreme Court's role in it, which explains the emergence of a plenary national power:

> The Supreme Court's Commerce Clause doctrine fit comfortably in the presuppositions of the New Deal[81], that the national government had the power and indeed the responsibility to ensure the smooth functioning of the national economy. And, because everything was connected to the economy, the national government became one of plenary power. Its authority would be exercised whenever national politicians believed it to their advantage to do so, the constraints becoming purely political rather than constitutional – or, more precisely, the constraints arising from the efficient rather than the written Constitution. When the New Deal regime began to deteriorate and faced the Reagan Revolution, the Court's doctrine came under increasing pressure, which culminated in a series of decisions in the 1990s that were the Reagan's Revolution equivalent….. [F]or the first time since 1936 the Court invalidated [in 1995, in *United States v. Lopez*] a national statute on the ground that it did not deal with 'commerce among several states' … [However], after *Raich* it would appear that Congress can regulate local and non-commercial activities as long as it embeds that regulation in a larger regulatory program …

---

[79] Ibid., 30, 44-45. Cf. also a recent decision of the Supreme Court on the notion of a 'tangible object' which also restricts overcriminalization: *Yates v. United States*, 574 U.S.; 135 S. Ct. 1074 (2015). The Court argued: 'we hold that a "tangible object" within § 1519's compass is one used to record or preserve information, not all objects in the physical world'.

[80] Cf., however, *Gómez-Jara Diez*, European federal criminal law, 121-126, who posits that the Supreme Court's stance is premised on the interpretation of the 'Necessary and Proper Clause' of the US Constitution. For the similar trend of allocating law enforcement to the federal level see, indicatively, the analysis of *R. Barkow*, Federalism and criminal law: What the feds can learn from the states, 109 Michigan Law Review 519 2010/2011, 519 et seq.

[81] On the New Deal crisis and the new constitutional regime see also *Tushnet*, A contextual analysis, 28 et seq.

> After *Raich* the only national statutes likely to be held unconstitutional are small policy initiatives that may well have little justification other than political grandstanding. Anything important Congress wants to do, it can.

As far as the Supreme Court's role is concerned, Tushnet concludes:

> Judicially enforced doctrine under the written Constitution has done little to place real limits on the expansionist tendencies of the national government, although such doctrine may have occasionally and erratically slowed the centralizing trend. The written Constitution, as interpreted by the Supreme Court, gives Congress almost plenary regulatory authority, and the Tenth Amendment's residuary clause is indeed no more than a truism imposing no real limits on congressional power. The United States is not, though, a nation in which all governing power is in fact exercised by a national government that, when it chooses, allows state and local governments to pursue whatever policies they want … The efficient Constitution, that is, does limit congressional power. As a classic article written in the 1950s put it, there are 'political safeguards of federalism'.[82]

This state of affairs can hardly be justified, even if one takes into serious consideration the different thoughts of the Supreme Court in the course of relevant cases, and the points raised by Tushnet above. Assuming, *arguendo*, that the basic rule in a federal state is that the power for enacting criminal statutes lies primarily with the states, then the interpretation of every provision that allows Congress to enact criminal legislation has to be based on the premise that its power is restricted and special and thus may not exceed the limits set by the letter of the given constitutional provision. If, in due course, it were ascertained that the relative power of Congress fails to meet the actual needs of the federal state, then the appropriate solution would be to compel – through the case law of the Supreme Court – a pertinent amendment of the Constitution rather than allow an interpretational overexpansion of its provisions. The latter choice would indeed entail great risks, and would hardly be compatible with the sort of interventions required in the field of criminal law, which tend to restrict the freedom of citizens. A case in point is the interpretation of the commerce clause: inasmuch as importance is given to presumed, indirect (hence unrelated

[82] *Tushnet,* A contextual analysis, 168-169, 170, 171, 172, 181-182. In his effort to identify the political safeguards of federalism, the author refers to Wechsler (*H. Wechsler*, The political safeguards of federalism: The role of the states in the composition and selection of the national government (1954) 54 Columbia Law Review, 543), who coined the phrase and found such structures built into the written Constitution (e.g. the influence of the electoral college in ensuring that presidential candidates pay attention to the interests of States throughout the nation). However, Tushnet himself finds that by the end of the twentieth century the political safeguards of federalism were more purely political (e.g. many members of Congress gain experience by serving in State or local office before they move to Washington) and that efforts to develop doctrinal limits on centralization have not succeeded: 'In the absence of some coherent normative account of the distribution of authority created by the US Constitution, the political safeguards simply are how the efficient Constitution implements federalism', ibid., 182-184.

to a concrete case) 'effects' on commerce, there can be no perceived reasonable criterion for delimiting the ambit of a constitutional provision which exclusively refers to the power of Congress to regulate 'commerce *among the several states*'.

Nonetheless, it should not evade our attention that, in the evolution of US federal criminal law, one can also trace features that are important for criminally proscribing conduct on the federal level. As previously mentioned, some of the different categories of Acts introduced by Congress to criminalize violations against non-direct federal interests feature an express description of the federal jurisdictional element, i.e. they include a justification of the concrete federal interest for criminalizing the described conduct. This is the case in the Hobbs Act, which contains such an *expressis verbis* federal jurisdictional requirement in the criminal statute itself. According to the Hobbs Act, the conduct of robbery or extortion has to be *obstructing, delaying or affecting commerce in any way or degree* in order to be punishable under it. In other Acts (e.g. some of the Firearm Acts), such an element is absent, but the federal courts presuppose by interpretation a similar requirement (alluding to an effect on interstate commerce), though in the form of a 'class of activities approach'[83]. In other federal criminal statutes, like RICO (18 U.S.C. §§ 1961-68), the provisions themselves require (in lieu of a jurisdictional element) that an item or a person be 'in' or 'engaged in' interstate commerce[84]. Last but not least, in the Travel Act (18 U.S.C. § 1952) and in certain acts referring to sexual offences (18 U.S.C. § 2251: transport in commerce of a visual or print medium which depicts sexually explicit conduct involving children), the statutes require movement in interstate commerce or the use of facilities of interstate commerce[85].

The presence of such explicit jurisdictional elements in the statutory provisions, i.e. elements which constitute necessary prerequisites for the application of the statute in each particular case, are a pivotal feature of a federal criminal law provision. This is so not only because they justify the exercise of federal authority as applied in the concrete area of the proscribed offences, but also because they *confine* the scope of the criminal provision itself to cases which, bearing such a feature, are properly subject to prosecution by federal authorities. Put differently,

---

[83] See above, note 73.

[84] *Abrams/Beale/Klein,* Federal criminal law, 29.

[85] See, e.g., the legislation concerning child pornography, which – many argue – invariably involves a facility of interstate commerce due to use of the Internet, thereby easily defeating a commerce clause challenge. See also *United States v. MacEvan*, 445 F. 3d 237 (3d Cir. 2006), according to which: 'Having concluded that the Internet is an instrumentality and channel of interstate commerce it therefore does not matter whether MacEvan downloaded the images from a server located within Pennsylvania or whether those images were transmitted across state lines. It is sufficient that MacEvan downloaded those images from the Internet, a system that is inexorably intertwined with interstate commerce.' See also *United States v. Farris*, 583 F.3d 756, 758-759 (11th Cir. 2009) as cited by *Abrams/Beale/Klein*, Federal criminal law, 69, holding that defendant's use of the internet in violating 18 U.S.C § 2422(b), which prohibits using a facility of interstate commerce to entice a minor to engage in sexual activity, satisfied the commerce clause, and further noting that 'even if none of Farris' communications were routed over state lines, the internet and telephone he used to contact the undercover officer were still "'instrumentalities of interstate commerce"'.

the federal criminal justice system is not – and should not be – interested in every robbery or extortion, but only in those that, by their very characteristics, invite the exercise of federal prosecutorial powers. This is the case under the Hobbs Act (18 USC § 1951 (a)), when the robbery or extortion obstructs, delays or affects commerce. The choice of describing the federal jurisdictional element in the definition of a crime itself exerts a significant influence on the criminal offence. In this way, robbery or extortion as prosecuted under State and federal criminal law, respectively, can never be one and the same offence[86]. The latter has an additional element in its description that is not to be found under robbery or extortion as conceived on the State level. A federal jurisdictional element, factored into the description of a 'federal criminal offence', can be a very useful idea for EU criminal law as well. However, the US federal criminal justice system shows that such an element is indeed useful, inasmuch as it is afforded its actual – substantive – function.

As previously mentioned, the description of the jurisdictional element in US federal criminal statutes is neither an indispensable nor an invariable feature, despite the fact that it derives from the same constitutional power that allows Congress to proscribe conduct as criminal on a federal level. However, the courts seek its affirmation even where it is not explicitly required. Although the effect on commerce need be only minimal, such effect is still an element of the offence that must be proven to the jury beyond reasonable doubt[87]. On the other hand, it is true that the effectiveness of such an element in confining the scope of the pertinent provisions to conduct that ought to attract federal interest largely depends on its precise description and its interpretation. All the same, one has to distinguish between federal criminal law statutes that encompass a federal jurisdictional element, whether precisely defined or not, and those that do not. In the framework of the latter, the role of interpretation is (almost) absolute, being limited only by the Constitution, while in the former the interpretation has to rely on the wording of the federal criminal statute itself.

The main question that arises in cases where *the federal jurisdictional element is interpretatively inserted into a federal criminal law statute* is whether the normative content acknowledged to it is compatible with a genuine federal interest for the proscribed offence, within the boundaries of the constitutional power relied upon to enact the particular federal criminal statute. The same question, though in less pressing terms, also arises in cases where an express federal jurisdictional element calls for interpretation. In these latter instances, the question essentially boils down to whether interpretation has broadened the clause's scope to such an extent that it is not covered by the actual wording of the relevant statute, or whether the required element is not fulfilled in each particular case. In

[86] Compare *Stuntz/Hoffmann*, Defining crimes, 204 and 206.
[87] *Abrams/Beale/Klein*, Federal criminal law, 24.

other words, it is open to doubt whether 'the class of activities'[88] or the similar 'aggregation' approach[89] are ample to justify the application of a federal criminal statute, when in practice (i.e. through the interpretation of the Supreme Court), the norm covers even conduct that in reality has nothing to do with interstate commerce, in apparent contradiction to the power relied upon by federal authorities.

In considering this question, one can proceed to certain useful distinctions. For instance, child pornography produced with 'homemade materials' for the purpose of trafficking, bears – in and of itself – features related to interstate commerce, since the perpetrator cannot normally exclude the possibility that this material will be involved in interstate commerce (even if he/she intends otherwise), especially with the contemporary proliferation of similar material over the Internet. On the contrary, the same argument cannot be made with regard to the possession of 'homemade' child pornography material (not obtained via the Internet) that is meant exclusively for personal use, inasmuch as the circumstances of its possession cause no danger of distribution[90]. Not requiring the inclusion of the federal jurisdictional element in the description of a federal offence, as the Supreme Court does, trying to infer from its rationale whether it abides by the power assigned to the federal government from the Constitution itself, of course makes it easier for Congress to expand its authority even to conduct that does not *per se* invite the exercise of federal powers. Such an outcome, which should be undesirable in a federal system, can only be averted if one insists on the *explicit* inclusion of a federal jurisdictional clause among the elements of a proscribed offence. Only thus might federal legislative power conform to its constitutional limits. It is therefore imperative to distinguish the federally criminalized conduct from that which does not belong to this category by clearly describing the federal jurisdictional element as a prerequisite to the fulfilment of the *actus reus* of every federal criminal offence. Such a requirement would only be unnecessary in cases concerning undoubtedly direct federal interests, as the latter by definition justify the exercise of federal powers, inherently reflecting the requisite jurisdictional element.

It is worth mentioning at this point that, even in the European legal tradition (which, in contrast to the common law tradition, is rather reserved when it comes

---

[88] See above note 73.

[89] The aggregation approach focuses on whether one can add up all of the effects of individual instances to determine the effect on interstate commerce (see *United States v. Morrison*, 529 U.S. 598 (2000) (civil)). This is why it is actually a similar concept to the 'class of activities' approach.

[90] See, however, *United States v. Bowers*, 594 F. 3d 522, 527-528 (6th Cir. 2010), holding that Congress had a rational basis for concluding that home-produced and -consumed child pornography would affect the interstate illicit market, and rejecting an as-applied challenge to the constitutionality of 18 U.S.C. §§ 2251 (a) and 2252 (a)(4)(B) after Raich; *United States v. Poulin*, 631 F.3d 17 (1st Cir. 2011) (holding that home-grown child pornography not for distribution has a substantial effect on interstate commerce as a category of crime) as cited by *Abrams/Beale/Klein,* Federal criminal law, 74.

to inserting elements of crimes by means of interpretation), an interpretative 'addition' of the federal jurisdictional element in cases where the federal legislator has impermissibly omitted it would not be excluded, since such an element restricts the scope of the proscribed offence, thereby acting in favour of the alleged perpetrator. However, the problem of this methodology lies in potential risks for the rule of law, as it would fall on each judge to decide whether or not to abide by such an interpretation. As described above, the Supreme Court itself has adopted a variety of approaches for one and the same federal jurisdictional element, even when explicitly described in a federal criminal statute.

Thus, the message is that in federal systems – like the US – the federal legislator should draft the federal jurisdictional element as an express part of the criminal norm itself, not in order to show his/her loyalty to the Constitution, but because such a description is needed to distinguish which category of proscribed conduct falls under the federal rule, as the latter by definition cannot cover the same conduct that a State criminal rule does.

4 The EU's competence to intervene in the field of substantive criminal law of its Member States

As already mentioned, the EU has evolved into a supranational organization with a legal personality, constituting a union of sovereign states that now represents much more than an 'economic community'. One of its main goals is to offer its citizens a common area of freedom, security and justice (Article 3 para. 2 TEU). For the realization of this goal, the EU can, *inter alia*, make use of criminal law (Article 67 para. 3 TFEU). This does not mean, of course, that the Union has somehow 'appropriated' the task of its Member States to proscribe as criminal conduct that they deem harmful for their respective societies. All the same, its competence in the field of criminal law has expanded and gained in importance, as the shared competence of the Union[91] in this field can potentially set aside that of the Member States. EU Member States are no longer exclusively competent to decide about the threshold between what should be punishable or not, at least in those areas of interest to the Union (Articles 83, 325 para 4, 258, 260 TFEU). On the other hand, the powers of the EU – being a supranational organization – are *delegated by its Member States, and are thus both special and restricted*[92]. This is why one of the most important questions in the field of European criminal law is the actual extent of the Union's competence in the field of criminal matters in general, and substantive criminal law in particular.

---

[91] According to Article 2 para. 2 TFEU: 'When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. *The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence*.'

[92] Art. 4 and 5 TEU.

The EU possesses shared competence to co-define binding rules of substantive criminal law with its Member States in three categories:

- (1) The first category refers to areas of *particularly serious crimes with a cross-border dimension,* resulting from the nature or impact of such offences or even from a special need to combat them on a special basis (Article 83 para. 1 TFEU). These areas of crime are explicitly listed in the TFEU. That list includes: terrorism, trafficking in human beings, sexual exploitation of women and children, illicit drug trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime. If the Union wishes to broaden this category in the future so as to include more types of crime that meet the specified criteria, then the Council has to adopt a unanimous decision on the matter, obtaining the prior consent of the European Parliament.
- (2) The second category of crime in which the EU can intervene 01is that of *any EU policy that has already been subject to harmonization measures* (:common market, protection of the environment, etc.), where the EU is of the opinion that *criminal law measures are essential for the effective implementation of such a policy* (Article 83 para. 2 TFEU). The Union's competence for intervening in the Member States' criminal law in the context of this category is called 'annex-competence', as it gives the EU the possibility to employ criminal law as an enforcement tool for practically all its policies, potentially proscribing even violations which in some Member States are deemed to be exclusively administrative in nature[93].
- (3) The third – and final – category refers to *the protection of the EU's financial interests.* The TFEU gives particular emphasis to this category, dedicating to it a special provision, namely Article 325 para. 4 TFEU. According to some scholars, this provision gives the Union the competence even to adopt regulations in order to criminalize conduct that violates its financial interests[94].

The first difference to note between the above categories is that, in the framework of the first two, the European legislator cannot directly enact criminal statutes, i.e. in the form of a regulation which shall directly be applied by the Member States. Rather, the legal instrument to be used is a directive, which has to be transposed by Member States into their respective national legal orders. On the contrary, the third category permits the use of either a regulation or a directive. The second difference relates to the so-called 'emergency brake clause'. This clause is explicitly recognized as an ad hoc 'opt out' possibility available to Member States with regard to directives adopted under the first two categories,

[93] See *Weigend,* Strafrecht der Europäischen Union nach dem Vertrag von Lissabon, 209.
[94] See above, note 20.

but not with respect to the third category. According to Article 83 para. 3 TFEU,

> where a member of the Council considers that a draft directive as referred to in paragraph 1 or 2 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 case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure. Within the same timeframe, 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 authorization to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

Such a clause does not exist in Article 325 TFEU, nor is there any allusion thereto. However, it is strongly argued that it can also be applied in the event of a directive concerning fraud affecting the Union's financial interests, by virtue of applying Article 83 para. 3 TFEU by analogy[95], given that in both cases the need may arise for a Member State to protect fundamental aspects of its criminal justice system, as would be the case, for example, if a pertinent directive were to require criminal punishment absent the requisite element of guilt or via shifting the burden of proof to the accused.

To date EU law has confined itself to directives in the field of substantive criminal law (as well as their equivalent in the previous institutional EU environment, namely framework decisions). This has been the case even when it comes to protecting the EU's financial interests[96]. In all these cases, the Union has asked Member States to criminalize certain conduct, and in some instances has even set a minimum upper threshold of penalties[97] that have to be threatened by national legislators. In other words, the EU has thus far introduced *minimum rules*, binding Member States to a minimum content of criminalization as described in the directive as well as a minimum level of sanctions, and leaving to the national legislator the choice to criminalize even more types of conduct or to threaten even harsher sanctions.

---

[95] *Satzger,* International and European criminal law, 82.

[96] See the last proposal of the Commission for a directive on the fight against fraud to the Union's financial interests by means of criminal law, COM (2012) 363 final, 11 July 2012.

[97] See, e.g., the directive on preventing and combating trafficking in human beings: 2011/36/EU, Art. 4, providing, in para. 2, that 'Member States shall take the necessary measures to ensure that an offence referred to in Art. 2 is punishable by a *maximum penalty of at least 10 years* of imprisonment where that offence…'.

In order to give a complete overview of the issues that arise with regard to the EU's competence to intervene in the field of substantive criminal law on the basis of the aforementioned provisions, the following issues should also be taken into account.

The Treaty itself specifies the *areas of particularly serious crime* that could meet the requirement of cross-border dimension that would make a crime subject to the Union's competence, however, the areas listed are in some cases so *vague* that one can hardly derive from their description the limits of the EU's competence. This holds true, for example, in the cases of corruption, organized crime or even computer crime. Such vagueness contravenes the principle of conferral (Article 5 para. 1 TEU)[98], under which 'the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.' Indeed, the use of ambiguous terms to describe the areas of possible EU competence to co-define criminal law rules may actually lead to a sham application of the principle of conferral, and consequently to its deterioration, as they are unfit to delimit the boundaries of the EU's authority with sufficient precision.

Additionally, the competence conferred on the EU by the so-called 'annex-competence' provision of Article 83 para. 2 TFEU is also extremely broad; under that provision, the Union can employ criminal law as a tool for the effective implementation of its policies in areas which are subject to harmonization measures. Employing criminal law as a tool for the effective implementation of a policy and not for tackling serious crime, as is the case with the previous category, could very easily lead to excessive criminalization of merely administrative infractions, which in some Member States would not be regarded as criminal offences because of their lesser 'wrongfulness'. This is why the Constitutional Court of Germany, deliberating on the Lisbon Treaty, has given an interpretation of the '*essential*' character that an EU intervention must possess for the effective implementation of a Union's policy, significantly narrowing down the scope of the Treaty's provision. According to the Constitutional Court of Germany: 'Only if it is demonstrably established that a serious deficit as regards enforcement actually exists and that it can only be remedied by a threat of sanction, this exceptional constituent element [of being essential] exists and the related power to legislate in criminal law may be deemed conferred'[99]. The decision of the Constitutional Court of Germany is, of course, not binding for the EU and it is assumed that the European Court of Justice (ECJ) would not subscribe to the same position. Indeed, the ECJ has thus far steadily adopted a 'Union-friendly' stance, and has even recognized competence to the EU that does not derive

[98] See *Weigend*, Strafrecht der Europäischen Union nach dem Vertrag von Lissabon, 208.

[99] BVerfG, NJW 2009, 2267 et seq. and its English translation online at: http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html

from the Treaty's text. This has largely been the case due to the need to achieve the goal of integration[100]. However, the main question remains whether such a position is compatible with the Treaty itself, and especially with Article 5 para. 2 TEU, which provides for the principle of conferral of powers. The said principle bears particular importance for the sensitive area of criminal law, and supports a restricted rather than an extensive interpretation of the EU's powers.

The 'emergency brake' clause (Article 83 para. 3 TFEU) also seems to play the role of a 'checking mechanism' delimiting all the above areas of EU competence. Naturally, in each particular case, the objections of a Member State will have to be relevant to the fundamental aspects of its criminal justice system, i.e. a notion which is rather difficult to establish and inherently vague. Still, the emergency brake has yet to be invoked, and one cannot easily prefigure its importance in terms of its actual application. Once invoked, however, it is expected to prove suitable to lead the European legislative organs to a compromise or at least give Member States raising fundamental objections to a European criminal law provision the possibility to avoid its binding effect for their own legal order.

Last, but not least, it is important to highlight that no EU minimum rule for criminalizing conduct has thus far contained an element concerning the EU's jurisdictional competence; for example, that the conduct described (e.g. sexual exploitation of women, environmental pollution, etc.) has a cross-border dimension or might obstruct, delay or affect the effective implementation of a certain EU policy.

5 Comparing the US federal and EU criminal law systems in terms of the competence to introduce substantive criminal law rules

At this point, let us recall the important starting point for the comparison between the criminal law systems of the US and the EU. Both systems function on two levels (federal/State and supranational/national), and they both possess similar competence constraints (also applicable to the field of criminal law) which stem from the principle of federalism that gives priority in introducing criminal law rules to the States, or the principle of conferral of specific and restricted powers to the EU by its Member States, respectively. Bearing this common groundwork in mind, the legitimate exercise of every power becomes especially important in the field of criminal law, which is particularly sensitive by its very nature. Criminal law directly affects citizens' freedoms, thus it is crucial to identify exactly how far the competences of the US as a federal state and the supranational organization

[100] See *Commission v. Council*, C-176/03, 13 September 2005.

of the EU reach, and what are their institutional limits, as well as the particular characteristics underlying their application.

5.1 The competence to protect direct US federal or EU legal interests

Addressing, first of all, the areas of crime in which these two multi-state entities can intervene in terms of substantive criminal law, one can make the following remarks from a comparative perspective.

Though not of central importance to this work, direct interests of the US federal state or the EU (as a supranational organization) which are protected through criminal law seem, at first glance, to be the least problematic area, inasmuch as competence for enacting criminal law rules in both systems is recognized.

In the framework of the US federal criminal law system, this competence refers – as expected – to a more extended category than the respective one in the framework of the EU. The US federal criminal law system protects (as direct interests of the federal state) federally owned property, persons employed by the federal government, federal programmes or the federal purse[101]. On the contrary, in the EU environment – at least for the moment – the only direct Union interest that is expressly mentioned in the EU Treaty (Article 325 para. 4 TFEU) as an object of the Union's criminal law competence is its financial interests[102].

In the US system – contrary to the EU – the institutional basis of the competence to protect direct federal interests by means of criminal law has a significant extent (unsurprisingly so), although the powers of the national government are deemed – at least according to a certain view – to be few and clearly delimited[103]. According to the US Constitution, Congress is entitled to enact criminal statutes aiming at the protection of direct interests of the federal government derived from the powers enumerated in Article I section 8, among them the power 'to provide for the general Welfare of the United States', as well as the power 'to make all laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other powers vested by this Constitution in the

---

[101] *Abrams/Beale/Klein,* Federal criminal law, 3; on the competence of the US federal state see *Gómez-Jara Diez*, European federal criminal law, 85-89.

[102] According to some authors, however, the Union's competence to protect its financial interests by means of criminal law does not rest on Art. 325 para. 5 TFEU, but rather on Art. 83 para. 2 TFEU; see note 20 above, as well as Editorial, EuCLR 2012, 201. Another direct interest of the Union which is now protected by means of criminal law is its 'public office' (against bribery acts); see the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union, OJ C 391, 15.12.1998.

[103] See *J. Madison* (The Federalist, 45), who expressly classifies the powers of the national government listed in Article I of the Constitution as 'few and defined'. Compare, however, *Tushnet,* A contextual analysis, 159, who rightly argues that these powers are defined only to some extent, as some of the powers listed in the Constitution cannot be deemed well defined, e.g. the power 'to regulate commerce……among several States', which has been contested almost continuously since 1789.

Government of the US, or in any Department or Officer thereof'. At the same time, it is important to note that, apart from the power to provide for the *general* welfare of the United States, the adjunct 'to make all laws necessary and proper for carrying into execution the foregoing powers…' does not broaden the scope to *other* powers but merely alludes to the exercise of the already recognized ones. Thus, it seems that the powers of the national government could be still deemed as strictly defined and warranted[104]. Thus, it can be argued that the recognized competence of the US federal state to provide protection to legal interests by means of criminal law is ancillary to its concrete enumerated powers, even if the latter are sometimes formulated in a general or even vague fashion. Such broadness, albeit criticized in the American academic literature, is acceptable in a federal state to allow it to realize the goals set by its Constitution, but is certainly not warranted in the context of a supranational organization, which operates based on the conferral of special and restricted powers by its Member States, aimed at serving certain objectives. Accordingly, it should be noted that the Lisbon Treaty, in Article 325 para. 4 TFEU, recognizes the EU's competence to provide criminal protection to a direct (supranational) interest of the Union by referring *specifically* to 'fraud affecting the financial interests of the Union'[105].

Unfortunately the situation is different in actual practice. In 2012, the Commission issued its proposal for a directive on the fight against fraud to the Union's financial interests by means of criminal law[106], indicating that it promotes a much broader concept of the competence envisaged in Article 325 para. 4 TFEU. According to the said proposal, the EU should introduce minimum criminal law rules even for other offences that are simply 'related'

---

[104] See,however, the broad interpretation of the Supreme Court referring to this power of Congress in *Abrams/Beale/Klein,* Federal criminal law, 76, who point out the decision in *United States v. Comstock*, 560 U.S. 126 (2010): 'The Court concluded that "the statute is a necessary and proper means of exercising the federal authority that permits Congress to create federal criminal laws, to punish their violation, … and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others". With these thoughts the Court rejected the defendant's contention that the federal civil commitment statute invades the province of State sovereignty by directing the Attorney General to inform the States where the federal prisoner "is domiciled or was tried" of his detention under § 4248, and giving either State the right to asset its authority over the individual' (Justice Alito concurred in this judgment: 'The statute recognizes that, in many cases, no State will assume the heavy financial burden of civilly committing a dangerous federal prisoner who, as a result of lengthy federal incarceration, no longer has any substantial ties to any State').

[105] Compare, however, *C. Gómez-Jara*, European federal criminal law: What can Europe learn from the US system of federal criminal law to solve its sovereign crisis?, EuCLR 2013, 177, who argues that: 'The fact that the type of federalism present in the EU is not state federalism, but supranational federalism should not weigh against the EU. It is matter of design, not of principle.' The author also contends that EU funds are to be treated as 'federal' funds and their mismanagement has to be prosecuted and punished by the EU itself, because there is a close relationship between law enforcement and investors' confidence, which has to be restored. See also, along the same lines, the author's proposal towards enhancing the vertical federalism dimension in EU criminal law in *Gómez-Jara Diez,* European federal criminal law, 2015, 250 et seq.

[106] See COM (2012) 363, final 11 July 2012 and the recent Council doc. 8604/15 (7 May 2015).

to fraud affecting the Union's financial interests. Such an application of Article 325 para.4 TFEU amounts to overstepping the EU's competence.This is so not only because one could *create a whole special part of criminal law just for the Union's financial interests* (by adding 'related' to fraud offences which affect those interests), but also because one could *unduly expand*the scope of all the Treaty provisions that refer to the Union's competence to introduce minimum criminal law rules in different crime areas, simply by supplementing each of those areas with a variety of offences 'related' to them. Such an approach is evidently not acceptable, although it apparently represents an existing trend in the EU's practice, which aims at broadening the ambit of its conferred special criminal law powers. Last but not least, the argument that the Treaty itself warrants the Commission's approach(based on the text of Article 325 TFEU, para. 1, which provides that: 'the Union and the Member States shall counter fraud *and any other illegal activities affecting the financial interests of the Union* through measures to be taken in accordance with this Article'), cannot possibly be valid, given that the actual provision of the Treaty recognizing the EU's competence to protect its financial interests by means of criminal law is not paragraph 1, but rather paragraph 4 of Article 325 TFEU. In this latter provision, the Treaty, despite the distinction previously made in paragraph 1, restricts the scope of competence by only referring to 'fraud' affecting the financial interests of the Union, as opposed to any other illegal activities with regard to these (financial) interests. Thus, although administrative measures can be taken by the EU even with respect to other forms of conduct violating its financial interests, this cannot be the case when it comes to criminal law measures, which have to be restricted to the field of fraud alone. The same reasoning explains why Article 86 TFEU, which recognizes the Union's competence to establish a European Public Prosecutor's Office in somewhat broader terms (i.e. crimes affecting the financial interests of the Union as opposed to merely fraud), cannot be regarded as a legal basis of the EU's competence to introduce minimum rules of substantive criminal law protecting its financial interests.

On the other hand, one could of course argue that the competence to protect direct EU interests through criminal law measures derives from Article 83 para. 2 TFEU, insofar as the violation of such interests is affecting the effective implementation of the EU's policies, and criminal law measures may prove to be essential for this purpose. According to such a view the Union could, for example, enact directives to protect its financial interests by means of criminal law, as the violation of such interests could affect its economic policy. It could also enact directives to punish corruption involving EU officials, since all its policies could practically be affected through corrupt practices. The particular features of Article 83 para. 2 TFEU will be explored in the next section, because this provision grants the EU competence to introduce minimum criminal law rules even with respect to non-direct EU interests. Suffice it to say, at this point, that the said provision is problematic in terms of the extremely broad manner in which it delimits the scope of the Union's competence by alluding

to the effective implementation of *all* its policies which have been subject to harmonization[107]. With regard to Article 325 TFEU, which explicitly assigns criminal law competence to the EU for the protection of an EU direct legal interest (its property), it is also useful to note that, inasmuch as the EU wishes to broaden its criminal law competence in the field of its direct legal interests under this controversial provision (which would be a sensible thing to do, at least with respect to the protection of EU public office against corrupt practices[108]), it will have to reform the Treaty[109]. The ECJ is not allowed to create such competence through an interpretation of the Treaty, since, unlike a federal state, the powers of a supranational organization like the EU do not emanate from a Constitution but are merely delegated by different (sovereign) Member States. It might be true, of course, that, despite the residual clause of the US Constitution (in the Tenth Amendment), which provides that all powers which have not been surrendered to the national government are retained and rest with the States[110], the 'efficient' Constitution reveals a quite different state of affairs[111]. Scholars make it clear that, although in ordinary criminal law the national government enjoys quite limited powers, federal criminal law reaches deep into the various States[112]. Congress, it is argued, does not exercise the full extent of its powers under the efficient Constitution, but the reasons for such reticence lie in politics rather than constitutional law[113]. However, even under this perspective, things are different when one moves from a federal state, which is based on its constitutional set of powers, to a supranational organization with powers conferred by its member states. An *ad hoc* conferral of powers of sovereign nation-states in the latter model cannot be equated to a constitutional division of powers between the states and the federal government in the former (i.e. the federal) model. This division may arguably be leaning to one side or the other, depending on a nation's history and the interpretation of its Constitution. In a supranational organization, contrariwise, member states *have to decide afresh* whether they wish to expand the powers conferred on it, which is why the ECJ is divested of the authority to broaden the ambit of the EU Treaty by interpretation. Put differently, there is a presumption *against* the recognition of a power not explicitly conferred on the supranational organization. In this respect, one can hardly speak of an 'efficient' EU Treaty, comparable to the 'efficient American Constitution'[114], or of an EU

---

[107] See *Asp,* Criminal law competence of the EU, 127 et seq. and 137-139, *Giannakoula,* Crime and sanctions in the EU, 394 et seq., and *Satzger,* International and European criminal law, 76-77, with further citations. Cf., however, *B. Hecker,* Strafrechtsangleichung in harmonisierten Politikbereichen, in Sieber/Satzger/v. Heintschel-Heinegg, Europäisches Strafrecht, 2nd edition, 277 et seq. The variety of scholarly views on Art. 83 para. 2 TFEU evidences the ambiguous manner in which this provision defines EU criminal law competence.

[108] *Schünemann (ed.)*, A programme for European criminal justice, 310.

[109] Compare the different method employed in Art. 83 para.1 TFEU, which makes a renewal of the euro-crime areas possible through a decision by the Council.

[110] *United States v. Darby*, 312 US 100, 124 (194).

[111] *Tushnet,* A contextual analysis, 158-159.

[112] Ibid., 159 and *Abrams/Beale/Klein*, Federal criminal law, 39 et seq.

[113] *Tushnet,* A contextual analysis.

[114] Ibid., 182-184; also see note 82.

Treaty being a 'living instrument' comparable to the ECHR[115], at least in the field of its provisions referring to criminal law. Any broadening of the scope of powers conferred on the Union must always be decided anew by its Member States. It is they, as sovereign actors, which should have the chance to express themselves as to whether they wish such an expansion of EU powers. Expanded EU powers do not stem from the EU Treaty, nor can they evolve from it. This is also why the Treaty establishing a supranational organization ought to be much more precise than the Constitution of a federal state in order to support the implementation of the principle of conferral.

With regard to the competence to protect direct US federal and EU supranational legal interests by means of criminal law, one could thus arrive at the conclusion that, although the US Constitution, compared with the Treaty of Lisbon, appears at first glance to offer a rather extended legal basis, containing a general clause, it is in fact the EU institutional framework which, upon closer examination, remains much more imprecise and vague (unfortunately so). This is due to the fact that the EU is afforded competence to enact criminal law rules to protect its own legal interests by virtue of a general allusion to the protection of the effective implementation of *all* its policies that have been subject to harmonization measures. However, the nature of the EU as a supranational organization (based on the principle of conferral of powers) calls for a concrete and clear-cut manner of describing the areas of such competence[116].

5.2 The competence to protect non-direct US federal or EU legal interests

Turning to the competence to extend criminal law protection to non-direct US-federal or EU-supranational interests, one encounters a rather more complicated state of affairs in both legal orders of this comparison.

In this field, the institutional constraints posed by the US federal system on the competence of Congress regarding criminal law appear sufficient. In order to enact a criminal law statute, Congress has to rely on one of the powers explicitly enumerated in the Constitution. However, as already mentioned, the application of this principle by Congress, and especially its interpretation by the Supreme Court, has led in many cases to a much broader perception than allowed by the language of the pertinent constitutional provisions, and this now constitutes the prevailing view. Let us recall, in addition, that this is so, despite the fact that the federal legislator has incorporated, in several instances, the federal jurisdictional

[115] *L.-A. Sicilianos*, European Convention of Human Rights, 2013, 8.

[116] See a relevant proposal by *P. Asp*, The substantive criminal law competence of the EU, 2012, 85, and *Giannakoula*, Crime and sanctions in the EU, 421, who not only alludes to particularly serious crime areas with direct negative influence to the effective implementation of a Union's policy, where harmonization measures have been taken, but also exhaustively lists the relevant crime fields, providing, at the same time, for the Council's competence to add more crimes meeting the same criteria.

element in the description of the criminal offence itself, in an attempt to meet constitutional requirements. On the contrary, the EU's competence to (co-) draft the criminal law rules of its Member States is characterized by serious *institutional* deficits with regard to clarity and precision and, consequently, with regard to the very limits of such competence.

With respect to such institutional deficits, it is worth mentioning that, to a certain extent, these can be overcome through a systematic interpretation of the Treaty itself. First of all, with respect to Article 83 para. 1 TFEU, it should not evade our attention that the elements of cross-border criminality and particularly *serious* gravity of the crime proscribed should cumulate in all crime areas listed in the above provision[117], as opposed to merely constituting – as has been argued – a criterion only applicable to a future expansion of the list[118]. Although the wording of the enumeration[119] may give the opposite impression, a closer look reveals that this cannot hold true. If the Treaty was intended to confine the cross-border dimension only to future additions to the list, this could have been achieved much more easily by listing first the areas of crime subject to the EU's competence (absent any further criteria), and then identifying separately the criteria applicable to future expansions of the list. It follows that the EU possesses competence to set the minimum threshold of 'punishability' in the areas of terrorism, trafficking in human beings, etc., *only insofar as these offences prove to be particularly serious crimes and feature a cross-border dimension as well*. The importance of this viewpoint will be further elaborated below.

On the other hand, the cross-border dimension of the enumerated offences can derive, according to the Treaty, 'from the nature or impact of such offences or from a special need to combat them on a common basis'. Although the first and the second categories of the cross-border character of an offence are rather unambiguous[120], the third category could easily lead to an extremely broad ambit, which would actually go beyond the confines of 'justified' EU intervention. Assuming, *arguendo*, this element were deemed to exist whenever a need for judicial cooperation arose between Member States in the prosecution of such an offence[121], that would result in upholding the EU's competence even in cases where the only cross-border element was, e.g., the alleged perpetrator fleeing

---

[117] See *Giannakoula*, Crime and sanctions in the EU, 394 et seq., *Satzger*, International and European criminal law, 76.

[118] See, however, *Weigend*, Strafrecht der Europäischen Union nach dem Vertrag von Lissabon, 215.

[119] Art. 83 para. 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 or impact of such offences or from a special need to combat them on a common basis. These areas of crime are the following …'.

[120] Nature: on the basis of its description involving more than one Member State, impact: effects caused by the conduct in different Member States.

[121] *Weigend* seems to be arguing in this direction, in Strafrecht der Europäischen Union nach dem Vertrag von Lissabon, 215.

to another Member State after committing the offence. The Treaty, however, refers to particularly serious *crimes with a cross-border dimension*. This literally means that the relevant dimension must stem *from the crime itself*. If this category is expanded so as to cover even cases in which evidence is sought from another Member State, this would extend the provision to practically every case of (ordinary) judicial cooperation. Such a reading of the Treaty's provision is surely unwarranted based on its present wording. Besides, judicial cooperation is actively promoted and facilitated for Member States on the basis of Article 82 TFEU[122]. Thus, the only way to interpret Article 83 para. 1 TFEU is to hold 'the special need to combat a crime on a common basis' not as a separate criterion for crimes featuring a cross-border dimension (which is logically inconceivable), but as an additional prerequisite to the exercise of the EU's competence in cases of crimes with a cross-border dimension resulting from the nature or the impact of the offence as such[123]. Nor could it be acceptable that the element of cross-border character is a 'label' that can simply be attached to any offence by virtue of the political determination to combat crime on a European level (however strongly voiced or justified as an ultimate goal)[124]. Accepting such a view would effectively open a leeway to the possibility of attaching that label at will to potentially every offence.

A remark should be made concerning the other category of EU competence in the field of substantial criminal law, the so-called 'annex-competence', which aims at the effective implementation of harmonized EU policies. As has already been mentioned, this provision is deemed problematic because it can lead to an over-criminalization of otherwise administrative violations by the EU, which could disturb the balance of the national criminal law systems of the various Member States. This is why interpreting the element of 'essentiality' for such an EU intervention in the field of criminal law could pose an important institutional constraint, in the vein argued by the German Constitutional Court in its pertinent decision[125]. This constraint derives from the Treaty itself and should therefore not be overlooked. It is worth noting that the criticism voiced against

---

[122] Cf. BVerG 123, 267, 410 et seq., and in English translation at http://www.Bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html , *F. Zimmermann*, Die Auslegungkünftiger EU-Strafrechtskompetenzen nach dem Lissabon - Urteil des Bundesverfassungsgerichts, Jura 2009, 850, cf. *M. Kaiafa-Gbandi*, ZIS 2006, 522, arguing that simply facilitating the judicial cooperation cannot provide a basis for harmonizing criminal procedure law.

[123] See, in this direction, BVerfG 123, 267, 410 et seq., *K.Ambos/P. Rackow*, Erste Überlegungen zu den Konsequenzen des Lisabon-Urteils des Bundesverfassungsgerichts für das Europäische Strafrecht, ZIS 2009, 397 (402), *Asp,* Criminal law competence of the EU, 87 et seq., *H. Satzger*, in Streinz Kommentar, 2012, Art. 83 AEUV, 993; see, however, *H-J Vogel*, in Grabitz/Hilf/Nettesheim, Kommentar, Art. 83 AEUV, Rn 42, *Giannakoula,* Crime and sanctions in the EU, 410 et seq., who support a distinct category of cross-border crimes resulting from a special need to combat them on a common basis.

[124] *Ambos/Rackow*, ZIS 2009, 397, *Zimmermann*, Jura 2009, 849.

[125] BVerfG 123, 267, 410 et seq., with regard to it also *Zimmermann*, Jura 2009, 844 (850) and *Kaiafa-Gbandi,* ZIS 2006, 522 et seq.

the decision of the German Constitutional Court is not justified. Assuming the rationale underlying the above criticism, i.e. that the Court's demand for a *demonstrable* serious deficit as regards enforcement is practically and empirically not possible, because it refers to the non-demonstrable stage-relationship between administrative and criminal law[126], held true, then one would never be able to justify the adoption of criminal law rules. Thus, it becomes evident that *the legislator has to demonstrate* that there exist no milder means to solve the problem. In a democratic system, in the event of doubt concerning the existence of such a justification, priority has to be given to the milder means, for example, administrative sanctions, and thus to a decision *pro libertate*.

Unlike in the US system, where the Supreme Court has actually supported an over-broadening of federal competence in criminal law, the Lisbon Treaty provisions referring to EU criminal law competence have not yet been the object of interpretation by the ECJ. Still, the ECJ has shown through its practice heretofore that it does not hesitate to take a favourable position toward the Union's further development, even where it cannot be premised on the provisions of the EU Treaty[127]. Thus, it is useful to note that, despite their gaps, the pertinent provisions of the Lisbon Treaty do offer (through their wording and intra-systematic relationship) significant assistance to a proper interpretation, taking into account the main features of the EU, i.e. being a supranational organization, and especially the principle of conferral of powers on which it is primarily established.

Although the experience of the American federal criminal law system demonstrates that institutional constraints to federal criminal law power, albeit available, have not been used by the US Supreme Court to their full extent, there is still a further tool, which the US system provides, that could be used to activate the aforementioned institutional constraints in the field of the EU Member States' criminal law. This tool is actually implied by the Union's institutional framework. Specifically, the Lisbon Treaty confines the EU's competence to introduce criminal law instruments insofar as it refers to areas of crime which, though *prima facie* resembling crimes already proscribed by Member States, do not fall under its competence, either because they do not have a cross-border dimension or because they do not affect the effective implementation of its policies. In other words, by delimiting the areas of EU competence when it comes to Member States' substantive criminal law, the Lisbon Treaty implicitly requires an additional element, thereby attaching a 'European dimension' to these crimes (jurisdictional element). Thus, the EU oversteps the constraints set by the Treaty by not including such an element in the description of the types

[126] *Weigend,* Strafrecht der Europäischen Union nach dem Vertrag von Lissabon, 216-217.

[127] See, for example, its decision C-176/03, 13 September 2005, on the EU competence to enact directives in the criminal law field under the former institutional 'pillars regime'; for a critical appraisal of that decision, see *Kaiafa-Gbandi*, ZIS 2006, 522 et seq.

of conduct to be criminally proscribed[128]. If the Member States wish to adopt the Union's criminal law rules in areas that do not belong to its competence, for example, in the area of exclusively national organized crime, it is, of course, their own right to do so. What is important, however, is that they are not bound to do so.

One might argue that the US federal criminal law system is different from that of the EU, and the characteristics of the latter do not allow the adoption of such a method, or at least make it impracticable. There do not exist two parallel sets of criminal law rules in the EU. Member States have to transpose European directives into their national legal orders in enacting criminal law statutes that reflect the EU's minimum rules, modifying them to the extent allowed (e.g. criminalizing more types of conduct than required by the directive). Besides, even if there ever is a 'genuine' European criminal law statute in the form of a regulation (which would directly apply in Member States as part of their national legal order), there would exist no national criminal law provision overlapping with the EU regulation in terms of its object. This means that, assuming one were to insist on a description of the crime that featured additional elements expressing its European dimension, as the Treaty calls for, then there would be ample differentiation in one and the same crime area that would have to be expressed in the Member States' national legislation. The latter would then have to adopt two pertinent provisions in any given area (e.g. human trafficking): one national and one European.

Although this would be the actual result of such a proposal, there are good reasons for it and, at the same time, it could be applied in a practicable fashion. The reason has to do, first of all, with the Treaty itself, which does not grant the EU any competence other than that described above. On the other hand, there are reasons related to the threshold of 'punishability' of a given criminal conduct proscribed by the Union. This is binding on the Member States, but might potentially go too far for cases that do not feature a European dimension, thereby disturbing the coherence of national criminal law systems or even violating the principle of proportionality. In practice, the aforementioned distinction between criminal norms referring, for example, to human trafficking for national or European purposes, respectively, would be made either by introducing *special* elements in addition to the ones nationally required (assuming the Member States wish to share the same general elements and add to the 'EU rule' the element of European dimension, differentiating the level of punishment accordingly), or by *modifying* elements of the 'European definition' of the crime (other than the element of 'European dimension'), in which case the national and the European rules would not cover the same conduct. In fact, this is not an unusual practice in the framework of contemporary national legal orders. For example, in the case of theft, the Greek legal order proscribes not only a special form thereof in the

[128] Cf., however, the different opinion of *Asp*, Criminal law competence of the EU, 88-90.

case of stealing, e.g., a religious object from a church (Art. 374a GrCC), but also the distinct (albeit similar to ordinary theft) crime of unauthorized taking of a motor vehicle (Art. 374A GrCC). Of course, national legislators who would be happy with the Union's description of a crime, as a minimum form of punishing certain conduct, as well as with the Union's sanctions, may even refrain from making any reference to the European dimension of the crime. This would mean that such a norm would equally apply to every relevant conduct, regardless of a possible European dimension.

Having ascertained that the difference between the US federal criminal law system and that of the EU does not preclude the use of such a method, and that it can still be practicable, it is important to explore at this point how the European legislature could actually make use of the said tool. The case of fraud affecting the Union's financial interests is the least problematic. The reference made to the Union's budget, in lieu of the legal interest breached, demarcates *ea ipsa* the European dimension of the crime, and helps delimit the criminal norm compared with any other relevant fraud affecting the financial interests of other entities.

Things become much more complicated in the case of crimes with a cross-border dimension. In this field, one could argue, first of all, that the areas listed in Article 83 para. 1 TFEU bear such a characteristic in and of themselves: human trafficking, for instance, is normally committed in more than one country, while the same is true of terrorism, organized crime, etc. In other words, were one to argue in terms of a 'class of activities' approach, as applied by the US Supreme Court[129], one could allow the cross-border dimension to flow from the usual occurrence of such forms of crime. The argument would then be that, although human trafficking in a particular case might feature no cross-border dimension, it still remains part of a human trafficking 'class of activities' that might potentially feature such a dimension, thus falling within the ambit of the Union's criminal law competence. Apart from the fact that the 'class of activities' approach is criticized even in the US, it could come into consideration *only after* the incorporation of the cross-border element in the EU's description of the crime. Even then, the 'class of activities' jurisdictional approach should not be an option. The argument that goes: 'although human trafficking in a particular case might feature no cross-border dimension, it still remains part of a human trafficking "class of activities" that might potentially feature such a dimension, thus falling within the ambit of the Union's criminal law competence', first of all does not hold true of all individual cases, and, secondly, is not even true of all crime areas listed in the above provision (e.g. sexual exploitation of women and children largely occurs on a national level, and even within the confines of the children's own families). Thus, the European legislature *has to adopt this element in the description of the minimum rules defining the criminal offences themselves,* in order to respect the limits of competence afforded by the Treaty.

[129] See note 73.

The optimal way to do so would be to adopt, in the minimum rules, a description of the (actually) two categories of cross-border dimension referred to in the Treaty (resulting from the 'nature' or 'impact' of such offences, respectively[130]). The cross-border *nature* of an offence provides a rather unambiguous criterion, as it necessarily relates to the particular attributes of the offence itself. In that respect, the emphasis should be laid on offences whose elements perforce involve more than one Member State (e.g. import/export of narcotic substances, etc.). On the contrary, cases where the cross-border dimension relies on *the impact* of an offence are not as clear. One might allude to examples where the effects of the perpetrator's acts are diffused in more than one Member State, or even cases where a given offence has brought about results in more than one Member State. In any event, one would have to delimit the notion of a crime's impact in terms of the *actual* (rather than hypothetical) and *direct* results that it produces in other Member States. In addition, the European legislature would have to establish ample grounds justifying the minimum rules for such offences, i.e. not only showing that they are particularly serious, but also that a special need arises to combat them on an EU level, supporting both premises with pertinent empirical data. According to the Treaty, mere political or even deterrence reasons are not sufficient to justify a special need to combat an offence on common grounds, if the latter lacks a cross-border dimension.

Last but not least, when it comes to the EU's competence under Article 83 para. 2 TFEU, the definition of a criminal offence in the sense of minimum rules established by the Union should also contain an element expressing the justification underlying such competence, i.e. *the essentiality* of criminalizing a concrete type of conduct in order to ensure the effective implementation of a Union policy. However, as already mentioned in the context of Article 83 para. 2 TFEU, the EU could protect – at least according to a certain view – even its direct legal interests. For example, it could introduce directives to protect its financial interests, as their violation can affect the effective implementation of its economic policy, or it could introduce directives to protect the Union's public offices against corruption, because most of its policies could be negatively affected through such criminal conduct. In criminalizing such conduct, there would be no need for any additional element in the directive's minimum rules describing the offence. The violation of a direct EU legal interest, such as its budget or its public office, self-evidently affects its ability to implement its policies effectively.

Article 83 para. 2 TFEU contains, however, a possibility to introduce minimum criminal law rules that are not necessarily related to violations of direct EU interests, but merely to violations that could affect the effective implementation of the Union's policies, in fields where harmonization measures have been

[130] See above for the interpretation of 'particularly serious crimes with a cross-border dimension', which excludes the third sub-category based exclusively on 'a special need to combat a crime on a common basis'.

taken, as the Treaty provides[131]. Cases in point would be certain violations of the environment or breaches related to the Union's migration policy. The Union is not allowed to introduce minimum criminal law rules in these fields but for the presence of certain prerequisites. Apart from the essentiality of criminal law measures towards the implementation of the pertinent Union policy, which has to be demonstrated in each and every case on the basis of empirical data[132], the need to safeguard the effective implementation of a Union's policy in a field where harmonization measures have been taken also needs to be expressed in the description of the criminal conduct itself. Otherwise, the Union may not exercise its competence to classify certain conduct as a criminal offence. Conversely, this means that the conduct proscribed should *have a direct nexus to a significant delay in, obstruction of or negative effect on a Union policy*. For example, the Union's environmental policy cannot be significantly obstructed, delayed or affected by every conceivable instance of environmental pollution or damage (e.g. no such significant impact arises out of a small forest fire in a given Member State). When such diffusion of the environmental damage or its effects is not possible, any realistic justification of the Union's intervention in terms of securing an effective implementation of its policies is hardly conceivable. Similarly, in the field of the Union's migration policy, it is not possible for the Union to assume legal action towards the criminalization of the conduct of each foreigner who tries to enter the Union illegally, because a single person's act can never be deemed to significantly delay, obstruct or affect the Union's migration policy, unlike the illegal entry of a significant number of illegal immigrants. This explains why the Union's policy in the field of migration can be significantly delayed, obstructed or otherwise affected through the conduct of the traffickers of illegal immigrants. Thus, when describing, in the minimum rules, the criminal conduct as well as the sanctions threatened against it, the Union should specify the aforementioned jurisdictional element, namely *that the proscribed* actus reus *be objectively conducive to bringing such results (as demonstrated through the criteria mentioned above), with at least a possible risk of significantly delaying, obstructing or otherwise affecting the effective implementation of a given policy of the Union*.

Once again, it has to be emphasized that national legislatures might opt, of course, to employ the Union's definition of the offence even for conduct that arises in a purely 'internal' dimension (for example, pollution of the domestic environment or breaches of national immigration rules). This, however, would only come about as a matter of their discretion, and not as a consequence of some binding effect of the pertinent European legal instrument.

---

[131] See the relevant discussion on whether Art. 352 TFEU allows for broadening the 'annex-competence' beyond Art. 83 para. 2 TFEU and the negative answer to this question in *Asp*, Criminal law competence of the EU, 137-139.

[132] BVerfG, NJW 2009, 2288 para. 362 and its English translation online at http://www.Bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html; cf. the rather varied approach of *Asp*, Criminal law competence of the EU, 131, arguing that: 'Generally speaking it is difficult to show that criminal law reforms have substantial effects – but one can surely require a serious attempt to justify the conclusion by means of reference to empirical data in combination with arguments and judgements built on common sense'.

It should also be made clear that, even if the EU legislature decided to emulate this aspect of the US federal criminal law system, encompassing the supranational jurisdictional element in its minimum criminal law rules (as the EU Treaty actually calls for), the positive effect of such a method could be undermined in practice via a broad interpretation by the ECJ, following the example of the US Supreme Court. The 'class of activities' approach[133] or the 'aggregation theory'[134] for identifying impact on interstate commerce are liable to overstep, interpretatively, the limits of federal or, in the case of the EU supranational, competence in the field of substantive criminal law, practically invalidating the aforementioned 'tool'. Thus, avoiding interpretational 'excesses' is equally important to introducing such an element in the first place (pursuant to the Treaty's provisions).

A final remark should be made concerning *the doctrinal character* that the supranational jurisdictional element ought to have in the framework of the EU's criminal law minimum rules. Should that be described as an element of the *actus reus*, thereby requiring a corresponding *mens rea*, or should it be classified as a different kind of element? There cannot be a single answer covering all the cases cited above. In the example of fraud affecting the EU's financial interests, the jurisdictional element, which is in fact identified through the very object of the violation (namely the Union's budget), is an element of the *actus reus*, inasmuch as the offence is proscribed so as to require damage or at least danger to the EU's assets. Should the European legislature decide that even preparatory acts in this field are punishable, the jurisdictional element would then probably shift to being an element of the *mens rea*, as the conduct would have to be undertaken 'with an intent to damage or endanger the Union's property'. Likewise, in the case of offences featuring a cross-border dimension that flows from their nature (e.g. import or export, crossing borders of different Member States) or their impact (e.g. different Member States affected by the conduct) the supranational jurisdictional element would have to be expressed in the form of an element of the *actus reus*, thereby requiringthe fulfilment of a commensurate *mens rea* element (at least according to the legal tradition of many EU Member States).

5.3 The essence of the underlying concept and the main obstacles thereto: US federalism and a European 'Sympoliteia' with delegated powers

Before drawing conclusions from the previous analysis, it is worth shedding light on the essence of the concept of federalism –as developed in the US-and the main obstacles it has had to overcome, contrasting it to the notion of a European 'Sympoliteia' of states and peoples emerging within a supranational

[133] See above note 73
[134] See above note 89.

organization with conferred powers like the EU[135]. Both concepts point towards the parameters necessary to address the problems inherent in the exercise of criminal law competence within federal states or supranational organizations.

Tushnet[136] offers us a succinct description:

> Federalism, it is said, limits the possibility of tyranny by making it possible for people to move easily from one location to another, thereby giving rulers an incentive to develop freedom-promoting policies that keep people from moving. It also helps achieve greater social welfare by allowing people with different values to live in subnational units and enact the policies that they like even though people living elsewhere, with different values, like different policies. And it is said to be a useful way of experimenting with various social policies until we see which policy works best, at which point the national government can scale up a policy that succeeded locally. Notably, though, these defences of federalism tell us almost nothing about how much centralization is too much – other than, perhaps, that complete centralization of all policies at the national level is a bad idea … What we do know is that efforts to develop sensible doctrinal limits on centralization have not succeeded. The reason may lie in the specifics of US constitutionalism: The words of the Constitution, or the nation's constitutional tradition, may be inadequate to generate sensible doctrine. What is left are the political safeguards of federalism. We can note that they operate without contending that the safeguards work 'well' in some normative sense … [T]he twentieth century saw centralization of power on a large scale… Politics and economics probably explain the centralizing trend[137]. An increasingly interconnected economy produces problems that nearly everyone thinks are better addressed at the national level. National politicians do not have to grab power, because, to overstate the point, no one really resists them. In the absence of some coherent normative account of the distribution of authority created by the US Constitution, the political safeguards simply are how the efficient Constitution implements federalism.

---

[135] Cf. an interesting comparison of the two systems in the field of addressing cybercrime by *Y. Naziris*, 'A tale of two cities' in three themes – A critique of the EU's approach to cybercrime from a 'power' versus 'rights' perspective, EuCLR 2013, 321 et seq.

[136] *Tushnet*, A contextual analysis, 184. See also *Halberstam*, Federalism: A critical guide, 50, identifying the following arguments in favour of 'local power': the greater democratic voice, solidarity, expertise, and risk management, and the following in favour of 'central power': savings, inter-jurisdictional difficulties, and intra-jurisdictional difficulties.

[137] Compare at this point the thoughts of *Stuntz/Hoffmann*, Defining crimes, 213, who point out the expansion of federal power in response to three new crises: '(1) the War on Terror that commenced on September 11 2001; (2) natural and man-made disasters with impacts on a scope never before seen in the United States, and well beyond the capacity of the individual states to address (i.e. Hurricane Katrina and the Gulf Oil Disaster); and (3) starting in 2008, a massive global economic downturn. These crises have produced new and unprecedented assertions of federal power (e.g., the USA Patriot Act, Homeland Security, and the new federal financial regulations).'

One may or may not totally agree with Tushnet's critical description of US federalism; be that as it may, it is hard to disagree with the main premise underlying his arguments. Setting limits to the trend of centralization within the overall structure of a federal state is essential, inasmuch as these limits preserve the very rationale underlying the choice of the specific political structure embodied in a multi-state entity. With particular reference to criminal law, which is the sternest mechanism of social control, entailing limitations to citizens' freedoms, one could add another important reason against centralizing power. This is the democratic principle itself, or, put differently, the need to ensure a certain degree of proximity between the authority entrusted with the tool of criminal repression and the people whose behaviour is 'controlled' by it.

Moving, then, to the EU as a supranational organization, as a 'European Sympoliteia'[138], i.e. as a union of sovereign nation states (see the function of the Council) and, at the same time, a union of the peoples of Europe (see the function of the European Parliament), one could speak about the merits of enhancing such a union with a common position on certain policies and securing the conferral of powers by its Member States to achieve common goals, while at the same time preserving their different identities and traditions. The element of centralization is – or rather should be – even more restricted in such a kind of union, its limits being even more clearly demarcated, as the EU remains a unity of *sovereign* states converging on different policy areas in order to achieve certain objectives. However, the trend of centralization has largely prevailed throughout the historic evolution of the EU as well, even in fields that are deemed to be typically reserved to Member States, for example, criminal law. Let us recall not only the significant – albeit unfortunate – decision of the ECJ on the EU's competence to enact directives containing criminal law rules in matters affecting its policies, at a time when such a competence did not exist at all according to the Treaties establishing the EU[139], but also the manner in which such directives are enacted in actual practice, even in areas of criminal law where such a (shared) competence is assigned to it, often showing disregarding for the principle of subsidiarity[140]. According to the latter, whenever a given directive is adopted, the Union has to prove that its action, compared to that of its Member States, is necessary because 'the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level' (Article 5 para. 3 TEU)[141].

---

[138] On this perception of the EU see *D. Tsatsos*, The notion of democracy in the European Sympoliteia (in Greek), 2007, 35 et seq.

[139] See above note 127.

[140] *European Criminal Policy Initiative (ECPI),* A manifesto on European criminal policy, ZIS 2009, 709, 714.

[141] Also see *Asp,* Criminal law competence of the EU, 184, 186-188.

In other words, the trend of centralization appearing in a federal state like the US is similar to observed in the framework of the EU, despite the distinct idiosyncrasy of the latter and the expected varying degree of centralization, which in case of the EU has to overcome the expected resistance from sovereign Member States. Economic globalization indeed appears to be the main historic and political reason that explains this trend. However, the need topose certain restraints such a development, particularly in the field of criminal law, is evident, and indeedis more exigent, because, in the case of criminal law, the overstepping of any applicable constraints directly affects the freedom of citizens. Thus, clearly setting the institutional limits of centralization and introducing mechanisms for the effective observation of such limits in practice is of great significance. Likewise, it is necessary to associate such limits with fundamental principles of European and particularly of criminal law, wherever this proves necessary and possible. Especially in the field of criminal law one cannot leave this task to merely political checks, as Tushnet seems to imply in discussing the idea of federalism in the US constitutional framework. The reason is that politics have to be institutionally controlled when deciding whether and to what extent to use criminal law as the sternest mechanism of social control.

5.4 Concluding remarks

Within this broader framework, it is time to articulate some concluding remarks with regard to the problems discussed in the previous sections of this chapter.

The EU cannot properly be described – at least not yet – as a federal state. However, it does bear certain features of a federal union[142]. A restrictive view holds that 'federalism' essentially refers to the structure of a 'nation state'[143]. In the EU differences in culture, language and social or political values are far more pronounced than are the generally prevailing differences in the US. The EU has historically been dominated by federal nation states[144]. Within a broader definition, however, as Koen Lenaerts, the president of the European Court of Justice, has argued,

> federalism, as a means of structuring the relationship between interlinked authorities, can be used either within or without the framework of a nation state … Its basic tenet is that power will be divided between a central authority and the component entities of a nation-state or an

[142] *Tushnet*, Comparative constitutional law, 1012.

[143] On the different views on federalism see *E. Young,* Protecting Member State autonomy in the European Union: Some cautionary tales from American federalism, in Tushnet, Comparative constitutional law, 1028.

[144] *G. Bermann*, Taking subsidiarity seriously: Federalism in the European Community and the United States, in Tushnet, Comparative constitutional law, 1021.

international organization, so as to make each of them responsible for the exercise of their own power[145].

Systems built on a broader notion of federalism are centrally concerned with balance, i.e. with preserving the role of each level of government they embrace[146]. Yet it cannot be overlooked that the EU, as a supranational organization of nation states, is still a system in search of its federal constitutional foundations. This is why, in contrast to US federalism (with its capacity to accommodate a broad array of considerations in the decision to allocate political responsibility over a given issue to a certain level of government or its close attention to the operational aspects of federalism)[147], the EU, as Bernmann aptly observes, seeks to establish (and not merely preserve) its basic federal-State equilibrium on the basis of a guiding principle of regulatory federalism, designating that role to the principle of subsidiarity[148]. However, it should be clear from the outset that subsidiarity refers to a different question than the one relating to the exercise of conferred powers within their proper limits. Subsidiarity comes to the fore when the question asked is whether the conferred power should in fact be exercised[149].

What is the meaning of these findings in terms of criminal law competence?

Addressing, first of all, the areas of the EU's competence to intervene in the criminal law of its Member States, one ascertains a development paralleling that of US federal criminal law. Through the Lisbon Treaty, the Union has acquired competence not only to protect its direct legal interests by means of criminal law, but also to protect non-direct EU interests, which have traditionally fallen within the ambit of its Member States' competence. Such competence is conferred on the Union only where this proves necessary either for implementing its policies effectively or in order to achieve a certain important goal, such as, for instance, offering its citizens a common area of freedom, security and justice (Article 3 para. 2 TEU), requiring, naturally, that it address cross-border crime as well. However, the institutional framework of the EU is characterized by significant deficiencies with respect to the description of the competence to introduce criminal law rules[150], as well as with respect to the limits to it. In the respective provisions, the Treaty employs, to a large extent, broad and ambiguous terms. In other words, the US constitutional environment offers more substantial

[145] See *Koen Lenaerts*, Federalism: Essential concepts in evolution. The case of the European Union, Fordham International Law Journal 21, 1997, 748. Cf. *E. Young,* Protecting Member State autonomy in the European Union, 1028, also *Halberstam,* Federalism: A critical guide, 50, arguing that 'federalism might well go all the way from private to global governance, depending on the purpose for which we employ the model'.

[146] *Young,* Protecting Member State autonomy in the European Union, 1028.

[147] See *Bermann*, Taking subsidiarity seriously, 1025.

[148] Ibid.

[149] Ibid., 1016.

[150] See, for example, Article 83 para. 2 TFEU, which refers to the effective implementation of the EU policies.

normative limits from a comparative perspective. The latter, however, are not always observed in practice, owing to the case law of the US Supreme Court, which seems to subscribe to the needs of the central government in the field of politics and economics. On the other hand, the EU framework is characterized by deficiencies which already surface on the institutional level as such, contrary to what one would expect on the basis of its identity as a 'European Sympoliteia' of sovereign states. Member States of a union pursuing specific policies and goals are expected to exercise better control the centralization trend, and to seek more precision and more elaborate restraints to delimit the criminal law powers they have conferred on the EU. This picture supports the conclusion that, in the modern era of globalization, the dynamics of politics and economics transcend the diverging structural forms of state power or federalism models and can significantly contribute inthe similar development of the respective systems, regardless of the distinct idiosyncrasies of the multi-state entities concerned.

This is precisely the reason why identifying and strengthening the proper function of institutional limits of competence, particularly in the EU framework, within which the principle of conferral of powers is the main constituent element, bears even greater significance[151].

The federal criminal law system of the US offers a very good example of *a legislative method* appropriate to apply institutional limits in the above sense, as well as maximize their proper function. As has been elaborated in the above analysis, the use of such a method is also possible with regard to the institutional framework of the EU Treaty. It can delimit the competence of the supranational organization in the field of substantive criminal law in actual practice and enhance the principle of conferral of powers to the Union, thereby safeguarding the freedom of EU citizens more suitably. In the context of the US federal criminal law system, the same method is deemed appropriate to serve the principle of federalism, according to which States have priority in criminalizing conduct, and the power of Congress is delimited. Thus, enacting minimum criminal law rules only in the areas of crime for which the EU has the relevant competence, by introducing –where necessary[152] – the supranational jurisdictional element as a limiting factor in the description of the respective offences, could mark a significant progress in the process of defining crimes on the EU level, because such a method can give

[151] Subsidiarity as a principle of regulatory federalism is of special importance to the EU, as Bermann has aptly highlighted (Taking subsidiarity seriously, 1024), because commandeering the member States apparatus and resources in the service of federally-established policies in a framework where a disjunction between the freedom to make policy and the burden of implementing it, compromises democratic values, is a precarious situation, in which subsidiarity may help reduce the field over which such a disjunction occurs. According to Bermann, the aforementioned disjunction lies in the fact that the makers of EU policy are neither politically accountable in any verifiable way to the people of these States nor necessarily even politically representative of them (ibid.).

[152] I.e. where its competence does not emanate from the legal interest violated or the proscribed conduct itself.

a true meaning to the existing institutional constraints of the EU competence in the field of criminal law[153]. The aforementioned institutional constraints are not, of course, the only applicable ones. One has to take into consideration other provisions of the Treaty as well, which call for respect for the principles of subsidiarity and the proportionality, as well as fundamental principles of criminal law that have marked its development in the European legal tradition and in that of the EU Member States. Still, limits emanating from such principles come into consideration once the Union is active in a field of its *existing competence*, and thus can only come into play subsequent to the matters raised here. On the other hand, the unique significance of the method employed in the American federal criminal law system (and the reason why its 'transposition' to the EU system is proposed here in a manner that might enhance the application of the relevant provisions of the Lisbon Treaty), is that it primarily tries to make use of all inherent institutional constraints to the federal state's power as they are described in the provisions recognizing such powers to it, and thus it helps maximize the gain emanating from the institutional framework itself. Likewise, the ECJ might be enabled to review whether the Union is overstepping its competence better with regard to a given criminal law legal instrument[154].

[153] *Young*, Protecting Member State autonomy in the EU, 1029, who is rather pessimistic in this respect, pointing out: 'Lopez and (the European) Tobacco Advertising (case), notwithstanding, the American experience suggests that renewed efforts to tighten the enumeration of community powers are unlikely to succeed'.

[154] For the essence of the ECJ's power of review in this respect see *Bermann*, Taking subsidiarity seriously, 1017-1018.

B) Key issues of US federal substantive criminal law and their importance for the evolving criminal law system of the EU

Having thus explored the fundamental issue of competence to enact criminal law statutes in the context of multi-state entities, it is now in order to address certain key issues pertaining to the hard core' of substantive criminal law, which will in turn shed light on certain peculiarities of those criminal law systems which evolve on different levels (federal/State and supranational/national, respectively), as well as on the guarantees that are indispensable in such systems.

Although the comparison made in the previous section can be fruitful, one might contest its meaningfulness with regard to core issues of criminal law. The US federal criminal legislation is directly enforced, and indeed by means of a distinct – federal – enforcement mechanism, whereas EU criminal law instruments – at least as things stand right now – have to be transposed into the national legal orders of the various EU Member States. Despite this notable difference, core criminal law issues remain significant to the evolving EU criminal justice system. As has already been mentioned, the EU co-drafts criminal law provisions along with its Member States, indeed laying down the minimum content of a crime, i.e. the minimum threshold of 'punishability' for the types of conduct it chooses to criminalize. Thus, the EU cannot possibly remain aloof from matters pertaining to fundamental principles of criminal law, which are definitive for the very essence of a liberal legal order.

Taking into consideration the most notable features of US federal criminal law, i.e.:

i. the unusual number of broadly defined, open-ended categories of crime (e.g. mail fraud) that are adaptable to many different types of fact patterns[155],
ii. the more 'flexible' approaches to *mens rea* compared with that adopted under common law or State criminal law[156], and
iii. the existence of (federal) legislative sentencing guidelines[157], contrary to State criminal laws,

this section discusses three main questions in the field of defining offences on the US federal and the EU supranational level, respectively:

i. the principle of legality,
ii. the principle of guilt (*mens rea*), and
iii. the principle of proportionality as applied to the sanctions threatened against criminal conduct.

---

[155] See *Abrams/Beale/Klein*, Federal criminal law, 4.
[156] See *Stuntz/Hoffmann*, Defining crimes, 2011, 204, 213, 237.
[157] *Abrams/Beale/Klein*, Federal criminal law, 1377 et seq.

1 The principle of legality

1.1 The principle of legality in US federal criminal law and its relationship with the principle of federalism

The most appropriate area to explore the function of the principle of legality in the framework of US federal criminal law is the federal crime of mail fraud. Mail fraud, which was first proscribed in 1872, is part of the oldest federal criminal statute, which is still being extensively used to prosecute crimes within the province of State and local law enforcement[158]. According to Abrams, Beale and Klein: 'The durability of the crime of mail fraud – despite the enactment over the years of a series of related, more specific criminal statutes – is largely explained by the unusual flexibility that courts have accorded it'[159]. It seems that this very flexibility has also been the main reason for the use of the mail fraud statute over the years to prosecute various forms of political corruption.

Durland v. United States (161 U.S. 306 (1896)) was the first case of mail fraud that was brought before the Supreme Court. The question was whether a person could be convicted under the Mail Fraud Act[160] having obtained property by making a false *promise*. Under the prevailing view of common law and State

[158] Ibid., 307.

[159] Ibid., 307, citing a former federal prosecutor: 'to federal prosecutors of white collar crime, the mail fraud statute is … our true love … we always come back to the virtues of § 18 U.S.C. § 1341 with its simplicity, adaptability and comfortable familiarity'.

[160] 18 U.S.C. § 1341-Frauds and swindles: Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both. 18 U.S.C. §1343-Fraud by wire, radio or television: Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds, for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both.

criminal law, false promises were not enough to prosecute someone for mail fraud; rather, misrepresentations as to present or past facts were required. The Supreme Court decided that the 'statute … includes everything designed to defraud by representations as to the past or present, or suggestions and promises to the future', and stressed that the significant fact is the intent and purpose.

The Court is deemed to have thus responded to a general tendency throughout the US towards upholding false promises as a modus of committing the crime of mail fraud, and at the same time to have cut the mail fraud statute from its common law moorings, having established that mail fraud was not confined to the scope of fraud punishable under State law[161].

In its 1999 decision in *Neder v. United States* (527 U.S. 1 (1999)), discussing the question whether materiality, i.e. a material omission or misstatement, is an element of mail, wire and bank fraud, the Supreme Court seemed to turn back to the 'well-settled' common law meaning for the offence of mail fraud, finding that Congress meant to incorporate the element of materiality into the fraud statutes in question. According to the Court, however, this was not inconsistent with its ruling in *Durland*, because, in its own words: 'Durland held that the mail fraud statute reaches conduct that would not have constituted "false pretenses" at common law, [but] it did not hold, as the Government argues, that the statute encompasses more than common-law fraud'[162]. Even if such a contradictory position of the Court were held convincing, it is quite obvious that it was the Mail Fraud Act that made both decisions of the Court possible due to its vague wording.

This is even more apparent in the lower courts' development of the doctrine of intangible rights. According to this doctrine, a person could be prosecuted and punished under the mail fraud statute even in cases in which the victims were deprived of some intangible right or interest[163], rather than money or property, and even absent any kind of misrepresentation. The Supreme Court rejected the intangible rights interpretation of the mail fraud statute in *McNally v. United States* (483 U.S. 350 (1987)), because it seemed to go too far. The Court concluded: 'Rather than construe the statute in a manner that leaves its *outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials,* we read §1341 as limited in scope to the protection of property rights. *If Congress desires to go further, it must speak more clearly than it has*'[164].

[161] *Abrams/Beale/Klein*, Federal criminal law, 314.
[162] 527 U.S. at 24.
[163] *Abrams/Beale/Klein*, Federal criminal law, 320.
[164] 483 U.S. at 360 (emphasis added).

However, Congress preferred the 'unlimited' breadth of the mail fraud act, and the *McNally* decision of the Court led –after one year – to the enactment of 18 U.S.C. § 1346. In order to fill the gap created by this decision, § 1346 provided: 'For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme of artifice to deprive another of the intangible right of honest services'.

Yet even the new provision failed to solve the problems of vagueness and ambiguity. Terms like 'honest services' continued to pose problems, despite an effort by lower courts to define their meaning. The various courts of appeal indeed attempted to develop different 'limiting principles' to define the boundaries of the honest services provisions[165], in order to tackle concerns about fair notice of citizens on the basis of the mail fraud provision, as well as about the risk of arbitrary prosecution. While most Circuits continued to adhere to the rule that no violation of State law is required in an honest services prosecution, the Fifth Circuit (in *United States v. Brumley*, 116 F.3d 728, 734 (1997)) disagreed and pointed out: 'the rights of citizens to honest government have no purchase independent of rights and duties locatable in state law. *To hold otherwise would offer § 1346 an enforcer of federal preferences of 'good government' with attendant potential for large federal inroads into state matters and genuine difficulties of vagueness.'*

The breadth of the mail fraud statute demonstrated above seems to have left federal prosecutors plenty of leeway, but above all raised questions under the constitutional *void-for-vagueness doctrine*. Under this doctrine, a criminal law statute has to give fair warning to those potentially subject to prosecution and not be susceptible to arbitrary and discriminatory enforcement. There are diverse scholarly arguments on the matter of a potential vagueness of the honest services statute that would render it unconstitutional[166]. Interestingly, however, Justice Scalia, dissenting from the denial of *certiorari* in *Sorich v. United States* (U.S. 555 U.S. 1204 (2009))[167], expressed concern about the vagueness of the honest services statute in a very sharp formulation. According to his dissent:

> Without some coherent limiting principle to define what 'the intangible right of honest services' is, whence it derives, and how it is violated, this expansive phrase invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs, who engage in any manner of unappealing or ethically questionable conduct

[165] See the description of the Courts of Appeals' attempt to cabin the breadth of § 1346 through limiting principles (e.g. criminalization only of a deprivation of services unlawful under state law, abuse of position for private gain) in the dissenting opinion of Justice Scalia (*Sorich v. United States*, 555 U.S. 1204 (2009)).

[166] *S. S. Beale*, An honest services debate, 8 Ohio St. J. Crim. L. (2010), 252 et seq.

[167] See *Abrams/Beale/Klein*, Federal criminal law, 327, highlighting that within the next few months after the decision the Supreme Court granted certiorari in three honest services mail fraud cases, sending a clear signal that it was ready to answer some of the questions about the scope of the doctrine.

> … This Court has long recognized the 'basic principle that a criminal statute must give fair warning of the conduct that it makes a crime … There is a serious argument that § 1346 is nothing more than an invitation for federal courts to develop a common-law crime of unethical conduct. *But 'the notion of a common law crime is utterly anathema today' and for good reason. It is simply not fair to prosecute someone for a crime that has not been defined until the judicial decision that sends him to jail.*

Justice Scalia further wondered: 'How can the public be expected to know what the statute means when judges and prosecutors themselves do not know, or must make it up as they go along?'.

As Abrams, Beale and Klein point out,[168] Justice Scalia's dissent from the denial of *certiorari* in *Sorich v. United States* seems to have been the turning point that galvanized the Court to take dramatic action just a few months later in *Skilling v. United States* (561 U.S. 358 (2010)). According to the authors, Skilling was a 'bombshell'[169]. In this decision, the majority of the Court invoked the doctrine of constitutional avoidance[170] and restricted the application of the honest services provision of the Mail Fraud Act to the 'solid core' of bribery and kickbacks. In the Court's words:

> Alert to § 1346's potential breadth the Courts of Appeals have divided on how best to interpret the statute uniformly, however, they have declined to throw out the statute as irremediably vague. *We agree that § 1346 should be construed rather than invalidated … It has been our practice before striking a federal statute impermissibly vague, to consider whether the prescription is amenable to a limiting construction* … to avoid constitutional difficulties by adopting a limiting interpretation if such a construction is fairly possible … *Our construction of § 1346 establishes a uniform national standard,* defines honest services with clarity, reaches only seriously culpable conduct, and accomplishes Congress's goal of 'overruling McNally'. If Congress desires to go further, we reiterate, it must speak more clearly than it has. *Interpreted to encompass only bribery and kickback schemes, § 1346 is not unconstitutionally vague.* Recall that the void-for-vagueness doctrine addresses concerns about: (i) fair notice and (ii) arbitrary and discriminatory prosecutions. A prohibition on fraudsters depriving another of one's honest services by accepting bribes or kickbacks does not present a problem on either score.

[168] Ibid.
[169] Ibid., 341.
[170] The doctrine of constitutional avoidance means that, as a general rule, the Court will not decide a constitutional question if there is some other ground upon which to decide a case.

Referring to the majority view, Justice Scalia called it an 'invention' as opposed to an interpretation, and indeed rightly so. The paring down of the scope of the Mail Fraud Act has obviously been a 'finding' of the Court's majority which did not emanate from the Act itself, either on its face or as it was applied by courts[171]. On the other hand, as has aptly been pointed out, the vagueness doctrine is more than notice to individual defendants[172]:

> the real problem is that § 1346 provided virtually no guidance or limitation on the government's power to select individuals for prosecution. That is an enormously serious problem for any criminal statute. It is an especially serious problem in the case of § 1346, which covers the conduct of state and local government officials implicating both federalism concerns and First Amendment values[173].

Furthermore, it should not evade our attention that, in a previous case of the same term, the Supreme Court had been reluctant to interpret another criminal statute narrowly in order to preserve it. As Justice Roberts remarked, writing for the majority in *United States v. Stevens* (559 U.S. 460 (2010)): 'courts may impose a limiting construction to avoid serious constitutional doubts *only if the statutory language is "readily susceptible" to that interpretation, and may not "rewrite" a statute to conform it to the Constitution*', because '*doing so would constitute a "serious invasion of the legislative domain"*' and sharply diminish Congress's 'incentive to draft a narrowly tailored law in the first place'.

In order to be able to better understand the *Skilling* decision, it is worth providing some historical context, as critically discussed by Abrams, Beale and Klein[174]. According to the authors, in *Skilling* not only was the Court well aware that Congress – in enacting § 1346 – had rejected policy concerns in the interest of fighting corruption at the State and local level, but it was also concerned about public opinion, because earlier in the same term it had issued a controversial decision (in *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010)), generating negative press and even presidential criticism. 'Thus, it might have been reluctant, later in the same term, to see itself in the headlines … The decision upholding § 1346 but paring it back was much less dramatic.'.

---

[171] As pointed out in a fictional academic debate by *Beale* (An honest services debate, 256-257): 'The Supreme Court has repeatedly said that facial vagueness challenges are rare and disfavoured. Facial challenges are successful only when: (i) no set of facts exists under which the challenged provision would be valid, or (2) the statute lacks any plainly legitimate sweep'. Note, however, the argument that defendants whose cases were before the Supreme Court had fair warning based on prior appellate cases.

[172] *Abrams/Beale/Klein,* Federal criminal law, 342 et seq.

[173] *Skilling v. United States*, 561 U.S. 358 (2010), at 260-261.

[174] *Abrams/Beale/Klein*, Federal criminal law, 346-347.

According to the authors, a cynic could say it was no coincidence that the Court selected a private sector case for such a decision[175].

Three elements of the above state of affairs are significant in terms of drawing an intermediate conclusion on how the principle of legality is applied in the framework of US federal criminal law:

First, despite the fact that federal criminal law in the US has deep roots in the common law tradition, the actual language of a federal criminal statute may be deemed rather decisive today. The Supreme Court's position in *McNally* – 'If Congress desires to go further it must speak more clearly than it has' – can be treated as a firm basis for addressing the question whether a federal criminal statute may be constitutionally void for vagueness. At the same time, it is true that the common law tradition makes the American courts – and the legal academia – feel comfortable even with interpretations of a federal criminal statute that do not strictly adhere to its language. However, even on the level of the Supreme Court, such a tendency is not unbridled. This is evidenced not only in Justice Scalia's dissenting opinion in *Skilling*, characterizing the majority's position an 'invention' rather than an interpretation, but also in the Court's majority itself in *United States v. Stevens* (559 U.S. 460 (2010)), where it was made clear that courts may impose a limiting construction to avoid serious constitutional doubts 'only if the statutory language is "readily susceptible" to that interpretation and may not "rewrite" a statute to conform it to the Constitution'.

Second, in American federal criminal law, the principle of legality and the relevant constitutional void-for-vagueness doctrine try to address two fundamental requirements for resorting to criminal law: (i) to give fair warning to those potentially subject to prosecution, and (ii) to not allow arbitrary and discriminatory enforcement[176]. These two parameters are self-evidently intertwined, because the language of a criminal statute is the basis on which both are addressed. Although the prevailing view in American law (as well as that embraced by the Supreme Court) is that a statute may not be held void for vagueness just on its face but only as it is applied, meaning that its interpretation by the courts plays a significant role, the same limits mentioned above apply here as well. In other words, the decisive factor is whether one has to do with an interpretation supported by the statutory language and not with an 'invention'

[175] For post-*Skilling* developments see *Abrams/Beale/Klein*, Federal criminal law, 350 et seq., and especially the wide consensus that after *Skilling* legislation was called for, because after this decision of the Supreme Court 'even a very small bribe, gratuity or kickback becomes a federal crime if a mail or wire transaction is involved, but much larger or more socially significant corruption involving public officials or Wall Street moguls falls outside of § 1346' (ibid., 352). However, Congress stopped short of adopting a legislative response to *Skilling* (ibid., 354-357).

[176] For the serious problems arising out of the discretionary power of federal prosecutors in the US see *S. S. Beale*, Prosecutorial discretion in three systems: balancing conflicting goals and providing mechanisms for control, in M. Caianiello/J. Hodgson (eds.), Discretionary criminal justice in a comparative context, 2015, 34-37, *Gómez-Jara Diez*, European federal criminal law, 132-136.

of the court. Despite the outcome of *Skilling*, which did not hold the provision concerning honest services mail fraud unconstitutionally vague, one cannot overlook that, by paring down the content of honest services to their 'solid core', the Court practically recognized the vagueness of the relevant federal statute, because there would otherwise have been no reason for such a measure. The restriction of the statute's substantive content was precisely an attempt to address the impermissible vagueness of the statute. On the other hand, the political background of the Court's decision can shed light on the reasons why, in this case, the Supreme Court stopped short of the further step expected of it, i.e. to recognize the unconstitutionality of the federal statute under scrutiny.

Last but not least, in the US the principle of legality appears to be closely linked with the principle of federalism as applied in the field of federal criminal law. An impermissibly vague federal criminal statute offers leeway for federal intervention in fields where the national government might not be competent according to the Constitution. One can easily read this interconnection, first of all, at the level of lower courts. In *United States v. Brumley* (116 F 3d 728, 734 (1997)), the Fifth Circuit pointed out that: 'the rights of citizens to honest government have no purchase independent of rights and duties locatable in state law. *To hold otherwise would offer § 1346 an enforcer of federal preferences of "good government" with attendant potential for large federal inroads into state matters*.' The same interconnection can be traced back at the level of the Supreme Court. In *McNally* (483 U.S. 350 (1987)), the Court concluded that: 'Rather than construe the statute in a manner that leaves its outer boundaries ambiguous *and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited* in scope to the protection of property rights … *If Congress desires to go further, it must speak more clearly than it has*.' There is great value in this interconnection for a federal system, because if the principle of legality also serves to prevent arbitrary and discriminatory prosecutions, then the exact fields where federal agents can take action according to their constitutionally recognized competence should be made clear in the criminal norm on which their action is founded. This is especially true in cases like § 1346, which covers the conduct of both State and local government officials implicating federalism concerns[177].

1.2 Particular problems arising out of the lex certa requirement in the framework of EU criminal law

The principle of legality has a special place in European criminal law. The said principle is enshrined in Article 7 para. 1 ECHR,[178] Article 49, para. 1 of the

[177] Cf. the more general thoughts for federal competence discussed by *Abrams/Beale/Klein*, Federal criminal law, 344-347.

[178] Cf. Recommendation No. R (98) 6 by the Committee of Ministers of the Council of Europe, sec. I. a. 1. Art.7, para.1 ECHR and Art. 49, para. 1 of the Charter do not guarantee the principle to its full extent; unlike most Member States, they require criminalization by law, including customary law. For a critical survey of the case law of the ECHR and the ECJ see *St. Braum*, EuropäischeStrafgesetzlichkeit, 2003, 47-48.

Charter of Fundamental Rights of the EU, and Article 6, para. 3 TEU,[179] which goes beyond the fundamental rights guaranteed under the ECHR, requiring respect for the *constitutional traditions common to Member States*, the latter being more concrete when it comes to legality. However, as we will see, the issues arising out of the precise function of this principle in the context of a supranational organization like the EU are quite different than those arising in a national or even federal criminal law system.

Under European legal doctrine, legality (*nullum crimen nulla poena sine lege*) generally requires that offences must be proscribed under *law,* and aspires to keep state power in check with respect to what exactly is punished and how[180]. Beyond the description of the object of punishment, the principle is also linked to the legislative process[181]. Specifically, criminal rules are only then legitimized when they are passed by parliament upon public discussion (*nullum crimen nulla poena sine lege parlamentaria*)[182]. This requirement connotes a public process involving the complete awareness of the potential consequences by the citizenry (the *demos*), as well as engaging the participation of the citizens – represented by their delegates in parliament – i.e. the ones who will ultimately suffer the consequences. Beyond the association with law enacted by parliament, the substantive content of the principle – as developed in European legal doctrine – is broken down into three separate requirements, addressed to the legislature, the executive, and the judiciary, respectively. These are: the *lex certa* requirement, the *non-retroactivity requirement*, and the *prohibition of applying criminal rules by analogy*[183]. The first one is exclusively addressed to the legislature, the second concerns all three branches of state power, while the third is exclusively addressed to the judiciary.

The main problems arising out of the application of the *nullum crimen nulla poena sine lege* (n.c.n.p.s.l.) principle on the EU level are related to the requirement of law enacted by Parliament, concerning the democratic deficit still existing even after the Lisbon Treaty at the level of the Union's legislative process, and the 'clarity' of criminal law provisions. In what follows, only the latter is addressed, as it resembles the relevant problems arising in the context of US federal criminal law.

---

[179] See *Kaiafa-Gbandi*, The development towards harmonization within criminal law in the European Union, 250.

[180] See, *inter alia*, *I. Manoledakis/M. Kaiafa-Gbandi/E. Symeonidou-Kastanidou,* Criminal law-general part (abridged) [in Greek], 7th edition, 18 et seq., *P.-A. Albrecht*, Die vergessene Freiheit, Strafrechtsprinzipien in der europäischen Sicherheitsdebatte, 2003, 47-48.

[181] *Cf. Albrecht*, Die vergessene Freiheit, 48-49, associating the principle with substantive criteria as to what may be punished by the State (not any conduct that is troublesome or risky may be criminalized; rather, criminal law should target conduct that constitutes denial of the fundamental rights of others, lest it itself become a liability for liberty). See a similar view in light of the Greek Constitution in *N. Paraskevopoulos*, The constitutional dimension of harm and guilt [in Greek], Yperaspise 1993, 1254 et seq.

[182] See *N. Androulakis*, Criminal law, general part, A theory of crime [in Greek], 2000, 95.

[183] For a presentation of the constituent elements of the principle see *Albrecht*, Die vergessene Freiheit, 49 et seq.

The *lex certa* requirement, as a particular facet of the principle of n.c.n.p.s.l. requires –according to European legal doctrine – criminal rules to contain a precise description of the objective and subjective elements of an offence, as well as the sanction to be imposed. It also requires that every offence describe a human act, hence prohibiting punishment for one's thoughts. Besides, the description must be clear enough so that the ordinary citizen can reasonably foresee which actions will make him or her criminally liable. In the absence of such *foreseeability*, the principle of legality would indeed be rendered moot[184].

It goes without saying that the *lex certa* requirement would apply without any distinction to criminal rules introduced by the EU itself, i.e. without the need of transposition by Member States, as provided for certain cases in the Treaty of Lisbon. That being said, the main type of criminal competence provided in the latter is the one to be exercised through directives establishing minimum rules concerning the definition of offences and sanctions (Article 83, paras. 1 and 2 TFEU). Therefore, the *lex certa* requirement acquires in this case a more intricate character, owing to the two distinct stages of criminalizing certain conduct (a European and a national one)[185].

A mere look at the case law of the ECJ[186] (predating the Treaty of Lisbon) indicates that the Court has indeed followed the ECHR by requiring that the criterion of foreseeability emanate from the text of the rule itself[187]. In the field of criminal law, the Court has also emphasized that the obligation of Member States to interpret the law in accordance with a directive[188] (or a framework decision) cannot lead to the establishment or aggravation of criminal liability. This would appear to imply that it is the national criminal rule that should abide by the principle of *nullum crimen sine lege certa* rather than the legislative act by which the EU has compelled its adoption.

---

[184] See, e.g., ibid., 49-50.

[185] Cf. *Asp*, Criminal law competence of the EU, 170 et seq., *ECPI*, A manifesto on European criminal policy, 708.

[186] See, for instance, the decision on the case C-308/06 of 3 June 2008, at para. 71. However, the ECJ, in *Advocatenvoor der Wereld* (C-303/05 of 2006), denied that mutual recognition in the EAW framework decision infringes the principle of legality with a non-convincing argumentation (see *S. Gless*, Legal certainty in a European area of freedom, security and justice [in Greek translation], in Bar Association of Piraeus/Association of Greek Penologists/Centre of International and European Economic Law (eds), Modern developments of European economic criminal law, 2010, 28-29. With regard to the n.c.n.p.s.l. principle, also see *A. Bernardi*, 'N.C.N.P.S.L.' between European law and national law, 2008, 101-102 and *Chr. Peristeridou,* The principle of lexcerta in national and European perspectives, in A. Klip (ed.), Substantive criminal law of the European Union, 2011, 69, 85-86, with further citations. Also compare the different understanding of the principle by the European Commission, the Council and the Parliament in documents COM 2011/573, 9, Council Doc. 16542/2/2009, 5, and the Resolution of the European Parliament of 22 May 2012, respectively.

[187] See *Chr. Mylonopoulos*, Community criminal law and general principles of community law, Poinika Chronika 2010, 161 [in Greek].

[188] See Cases C-74/95 and C-129/95, 12.12.1996, para 22, C-384/02, 22.11.2005, para 30.

However, that kind of reasoning would fail to take into account certain factors affecting EU law, particularly after the Treaty of Lisbon. Through its directives addressing cross-border crime or ensuring the effective implementation of its policies, the EU seeks to establish *a minimum content of the definitions of crimes*, which shall *bind* Member States[189] under threat of sanctions in the event of failure to incorporate them into the domestic legal order[190]. Such minimum content should clearly derive from each legislative act of the Union, despite the fact that it is up to each State's legislature to specify the elements of crimes for the purposes of its criminal justice system. In contrast, the sanction to be imposed does not need to be determined by the European legislature; that latter task could indeed be performed more aptly on a domestic level, in accordance with the principle of proportionality and the particularities of each criminal justice system.

Requiring the EU, to delimit clearly a minimum core of the conduct to be proscribed consists in two important parameters. First of all, lack of such clear delimitation would pose a dilemma to national legislators: either to introduce unilaterally a precise definition and risk diverging from the actual objective of the EU, which the European legislature did not adequately describe; or fail to give a clear description of the offence, thereby violating the principle of *nullum crimen sine lege certa*, which would amount to a breach of the Constitution in numerous Member States. It becomes evident that the *lex certa* requirement is addressed *to the European legislator as well*, *inasmuch as the latter may bind Member States to adopt minimum elements of an offence.* Otherwise, it would become impossible for national legislators to abide by their obligation to transpose EU law without violating the *lex certa* requirement. Even worse, fear of possible sanctions might lead Member States to opt for transposing pertinent directives verbatim, which would constitute an outright breach of the principle of legality[191]. Besides, in the absence of a clear delimitation of a minimum core by the EU, neither national parliaments nor states' representatives would be able to contribute in the consultation process or appraise the proposed norms in the light of fundamental principles inherent in their respective criminal justice systems, as the vagueness of the content may conceal serious deficiencies. As a result, this would drastically diminish the potential ambit of the emergency brake clause provided under Article 83, para. 3 TFEU. Since the consultation process and the emergency

[189] For a discussion of the function of 'minimum rules' in substantive criminal law see *Kaiafa-Gbandi*, The development towards harmonization within criminal law in the European Union,, 498 et seq.

[190] See Art. 260 TFEU.

[191] On the adverse effect of international law on the principle of legality in general see *B. Jähnke*, Zur Erosion desVerfassungssatzes 'Keine Strafeohne Gesetz', ZIS 2010, 463 et seq., esp. 469-470, *Kaiafa-Gbandi*, FSfürH.-L. Schreiber, 204 et seq., *S. Gless*, Strafeohnesouverän?, ZStrR 2007, 436-437, 442-443, *Mylonopoulos*, Poinika Chronika 2010, 166-167. See more generally *Chr. Mylonopoulos*, Internationalisierung des Strafrechts und Strafrechtsdogmatik. Legitimationsdefizit und Anarchie als Hauptcharakteristika der Strafrechtsnormen mit internationalem Einschlag, ZStW 2009, 68 et seq.

brake clause are both associated with the democratic principle, one can easily perceive a link between the latter and the *lex certa* requirement.

Aside from indirectly furthering the principle of *nullum crimen sine lege certa* within a national context, introducing specific directives regarding the minimum content of criminal rules to be adopted by Member States also concerns the European citizens themselves. This is because the directive itself, coupled with the national statute implementing it, can shed light on what exactly is punishable, thus ensuring foreseeability[192]. Of course, this does not mean that the directive – or at least one interpretation thereof – can lead to the establishment or aggravation of offences that the national legislature has not proscribed as such by virtue of domestic rules.

A much more pressing need to preserve the *lex certa* requirement arises when a piece of European legislation compelling Member States to criminalize conduct refers to other provisions of EU law[193]. This kind of situation might bring about practical problems, as the *lex certa* requirement must be observed with respect to every single provision involved. Otherwise, it would become unfeasible to adopt national rules incorporating EU law in a sufficiently unambiguous manner.

Evaluating the EU's practice in light of the principle in question – which also applies by analogy to framework decisions issued formerly under the third pillar, considering that they too aimed at binding Member States as to the result to be achieved – would churn out conflicting examples. For instance, where the EU wishes to proscribe any type of conduct occurring within a certain field, it does so through detailed descriptions of offences covering virtually every imaginable situation, such as in the case of drug trafficking[194] or the protection of the euro against counterfeiting[195]. These examples constitute, however, evidence of the exception rather than the rule. The latter is expressed in such cases as the framework decision on combating corruption in the private sector, by virtue of which Member States are bound to criminalize both 'active' and 'passive' corruption[196]. The central element of this offence is that a person employed in the private sector requests or receives an undue advantage in exchange for breaching his/her duties. Nonetheless, such breach of duty is only vaguely circumscribed under Article 1, sec. b and has to 'cover as a minimum any disloyal behaviour constituting a breach of a statutory duty, or, as the case may be, a breach of

[192] See in this respect also *Giannakoula*, Crime and sanction in the EU (in Greek), 252 who argues that the *lex certa* principle plays an important role even with regard to possible punishability restraints (defences) that the EU legal instrument introduces, as for example has been the case with the freedom of speech in the framework decisions for terrorism (FD 2002/475/JHA) and racism (FD 2008/913/JHA).

[193] On this issue see *Satzger,* International and European Criminal Law, 86 et seq., *Zimmermann*, ZRP 2009, 76.

[194] Framework decision 2004/757/JHA, L 335 of 11 November 2004, 8 et seq.

[195] Directive 2014/62/EU, L 151 of 21 May 2014, 1 et seq.

[196] Framework decision 2003/568/JHA, L 192 of 31 July 2003, 54 et seq.

professional regulations or instructions'. Thus, the framework decision would apply to breaches of duties arising out of contractual arrangements or even mere orders in the workplace. Since the uncertainty emanates from the framework decision itself, Member States are bound to get entangled in it. Although Article 2 para. 3 of the framework decision allows Member States to limit the scope to merely conduct involving a distortion of competition in relation to the purchase of goods or commercial services, this does not address the vagueness related to the breach of duty[197]. Similar flaws have surfaced in other EU legislative acts as well[198]: another case in point would be the directive on combating the sexual abuse and sexual exploitation of children and child pornography[199]. Article 2, sec. c (iii) of the said directive alludes to visual depictions of any (adult) person appearing to be a child, in disregard of the fact that no criterion in law can possibly determine when an adult would 'appear to be a child', since appearances may in fact vary significantly from person to person (an eighteen-year-old could easily appear to be seventeen, whatever this may mean)[200]. It becomes evident, then, that stipulations of this kind cannot satisfy the requirement of foreseeability, and should therefore be left outside the criminal law realm. In conclusion, the EU still has a long way to go toward ensuring actual respect for this facet of the principle of legality.

The above analysis demonstrates, first and foremost, that the principle of legality presents certain particularities on the EU level, calling for the contribution of both the EU and the Member States in order to preserve its core intact. At the same time, it is obvious that the application of the principle in actual practice requires further support.

1.3 Associating the principle of legality with the principle of conferral of powers in EU criminal law: a prerequisite for avoiding arbitrary prosecutions in an evolving criminal justice system of autonomous prosecutorial enforcement

As argued above, guaranteeing the principle of legality indeed turns the spotlight on the citizen, as it serves to limit the power of any government to impose criminal sanctions and safeguards civil liberties. When criminal law is developed in the framework of a multi-level system, the character and the function of legality will have to depend on the role and the extent to which every level is

[197] On the problem of transposing this framework-decision into the Greek legal order see *M. Kaiafa-Gbandi*, Punishing corruption in the public and the private sector: the legal framework of the European Union in the international scene and the Greek legal order, European Journal of Crime, Criminal Law and Criminal Justice 2010, 178 et seq.

[198] See the Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law, 2008/913/JHA, L 328 of 6.12.2008, 55 et seq., as well as the directive on the protection of the environment through criminal law, 2008/99/EC, L 328 of 6 December 2008, 28 et seq. See pertinent comments in Manifesto on European Criminal Policy, ZIS 2009, 711.

[199] Directive 2011/92/EU.

[200] *ECPI,* A manifesto on European criminal policy, 713.

engaged in the description of criminal offences. In a system like the US one, where federal criminal law is autonomous and co-exists in parallel to that of the States, legality has to be observed to its full extent on the federal level as far as its own rules are concerned. On the contrary, in multi-level systems like the EU, where the supranational organization intervenes in the legal order of its Member States, aiming at harmonizing certain fields of crimes mainly by co-designing criminal offences with them, things get much more complicated. The function of the legality principle depends, then, on the exact role and the depth of the Union's intervention in this process. Thus, safeguarding legality appears to be of paramount importance, as the division of tasks between the EU and its Member States in proscribing criminal offences generates certain risks.

Despite this difference between the two criminal law systems under scrutiny, the interconnection of the principle of legality to federalism, as observed in the US federal criminal law system, reveals an important idea that can be useful in European criminal law as well. The principle of legality helps to preserve federalism by precluding arbitrary prosecutions undertaken by federal agencies. This objective is achieved when federal crimes are clearly defined in areas of federal competence. Linking legality with the principle of conferral of powers, which governs the EU in the process of its gradual federalization, is of great significance for the criminal law system that evolves in its framework. The following thoughts are presented to elaborate this argument further.

In the framework of EU criminal law, one is tempted to conceive legality as addressed to Member States exclusively, because there has been no criminal statute to date directly enacted by the Union and, as such, enforceable by its Member States. In other words, as the principle's main goal is to give fair warning to those potentially subject to prosecution and to ban arbitrary and discriminatory criminal law enforcement, one tends to argue that this goal is actually served at the national level, because the criminal offence has to be foreseeable as defined by a national criminal statute on which relevant prosecutions are based. However, as has already been made clear above, this is an approach that does not adequately take into consideration essential characteristics of EU criminal law. When a minimum content of a criminal offence, i.e. its 'core', is defined by the Union itself, its elements not being subject to modification by Member States, legality has to be observed by the supranational organization inasmuch as it has to be respected by every Member State when transposing a European legal act into its national legal order. In other words, the description of a minimum criminal law rule in a directive is not only supposed to serve the principle of conferral of powers, thereby demonstrating that the Union is acting within the limits of its competence, but it is also supposed – even more so, in fact – to observe the legality principle, making clear which precise conduct should be punished by Member States as a minimum. If, for example, the EU called its Member States to criminalize the honest services mail fraud, describing this offence in the manner it is

proscribed under 18 U.S.C. § 1346, this would no doubt violate the principle of legality, and Member States would not be in a position to pare down its content to bribes and kickbacks, as the Supreme Court did with its decision in *Skilling*. That is the case, first of all, because the European provision introduces a *minimum* rule. On the other hand, the Member States, being unable to comprehend what exactly the Union wishes to criminalize, or rather how far such a provision might extend, would not be able to describe the offence in more precise terms without risking a breach of their obligation to transpose the minimum rule in their internal legal order. The only viable way to avoid this dilemma would be to make use of the emergency brake (Article 83 para. 3 TFEU). Thus, Member States need the precision of a European minimum rule in order to build upon it. This is why the foreseeability of the punishable conduct (which is ensured in criminal statutes of European origin) and the limits it sets to arbitrary prosecutions both hinge on the relevant minimum rule set by the EU. Of course, a Member State has always – even in cases of a vague and ambiguous minimum rule – the possibility to describe the offence in conformity with the principle of legality, thus risking EU sanctions for having deviated from the content of a minimum rule. However, this should not lead to the conclusion that the Union is not bound by the principle of legality. On the contrary, the Union is an indispensable player in the implementation of this principle in the framework of European criminal law precisely because it can put its Member States in the difficult position of not being able to abide by it in correctly transposing the applicable minimum rules. This is why, whenever the EU violates the *lex certa* requirement with regard to *minimum* criminal law rules, the imposition of sanctions to a Member State for not 'properly' transposing the pertinent European legal act into its national legal order should be ruled out. This should hold true even in those situations where the Member State has not made use of the emergency brake for the specific European legal act.

That being noted, we can now focus our attention on the association of legality with the principle of conferral of powers.

As already mentioned above in Part Two, section I, the European legislature has (as far as substantive criminal law is concerned) shared competence to (co) draft criminal law rules *only in certain areas of crime, and only insofar as certain other key features are given,* i.e. (a) affirmation of the cross-border dimension of the offence (Art. 83 para. 1 TFEU), or (b) essential character of the rule for the effective implementation of a Union's policy where harmonization measures have been taken (Art. 83 para. 2 TFEU), or (c) a violation of certain direct legal interests of the Union itself (EU financial interests: Art. 325 para. 4 TFEU). In contributing to the description of a crime, the European legislature is obliged to clarify these elements in its legal acts, because they make a substantial difference compared with the elements of the respective crimes that one can find in the domestic law of Member States: not every incident of sexual exploitation of

children or even of human trafficking or terrorist activity necessarily entails a cross-border dimension, nor does every case of environmental pollution affect the pertinent Union policy. On the other hand, as already analysed, the meaning of cross-border dimension of a crime is anything but self-evident, despite the Treaty's definition. Nor is it clear when a given conduct affects a Union policy or what degree of such impact would be necessary as a basis for its involvement in the field of Member States' criminal law. Even the notion of the Union's financial interests cannot be deemed clear enough to render any definition superfluous. In other words, offences derived from EU law, inasmuch as they bear the above particular features perforce according to the Treaty, are always a *distinct* category of offences compared with the respective ones taking place on national level or affecting national policies or the respective legal interests of the Member States. Thus, the European legislature cannot avoid defining the features mentioned above in its legal acts without violating the legality principle, as none of them is self-evident or precise enough without a relevant description. This obligation is unavoidable, even in the hypothetical case that all Member States were willing to transpose a legal act of the Union in their national legal orders in a manner that accepted the EU minimum rule's content even for the respective crime category which bears exclusively national features. The latter choice is a right reserved to Member States, which may be exercised or not, but could never render a relevant obligation of the Union moot. On the other hand, as far as the Union's competence for co-drafting or even introducing criminal offences by itself is restricted and cannot expand to the field of respective 'national' crimes, it becomes obvious that the principle of legality is unavoidably intertwined with the principle of conferral of powers. By defining the particular European elements of crimes, the Union does not only observe legality, but it also abides by the principle of conferral of powers. It is only then that its legal acts make evident whether it remains within the limits of competence conferred by Member States. This is why abiding by the *lex certa* requirement is valuable in terms of safeguarding the principle of conferral of powers as well.

This interconnection of principles, requiring legality in setting criminal law rules and not overstepping the limits of the EU's conferred powers, becomes even more important now that the EU is about to establish its own prosecutorial institution, a European Public Prosecutor's Office (EPPO), in order to combat fraud against the Union's financial interests[201]. European rules in the form of directives or even regulations will play a key role in this respect. The effective delimitation of the EPPO's powers in prosecuting economic crimes against the Union will only be possible by precisely describing the relevant criminal acts and concretely defining the Union's financial interests. At the same time, European directives or regulations in this field will have to make adequately clear to the European citizens on the whole, despite their different national legal backgrounds

[201] See COM (2013) 534 final, 17 July 2013 and the relevant European Parliament resolution (29 April 2015, P8_TA-PROV(2015)0173).

and traditions, what fraud against the EU's financial interests means, thereby securing their rights by preventing the possibility of arbitrary and discriminatory EPPO prosecutions throughout the EU. Directives in this field will be called to play the same role as far as legality is concerned, because the EPPO would not have competence to prosecute – under the umbrella of Union fraud – a broader spectrum of acts than those described by the pertinent European legislation. This will be the case even if a Member State made the choice to criminalize even more types of conduct than the EU legal act required. Such a view derives clearly from Article 86 para. 2 TFEU, according to which the EPPO shall be responsible for investigating, prosecuting and bringing to judgment offences against the Union's financial interests, *as determined by the regulation referred to in the same provision*.

US federal criminal law clearly illustrates that the broad scope of certain federal crimes, especially in the economic field, has been a rather deliberate feature with which not only the federal government but also the federal enforcement agencies feel rather comfortable. At the same time, the American system shows that such broadness of the definition of federal crimes has often been used in practice as a vehicle to trespass the boundaries of federal competence, making arbitrary prosecutions possible. Taking into consideration that EU criminal law is gradually evolving into a system which is probably soon going to have its own prosecutorial agency, at least in the field of European economic crimes, and that trespassing boundaries of competence and introducing vague minimum criminal law rules is also a well-known practice in the EU, it appears necessary to promote an understanding of legality in EU criminal law that adequately takes into consideration both its necessary interconnection to the principle of conferral of powers and the additional features that legality has to address in the case of crimes of Union origin. Both these parameters can play a key role in safeguarding civil liberties if applied consistently, as demonstrate by the American system's flaws. The added value of promoting such an understanding of legality in the EU is indeed significant, as evidenced by Article 86 para. 4 TFEU, which extends the array of crimes subject to future EPPO prosecutorial powers beyond fraud against the EU's financial interests, potentially covering the entire enumeration of EU crimes.

2 The principle of guilt

2.1 Mens rea in US federal criminal law

The 'general part' of federal criminal law is based on common law, having primarily evolved through judicial precedent. Unlike State criminal law, which is largely based on the Model Penal Code, one finds no legislative 'blueprint' for *mens rea* in federal criminal law, while defences about mistake of fact or mistake of law have evolved through case-by-case judgments of federal courts and are often limited to the context of the specific statute that is interpreted in the concrete

case[202]. The emergence of federal criminal law from the common law tradition explains why federal crimes often require *mens rea* elements similarly couched to those traced in common-law based State crimes[203], and often as obscurely defined as they have been in cases decided by State courts. However, there are federal crimes – and indeed the most significant ones – which are relatively new in comparison to crimes known to the common law tradition or to State law. In order to define the *mens rea* of such crimes, courts have had no other guidance than the act proscribed. Courts have developed a fairly high standard of *mens rea* for this category, higher indeed than expected based on the application of common law principles, and a distinctive 'federal' *mens rea* has thus emerged[204]. This particularity is so important to US federal criminal law that it is duly noted among the major differences that distinguish federal criminal law from its State and local counterparts, and is traced back to the constitutional authority of the federal government to regulate various kinds of economic activity on the basis of which federal courts have developed a special approach to *mens rea*[205].

One has to note, however, that historically, i.e. at the initial stages of the development of federal criminal law, the picture was altogether different. As Stuntz and Hoffmann point out in this respect: 'In the years following Franklin D. Roosevelt's New Deal, the legal conventional wisdom held that federal criminal law would be largely a strict liability field, filled with regulatory statutes that required the punishment of regulated actors regardless of their state of mind … But the field didn't turn out the way Franklin Roosevelt's admirers planned.'[206]. At that time the Supreme Court also favoured a strict liability approach for the field of federal criminal law[207]. This approach has been developed with regard to Public Welfare offences, also known as 'regulatory offences', comprising a category of 'strict liability crimes' for which actors could be held 'absolutely liable simply for engaging in the act, irrespective of the basis for any mistakes that may have been made'[208]. The reason why 'the regulatory offence' concept is deemed to have had such significance for the evolution of culpability in federal criminal law is because this strict liability model was considered even for so-called 'real' crimes punishable with severe criminal sanctions.

---

[202] *P. Low*, Federal criminal law, 2nd Edition (2003), 196.

[203] Ibid., 196.

[204] Ibid.,, 203, *Stuntz/Hoffmann*, Defining crimes, 213.

[205] *Stuntz/Hoffmann*, Defining crimes, 204.

[206] Ibid., 213.

[207] *United States v. Dotterweith*, 320 U.S. 277 (1943). According to *Stuntz/Hoffmann* (ibid., 217), 'Pro-New Deal politicians and judges feared that if the law restricted criminal prosecution too much, the regulatory state would be unable to regulate effectively. For their part, anti-New Deal politicians and judges often embraced restrictions on criminal prosecution and punishment, because they sought to limit government power generally – and hoped to limit the authority of the many government agencies that Franklin D. Roosevelt and his followers created'.

[208] *Low*, Federal criminal law, 196.

The question of how far the 'public welfare' doctrine is to be extended and, more particularly, which crimes can be prosecuted in federal courts without proof of culpability is still debated[209]. However, the opinion that a severe penalty is a factor suggesting Congress did not intend to eliminate the *mens rea* requirement[210] can be deemed as uncontestable today. Most of the new federal crimes that have no counterparts in common law or State law do provide for such penalties. On the other hand, although vagueness is still a problem as far as the *mens rea* elements required in different federal criminal statutes are concerned, it can generally be argued that federal crimes tend to offer more generous *mens rea* standards than the crimes in most States, regardless of whether States subscribe to the common law tradition or have adopted the Model Penal Code construction of intent[211].

Let us now retrace the steps taken in the course of the relevant development on the basis of Supreme Court decisions referring to factual and legal errors. They can provide a better idea of the particularity of the *mens rea* requirement in federal criminal law, and thereby help us to address relevant problems that can also be detected in the context of the EU's criminal law.

First of all as, far as mistake of fact is concerned, the Supreme Court has set, in *Staples v. United States* (511 U.S. 600 (1994)), a standard for judging factual errors in federal criminal cases according to which: 'A defendant must know the facts that make his conduct illegal'. Although this decision applies only to the particular statute at issue in that case[212], it is argued that 'practically, given the Court's analysis, *Staples* establishes a *mens rea* doctrine that applies to all federal criminal statutes, save when Congress speaks "more clearly to that effect"'[213]. Although the Court argued that proof of the defendant's knowledge of 'the facts that make his conduct illegal' amounts to the equivalent of proof of general intent, the decision in *Staples* is deemed to make evident a much more generous *mens rea* approach, because: 'Were *Staples* a general intent case, the defendant would have to prove that his mistake about the gun's character was honest and reasonable – which is much more than having to raise a mere reasonable doubt about the defendant's knowledge of his gun's automatic firing capacity'[214]. However, the Court's position on the matter cannot be deemed consistent, because one also comes across decisions, like *United States v. Feola* (420 U.S. 671 (1975)), in which the Supreme Court rejected the defendants' plausible claim that they had no idea the victims were federal agents and thus lacked the necessary intent[215].

---

[209] Ibid., 201.

[210] See *Staples v. United States* 511 U.S. 600 (1994) under II C.

[211] *Stuntz/Hoffmann,* Defining crimes, 237.

[212] The National Firearms Act.

[213] *Stuntz/Hoffmann*, Defining crimes, 233.

[214] Ibid.

[215] On the inconsistency of this decision to the standard introduced in *Staples* by the Supreme Court see the arguments of *Stuntz/Hoffmann*, Defining crimes, 237.

Far more interesting, however, and differing radically from the relevant doctrine as applied in the framework of common or State criminal law, are the decisions of the Supreme Court on mistake of law. Contrary to a bedrock principle of American criminal law, according to which 'ignorance of law is no excuse', they make clear that in federal criminal law ignorance of the law *is* often an excuse[216].

The first case of the Supreme Court that opened the way in this direction was *Morissette v. United States* (342 U.S. 246 (1952)). According to the proven facts, the defendant had taken away and sold spent bomb casings knowing they were located on government property and they did not belong to him. The government argued that this should be enough as proof of his guilt for stealing. According to the Court, however, although the defendant understood the nature of the spent bomb casings he took and although he knew he was on federal land when he took them, *he did not understand that the taking was illegal*. This is deemed to be a classic mistake-of-law claim that can have no impact on the culpability of a person under either common law or the Model Penal Code.

Thirty years later, in *Liparota v. United States* (471 U.S. 419 (1985)), concerning a prosecution for food stamp fraud, a similar argument prevailed: *the defendant did not know his conduct 'was not authorized by' the governing statutes and regulations*. Even more striking was the Supreme Court's position a few years later, in *Cheek v. United States* (498 U.S. 192, 200-02 (1991))[217]. The defendant, an anti-tax protester who regularly failed to file income tax return, argued – among other things – that ordinary wages were not taxable 'income' and that tax laws were unconstitutional. At Cheek's trial the district judge instructed the jurors that negligent misunderstanding of the law amounted to 'willfulness'. The Supreme Court disagreed and noted:

> The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to … comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the common law presumption (that every person knows the law), by making specific intent to violate the law an element of certain federal criminal tax offences.

The Court did not accept, however, that Cheek's constitutional 'misconstructions' could have any effect on his culpability.

Along the same lines, in *Ratzlaf v. United States* (510 U.S. 135 (1994)), the Court overturned the conviction of Ratzlaf, a gambler who won a big amount of money in a casino, broke his winnings into smaller portions and made a

[216] For the presentation of the following decisions see ibid., 237 et seq.

[217] With regard to this decision also see the analysis of *D. Kahan*, Ignorance of law is an excuse – but only for the virtuous, 96 Michigan Law Review 127 1997-1998, 145 et seq.

series of bank deposits under $10,000, without knowing that federal law also forbade 'willfully' structuring cash transactions in a manner designed to avoid federal reporting requirements (applicable to bank deposits of $10,000 or more). The Supreme Court hold that the word 'willfully' required the government to prove that Ratzlaf knew that breaking up his winnings violated the law. It is noteworthy that, after this decision, Congress amended the anti-structuring statute, eliminating the word 'willfully'. However, as it is pointed out, Ratzlaf still remains good law as to other defendants charged with violating other federal criminal statutes that use the word 'willfully', which has to be understood according to this decision as requiring that the defendants know their conduct is illegal[218].

However, in *Bryan v. United States* (524 U.S. 184 (1998)), where the petitioner was charged with not having a federal license to deal in firearms, and although there was no evidence that he was aware of the federal law that prohibited dealing with firearms without a license, the Court, addressing the meaning of 'willfully' and comparing this case with *Cheek* and *Ratzlaf*, decided in the opposite direction. According to its reasoning,

> Both tax cases and *Ratzlaf* involved highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct. As a result, we held that these statutes 'carve out an exception to the traditional rule' that ignorance of the law is no excuse and require that the defendant have knowledge of the law. The danger of convicting individuals engaged in apparently innocent activity that motivated our decisions in tax cases and *Ratzlaf* is not present here, because the jury found that this petitioner knew that his conduct was unlawful. Thus, the willfulness requirement of § 924 (a) (1) (D) does not carve an exception to the traditional rule that ignorance of the law is no excuse; knowledge that the conduct is unlawful is all that is required.

Lastly, in *Arthur Andersen LLP v. United States* (544 U.S. 696 (2005)), the petitioner (one of Enron's auditors) was charged with having instructed its employees to destroy documents pursuant to its document retention policy and the jury found that this action made the petitioner guilty of violating 18 U.S.C. §§ 1512 (b)(2)(A) and (B) (knowingly and corruptly persuade another person to withhold documents from or alter documents for use in, an official proceeding). The Supreme Court held that:

> Only persons conscious of wrongdoing can be said to 'knowingly … corruptly persuade'… A 'knowingly … corrupt persuader' cannot be someone who persuades others to shred documents under a document

[218] *Stuntz/Hoffmann*, Defining crimes, 242.

retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material'.

For these reasons the affirmative judgment of the Court of Appeals was reversed.

From the whole picture emerging from the Supreme Court's decisions on the requirement of knowledge of law under federal criminal law, one may have reservations, of course, about whether consistency of argumentation exists throughout this class of cases[219]. Still, one would have to acknowledge that the Supreme Court has offered, in this context, valuable thoughts towards safeguarding civil rights in areas where the proliferation and complexity of statutes and regulations, and the ensuing difficulties they entail for the average citizen in terms of comprehending the full extent of the duties and obligations imposed on him/her, necessitate exculpation. It did so by requiring substantial culpability in order to justify punishing criminal conduct under federal criminal law, the latter largely covering economic crime and other forms of complex modern criminality, where the unlawfulness of a given conduct is not so easy to comprehend even for prudent and otherwise knowledgeable citizens[220].

As a general conclusion, one could argue that, despite the still existing vagueness in the *mens rea* required to ascertain culpability on the basis of different federal criminal law statutes and the consequent inconsistencies of the relevant jurisprudence of federal Courts, federal criminal law has not only broken loose from the strict liability doctrine, but it has also introduced – with the help of the Supreme Court's jurisprudence – a much more generous liability model as far as the citizen is concerned, declining to uphold general intent in the presence of reasonable doubt about the defendant's knowledge and recognizing, at least in exceptional cases, mistake of law as grounds excluding culpability. The Court has thus made it clear that *the government has to bear the burden for the difficulties*

[219] See, in relation to this remark, *Stuntz/Hoffmann*, Defining crimes, 248, who, in comparing *Cheek*, *Ratzlaf* and *Bryan* ask the reader to think whether the following interpretation would be correct: 'A cynic might interpret the bottom line of *Cheek*, *Ratzlaf*, and *Bryan* as follows: White-collar criminal defendants (like Cheek and Ratzlaf) who are charged under federal criminal law that requires "willfulness", and who don't possess actual knowledge that their conduct violates the law, are generally not guilty. But street criminals (like Bryan) who lack the exact same kind of actual knowledge about the legality of their conduct are guilty of crimes requiring "willfulness", simply because we can usually find that they've done something else that they knew was either wrong or illegal'.

[220] The necessary features of a prudent citizen in a given legal order are normally set in discussing the notion of negligence. That is not to say that a defendant must be a 'virtuous' citizen to uphold a defence of ignorance of the law, unlike *Kahan* (Ignorance of law is an excuse, 145 et seq.), who conceives of ignorance of law in the framework of a legal moralism theory, which dominating the author's perception of criminal law on the whole (ibid., 153-154). The reason for denying such a perception of the ignorance of law as an excuse lies mainly in the inherent risk emanating from a highly contestable content of such a requirement ('virtuousness'), when the citizen gets entangled in the criminal law system. It is noteworthy, however, that Kahan recognizes the high degree of contestation when it comes to moralizing with criminal law doctrines, but he seems to hold it inevitable, and prefers that it be made openly (ibid., 154).

caused by the complexity and proliferation of legal obligations for the understanding of the average citizen. As discussed below, this finding is quite significant for the function of the principle of guilt in the EU criminal law system as well.

2.2 The principle of guilt in the framework of EU criminal law

In the European legal tradition following the Enlightenment, the principle of guilt is the cornerstone of a liberally oriented criminal justice system[221]. According to this principle, a criminal sanction can be imposed when a criminal act has affirmatively been proven to be the product of a 'guilty mind'[222]. Only then shall the individual deserve to bear the blame expressed through punishment. Such substantive content of the principle evidences its association with the principle of proportionality, as well as its function as a limit to the deterrent and/or the rehabilitative orientation of punishment. Penalties are imposed to address acts committed with 'a guilty mind', hence they should be proportionate to the offender's 'guilt' and never exceed it for any reason[223]. Thus, the principle of guilt becomes a constraint of state power, protecting individuals against otherwise unbridled deterrent policies, ensuring respect for the human being as an individual, and constituting an expression of the recognition of human dignity.

On the EU level, and with particular reference to criminal law, the said principle derives from Article 48 of the Charter of Fundamental Rights of the EU, encompassing the presumption of innocence: 'everyone who has been charged shall be presumed innocent until proved *guilty* according to law'; moreover, Article 1 of the Charter proclaims the inviolability of human dignity. It becomes evident, then, that the EU subscribes to the principle of guilt to its full extent.

---

[221] The principle of guilt has so far withstood every doctrinal objection against it: see *Albrecht*, Die vergessene Freiheit, 65 et seq., *N. Paraskevopoulos*, Thoughts and guilt in criminal law [in Greek], 1987, 118 et seq. On the content of the principle of guilt see BVerfG 2 BvE 2-08, BvR5-08, BvR1010-08, BvR1022-08, BvR1259-08, BvR182-09 of 30.6.2009, para 364, as well as an interesting approach by *K. Günther*, Schuld und kommunikative Freiheit, 2005, 245 et seq., associating the principle of guilt with a democratic state abiding by the rule of law in such a way as to bar non-democratic states from affirming guilt.

[222] *Cf.* BVerfG. Even if the affirmation of guilt inevitably encompasses an evaluation, the ontological foundation of guilt, i.e. the actual expression of the offender's mental state *vis-à-vis* the act, which can only be approached by the judge based on empirical evidence, constitutes a guarantee for the citizen (see *Paraskevopoulos,* op. cit., 124; on approaching dispositive concepts based on empirical evidence see esp. *W. Hassemer*, Die Freiwilligkeit beim Rücktritt vom Versuch, in K. Lüderssen (ed.), Vom Nutzen und Nachteil der Sozialwissenschaften für das Strafrecht, vol. 1, 243 et seq. On the limits to approaching the concept of guilt through empirical sciences by due process rights see *Albrecht,* Die vergessene Freiheit, 67 et seq.

[223] See *N. Androulakis*, Article 79 CC, in N. Androulakis/G.-A. Mangakis/I. Manoledakis/D. Spinellis//K. Stamatis/A. Psarouda-Benakis, Systematic interpretation of the Criminal Code [in Greek], 1038, *M. Kaiafa-Gbandi*, in M. Kaiafa-Gbandi/N. Bitzilekis/E. Symeonidou-Kastanidou, The law of criminal sanctions [in Greek], 2008, 298-299, *N. Paraskevopoulos*, in L. Margarites/N. Paraskevopoulos, Penology [in Greek], 7th edition, 325.

According to the said principle, the EU is bound to abstain from compelling its Member States to introduce strict liability crimes[224] or introducing them itself. Another ramification of the principle of guilt is the difficulty of transposing in those cases where legal persons are responsible for violating fundamental interests in the course of their activities. This is because a number of Member States reject criminal responsibility of legal persons on the grounds, *inter alia*, that it is incompatible with the fundamental principle of guilt[225]. Consequently, it is argued that the EU had better respect each State's right to choose whether it will introduce criminal liability of legal persons or not[226], as has been the case with every framework decision or directive on responsibility of legal persons thus far[227].

Having recalled the 'self-restrained' practice of the EU with respect to the principle of guilt, one should also take note of the fact that the Union's legislative acts steadily associate criminal responsibility with a requisite *mens rea*, and in fact require intent in most cases[228]. Beyond the refutation of strict liability, this choice also evidences the EU's respect for the *ultima ratio* principle, which leaves room for crimes of negligence only in exceptional cases, i.e. when the significance of the interest harmed and the gravity of the act render them indispensable[229].

Nevertheless, there are further examples indicating lack of respect for the principle of guilt on the part of the EU. For instance, one could mention Article 1, para. 4 of the PIF Convention on the Protection of the European Union's financial interests, which provides that 'the intentional nature of an act or omission … may be inferred from objective, factual circumstances'. This tends to oversimplify the dispositive nature of intent, which cannot be automatically inferred from 'objective circumstances' connected with the act alone. Likewise, Article 3 of the said Convention concerning the criminal liability of heads of businesses provides that 'each Member State shall take the necessary measures to allow [these persons] to be declared criminally liable in accordance with the principles defined by its national law' in cases of fraud affecting the EU's financial interests when a person under its authority is acting on behalf of the business; however, this provision does not seem to require the ascertainment of a

[224] See, however, the pertinent ECJ and ECHR jurisprudence in *Asp*, Criminal law competence of the EU, 180-182, pointing out that the ECJ has explicitly stated that strict liability is acceptable under certain conditions, which is also the basic position of the ECtHR.

[225] See, e.g., *M. Kaiafa-Gbandi*, The importance of core principles of substantive criminal law for a European criminal policy respecting fundamental rights and the Rule of Law, EuCLR 2011, 30-32.

[226] Based on their own understanding of the principle of guilt, which varies according to each people's culture.

[227] See,indicatively, Art. 5 and 6 of the Framework decision on organized crime (2008/841/JHA, L 300 of 11 November 2008, p. 42 et seq.), as well as Arts. 5 and 6 of the directive on trafficking in human beings, 2011/36/EU, L 101, 15 April 2011, 1 et seq.

[228] *Giannakoula*, Crime and sanction in the EU [in Greek], 260 et seq.

[229] *Cf.* Council conclusions on model provisions, guiding the Council's criminal law deliberations, doc. 16542/09 of 23.11.2009 under the title 'Intent', points 6–8.

criminal omission or subjective elements, despite the fact that the crime of fraud affecting the Union's financial interests requires intent on the perpetrator's part. Thus, improvements with regard to safeguarding the principle of guilt on the EU level are necessary[230]. This is why it is noteworthy that recent positive steps have been taken in this direction. For example, the proposal for a directive on the fight against fraud affecting the Union's financial interests by means of criminal law takes into consideration some of the concerns addressed above[231].

2.3 The complexity and proliferation of EU law involved in defining crimes: in search of its significance for the guilt principle

The situation described above makes clear that the extreme difficulty that EU citizens often find in keeping abreast of the precise obligations imposed on them under EU law has not been a matter of particular concern to the Union. The non-proximity of the Union's rules to the average citizen, their obscurity and complexity, often pose serious problems which are not taken into account when deciding about the criminal punishment of individuals based on the guilt principle. One of the core questions in discussing this principle is the role that a legal order attaches to legal errors. Such errors are actually related to the idiosyncrasy of a legal system *per se*. Although ignorance of the law is generally no excuse, as it constitutes practically an unacceptable form of its very denial (to admit an excuse here would in fact encourage ignorance of the law), exceptions are recognized in most legal orders. They normally cover cases in which the person involved has taken all reasonable measures to become aware of the law, but has nonetheless been *de facto* unable to eliminate the risk of error[232]. The US Supreme Court's decisions on *mens rea* in federal criminal law have adopted a useful approach in contributing to the solution of this problem: the object of such (exceptional) excuse for ignorance of the law can be categories of provisions which are especially complex and not easily understandable by the average citizen, and/or areas with a proliferation of legal provisions, as is often the case with federal law on economic crime.

Attempting to transpose this approach to EU criminal law, we should recall, first of all, that even in the framework of *Member States' criminal law*, and *especially in the area of economic criminal law*, there are very often *blanket criminal laws, which refer to specific EC/EU provisions to define the elements of a crime* (provisions of regulations), thereby making the European provisions part of the national legislation. This part of their legislation evokes Community/Union rules for

[230] *Giannakoula*, Crime and sanction in the EU, 262-263.
[231] See Art. 6 COM (2012) 363 final, 11 July 2012.
[232] For an interesting presentation as far as Member States are concerned see *J. Blomsa*, Mens rea and defences in European criminal law, 2012, 464 et seq.

interpretation purposes, i.e. the so-called '*effet utile*' aspect[233], whilst all linguistic versions of the EU's provisions also have to be taken into account. This obviously complicates the process of *finding the law* and causes extreme difficulties for the principle of legal certainty as far as the citizen is concerned[234], making it a realistic possibility that errors might occur as to what the law prescribes in a given case and what the lawful behaviour would consist in.

On the other hand, the previous sections have shown that, *on the EU level, there exists a particular problem in making clear for the citizens what a criminal law provision punishes,* and thus what they are expected to refrain from doing. This problem is caused by significant flaws interfering with the preservation of the *lex certa* requirement and the principle of legal certainty with reference to criminal law provisions which are the product of cooperation between the Union and its Member States. In such cases, citizens' misconceptions about the meaning of vague provisions – which the European and national legislatures ought to have avoided in the first place – should be considered as potential grounds for waiving punishment on the basis of the principle of guilt.

A distinct category comprises cases in which *the European legislature makes an act unlawful, because it infringes a (long) list of European provisions* that the average citizen may very well not be in a position to know, *and then asks its Member States to criminalize the relevant violations*. One such example is directive 2008/99/EC on the Protection of the environment, according which Member States are called to ensure that a number of 'unlawful' acts (e.g. discharges or emissions of materials into air or water, etc.) are proscribed as criminal offences, when committed intentionally or at least with serious negligence; according to the directive, 'unlawful' means 'infringing: (i) the legislation adopted pursuant to the EC Treaty and listed in Annex A; or (ii) with regard to activities covered by the Euroatom Treaty, the legislation adopted pursuant to the Euroatom Treaty and listed in Annex B; or (iii) a law, an administrative regulation of a Member State or a decision taken by a competent authority of a Member State that gives effect to the Community legislation referred to in (i) or (ii)'. The wording of this provision itself makes evident the difficulty of knowing the annexed law, even assuming it has been transposed by the national legislature of a Member State into its legal order. In these cases, the criminal provision has to refer to *a plethora* of other European regulations, the violation of which actually constitutes the

[233] Which means that the preferred way of interpreting a provision is the one that best guarantees the practical effectiveness of Community law in order to realize the aims of the EC Treaty, see *H. Satzger,* Europäisierung des nationalen Strafrechts, in Sieber/Satzger/v. Heinschell/Heinegg, Europäisches Strafrecht, 257.

[234] The citizen is normally supposed to understand from the text of the law *itself* precisely what kind of conduct is punishable. Thus, it is justifiably argued that, in such cases, the requirements as to the measure of clarity and certainty of the criminal conduct's description have to be raised accordingly, while only static – and not dynamic – references to European regulations should be allowed. For the meaning of 'static' and 'dynamic' references, see *Satzger*, Europäisierung des nationalen Strafrechts, 258-259.

criminal conduct. Such configuration poses the same problems described with regard to the category of national blanket norms concerning economic criminal law, containing a reference to EU legislation for the definition of the elements of crimes.

Last but not least, in EU criminal law a need arises to consider seriously whether the *mens rea* element could offer a solution to some of the problems engendered by the so-called 'principle of mutual recognition of judicial decisions and judgements'[235]. This refers to situations where an individual is in practice asked to know the law of *all* EU Member States, if he/she wants to avoid the risk of being prosecuted for an offence in another Member State, when acting in a certain way that does not give rise to a criminal offence in his/her own country (for example, when selling products that do not have the promised result, yet escapes criminal punishment in the legal order of his/her Member State because, e.g., the victim is too trustful or financial damage is eliminated[236]). According to the principle of mutual recognition of judicial decisions and judgments, it is now possible, even in the case of conduct that is not punishable in the Member State where the individual has acted, to be prosecuted according to the criminal law of another Member State (for example, because the victims of the act have been tourists, citizens of that other Member State) where the conduct is deemed to be a criminal offence, when that latter Member State can obtain, for the specific conduct at issue, a European Arrest Warrant (EAW) even without dual criminality[237]. In such cases, the ignorance of a citizen about the conduct being punishable in other Member States is in practice irrelevant. However, who could really ask an average citizen to know the laws of all EU Member States that might cover conduct he/she undertakes in his/her own country? If this is sometimes difficult to know in the context of one and the same legal order, how could it be possible to ascertain it with regard to the legal orders of another 27 Member States? In other words, putting this burden on the shoulders of citizens, and ignoring the problems caused in a European common area, is unacceptable. Such an approach would pay no heed to the fact that the common area to be attained is meant to be not only a common area of security but also an area of freedom and justice for the EU citizens as well.

In all the aforementioned examples there is a *common characteristic arising from the special features of EU criminal law*: *the process of finding the law* that makes the conduct punishable *is extremely difficult for the citizen*, either because of the law's vague content or because of the plethora of EU or Member States' provisions that have to be taken into consideration, in order to possess full

[235] See this point in *Gless,* Legal certainty in a European area of freedom, security and justice, 25 et seq.

[236] See example ibid., 32.

[237] See Art. 2 para. 2 of the Framework Decision on the European Arrest Warrant and the surrender procedures between Member States 2002-584-JHA, 13 June 2002, OJ L 190, 18 July 2002, 1 et seq.

knowledge thereof, i.e. of the conduct that constitutes a criminal offence. In the first case, the problem has to be addressed primarily both by the European and the national legislature by seeking conformity with the *lex certa* requirement. In cases where complexity and plethora of provisions involved in the definition of a criminal offence cannot be avoided, it would be wise for the European legislature either to make punishment contingent on knowledge of the conduct's 'illegality'[238], or – preferably[239] – explicitly to provide Member States with the possibility to introduce a relevant defence of error (concerning the illegality of the proscribed conduct), when the perpetrator has taken all reasonable measures to avoid it. Of course, one could argue that this last option could be left to the discretion of the Member States, as is the case with all the defences of the general part that are not regulated by the EU. The latter has no mandate according to the Treaty to introduce a general part of a European Criminal Code, but merely to harmonize criminal law provisions in certain fields when necessary. However, as the difficulty in the process of 'finding the law' emanates (in the above cases) from an inherent complexity of defining crimes on the EU level and the principle of mutual recognition of criminal decisions and judgments among the Member States, the European legislature should indicate to Member States that shifting the burden of the complexity of law (and of the need to facilitate the judicial cooperation of Member States) to the citizens should be avoided. Besides, the problems addressed here do not normally arise in national legal orders, so as to expect national legislators to become active themselves. The underlying thought of such a solution is *a more substantial approach and application of the principle of guilt. It addresses the particularities of EU criminal law* and takes into account that it should not be asked of the citizen to know the law when the legislature makes it extremely difficult for him or her to do so.

[238] This is method is not unfamiliar to the European legislator, although it has been used in a different context, i.e. when criminalizing acts that are a far cry from violations of legal interests. In particular, according to Article 2 (d) of the Framework Decision on Illicit Drug Trafficking (2004-757-JHA, L 335, 11 November 2004, 8 et seq.) and only with regard to trafficking acts of precursors the EU asks its Member States to criminalize 'the following intentional conduct when committed without right: … (d) the manufacture, transport, or distribution of precursors *knowing* that they are to be used in or for the *illicit* production or manufacture of drugs'. The fact that criminalization refers to preparatory acts, and thus to a very early stage of threatening the legal interest involved, explains this choice, because in such cases where the conduct lies far ahead of the actual violation, the knowledge of illegality of the acts to follow becomes essential for punishing conduct at such an early stage. This is so because the same substances can also be used for legal purposes, and thus cannot be otherwise differentiated from the illegal ones.

[239] This option is preferable because it takes into consideration when exactly ignorance of law cannot meet the substantial element of guilt that makes necessary a conscious choice of a wrongful act.

3 Criminal sanctions and the principles of proportionality and coherence

3.1 Federal Sentencing Guidelines and the doctrine of proportionality in US criminal law

A significant feature of US federal criminal law, absent from State criminal law, is the existence of Sentencing Guidelines. These were introduced by virtue of the Sentencing Reform Act of 1984 in an effort to address the widespread dissatisfaction with the main elements of the traditional law of sentencing[240]: (i) the uncontrolled discretion of the sentencing judge in applying a broad sentencing range of the federal criminal statutes, (ii) the non-availability of appellate review, (iii) the significant disparity of sentences for the same offence in the different districts or even in the same district when imposed by different judges, and (iv) the indeterminacy of the sentences as well as the determination of the actual release by the Parole Commission. The Sentencing Reform Act abolished the Parole Commission and introduced a system of determinate sentencing through the Sentencing Guidelines, which are significantly detailed and were meant to bind the courts, although they give a judge the right to depart from the guideline applicable in a particular case, if he/she finds an aggravating or mitigating factor that the Commission did not (adequately) consider when formulating the guidelines.

In order to provide an overview of how the system of the Sentencing Guidelines works, it is useful to illustrate it in the series of steps described by Abrams, Beale and Klein[241]: As the US federal criminal law contains over 2000 separate offences, the Guidelines begin by classifying the offences in various classes, building up relevant base offence levels (43 in total). The basic offence level for rape, for example, is higher than the base offence level for non-sexual assault. Then the Guidelines take into consideration the particular characteristics of the specific offence which are common to its class type, thus establishing the relative gravity of the offence (for example, in a robbery with possession of a firearm a three-level increase over the base offence level is provided or a six-level increase if a life-threatening bodily injury has occurred). In a subsequent step, the so-called Chapter Three Adjustments(applicable to any offence) have to be

[240] See *Abrams/Beale/Klein*, Federal criminal law, 1377. More particularly, the authors give the main features of the Sentencing Reform Act of 1984 as follows (1378 et seq.): (i) it rejects imprisonment as a means of promoting rehabilitation and sets for it retributive, educational, deterrent and incapacitative goals, (ii) it makes the judge and the parole commission competent to decide what punishment an offender should suffer, (iii) it makes all sentences basically determinate (a prisoner is to be released at the completion of his sentence, reduced only by any credit earned by good behaviour while in custody), (iv) it makes the Sentencing Commission's guidelines binding on the courts, with the exception referred to further down in the text, as well as the statements of the reasons for the sentence imposed, and (v) it authorizes limited appellate review (the defendant can appeal against a sentence above the range, the government for a sentence under the range and both for incorrect application of the guidelines).

[241] *Abrams/Beale/Klein*, Federal criminal law, 1384-1390.

taken into consideration. These assist in further individualizing the sentence (if the conduct involved a vulnerable victim, for example, then a two-level increase has to be applied). In the event of multiple counts, incremental amounts for each offence involving a distinct harm must be added to the base offence level that corresponds to the most serious offence. According to the Sentencing Guidelines, the court then has to credit the defendant for certain post-offence conduct (for example, the base offence level may be reduced by two levels when there is voluntary surrender or assistance to authorities on the defendant's part). The defendant's criminal record also has to be considered (for example, three points are added for serious past offences committed by him/her as an adult). After the offender's entire record has been examined and the appropriate points assigned, the points are then converted into 'criminal record categories' ranging from I to VI (a career offender, for example, is always assigned category VI). As a final step, by matching the applicable offence level to the particular characteristics of the case at issue (vertical) and the criminal record category (horizontal), the Court finds the guideline sentencing range that applies to the defendant. The court can choose any sentence within this range. By statute, the maximum of a sentence range providing for imprisonment may not exceed the minimum by more than 25%. According to the Guidelines, the court also retains discretion under an additional perspective: it can 'depart' from the guideline sentence by aggravating (upward) or mitigating (downward) circumstances of the case at issue, if these have not been considered (or adequately taken into account) by the Guidelines.

Since 2005, however, the Sentencing Guidelines are no longer binding, having been confined to an advisory role. In *United States v. Booker* (534 U.S. 220 (2005)), a five-member majority of the Supreme Court held the legislation authorizing the Guidelines unconstitutional. Under the same decision, however, the Guidelines continue to apply in an advisory fashion, according to a separate remedial majority of five members of the Court. In this highly disputed decision[242], the reason underlying the majority's opinion was the violation of the Sixth Amendment, as the Guidelines delegated to the judge – as opposed to the jury – the affirmation of facts which increased the sanction applicable to the offence level. Nonetheless, the remedial majority preserved the Guidelines, arguing that they may expect a sentencing court 'to consider Guidelines ranges', but the court can 'tailor the sentence in light of other statutory concerns as well'. Such an advisory role was held to be the actual goal of Congress when issuing the Sentencing Reform Act of 1984. In this manner, a form of appellate review has also been preserved, in order 'to help iron out differences from court to court'[243].

[242] See this discussion in ibid., 1396 et seq., and especially 1401 et seq.
[243] Ibid., 1400.

Trying to explain what was behind this decision of the Supreme Court, legal theory highlights two important elements[244]: first, that the Department of Justice had tried on the federal level 'to stamp out every vestige of judicial leniency at federal sentencing', and, second, that Justice Breyer had been a member of the drafting committee of the Guidelines, which explained his insistence on preserving them.

After *Booker*, the main problem posed, as expected, was the precise meaning of 'advisory'. The Supreme Court tried to address this problem in subsequent decisions[245]. What is important is that, after *Booker*, Congress did not take action to change the Sentencing Reform Act for a long time, despite the different proposals that were submitted; hence, the sentencing disparity persisted in practice. In 2014, however, the Sentencing Commission, the Department of Justice, Congress and the American Bar Association advocated a broad array of changes[246], which were based on a gradually increasing consensus that certain Guidelines were deeply flawed, and that district judges seemed to impose sentences below the level suggested by the Guidelines in cases where certain factors (not considered by the Guidelines as such) suggested that society may be better served by a lesser sentence[247]. In 2010, the Department of Justice reviewed the federal sentencing policy in a memo issued by Attorney General Eric Holder, which modified the policies of the department prosecutors in advocating sentences[248]; in 2011, the Sentencing Commission joined in calling for a reform of the mandatory minimum sentences, making recommendations to Congress[249]; in 2014, the American Bar Association released a second draft of proposals on the reform of federal sentencing on economic crime[250], while Congress managed to pass the Justice Safety Valve Act in 2013, aiming to prevent unjust and irrational criminal punishments, and the Smarter Sentencing Act in 2014, aiming to focus limited federal resources on the most serious offenders[251] (although pending reforms are said to have stalled of late). These Acts were the result of increasing concerns about the high costs of mass incarceration and the destructive effects that long-term prison sentences can have on families and communities[252].

---

[244] See ibid., 1400-1402, with further citations.

[245] See *Rita v. United States*, 551 U.S. 338 (2007), *Gall v. United States*, 552 U.S. 38 (2007), *Kimbrough v. United States*, 552 U.S. 85 (2007). In *Rita v. United States*, the Court held that courts of appeal may – but need not – apply a presumption of reasonableness to sentences within the Guidelines range, but also that courts may not adopt a presumption of unreasonableness for all sentences outside of the Guidelines range (*Abrams/Beale/Klein,* Federal criminal law, 1404-1405). In *Gall v. United States*, the Court discussed the question of whether the justification required for a non-Guideline *Booker* sentence must be proportional to the size of the variance and argued that a very large variance requires an exceptional justification (ibid., 1405).

[246] See *Abrams/Beale/Klein*, Federal criminal law, 1480.

[247] Ibid., 1474 et seq., 1479.

[248] Ibid., 1484.

[249] Ibid., 1486-1488.

[250] Ibid., 1490 et seq.

[251] Ibid., 1488-1489.

[252] Ibid., 1488.

Before attempting to draw a conclusion on the basis of this development, three observations are in order. First, federal criminal law is generally held to have acquired in the course of time a disproportionately punitive character expressed in high levels of sanctions, a tendency reinforced by the fact that the courts have often applied vague federal criminal law statutes even in cases that were not explicitly covered by them, thereby punishing conduct normally subject to State criminal law statutes that provide more lenient sanctions[253]. This state of affairs also explains the recent and ongoing endeavours to reform the Sentencing Guidelines. The second observation relates to the doctrine of proportionality[254]. In US criminal law, proportionality derives from the Eighth Amendment, which forbids 'cruel and unusual punishments'. This clause is aimed at prohibiting certain punishments in the abstract, without regard to the particular offences for which they might be imposed. According to the Supreme Court, the Eighth Amendment also requires some correspondence between the severity of a crime and the severity of the punishment imposed against the offender[255][256]. Even so, scholarly opinion is that the Court's view is that the proportionality doctrine has little bite outside the special context of capital cases[257]. In fact, the Supreme Court has developed two distinct doctrines relevant to proportionality[258]. The first refers to capital punishment, and the second to non-capital punishment cases. In the former, the Court has tried to ban the imposition of the death penalty in certain categories of crimes or criminals[259]. When it comes to the

[253] See *St. Smith*, Proportionality and federalization, Virginia Law Review 91, 2005, 893 et seq.

[254] See for the proportionality doctrine as follows *Stuntz/Hoffmann*, Defining crimes, 2011, 30 et seq.

[255] In *Weems v. United States*, 217 U.S. 349, 367 (1910) and in *Miller v. Alabama*, 567 U.S.; 132 S.Ct. 2455 (2012), it was argued that the prohibition of cruel and unusual punishment embodies the 'precept … that punishment for crime should be graduated and proportioned to [the] offence'. Besides, in *Graham v. Florida* (560 U.S. 48 (2010)), the Court, in assessing the culpability of juvenile non-homicide offenders, noted that when compared with an adult murderer a juvenile offender who did not kill or did not intend to kill has a moral culpability twice as diminished; both age and the nature of the crime each bear on the analysis.

[256] Illustrating this position, *Stuntz/Hoffmann*, Defining crimes, 30, note: 'To give a relatively clear example although a sentence of life imprisonment might be appropriate for first degree murder, the same sentence would be inappropriate for the crime of jaywalking – because it would be grossly disproportionate to the seriousness of that particular crime and thus "cruel and unusual punishment" in violation of the Eight Amendment'.

[257] *Stuntz/Hoffmann*, Defining crimes, 32. It is interesting that the authors discuss the constitutional limits of defining crimes by pointing out: 'Constitutional law has surprisingly little to say about the definition of crimes or about the (non-capital) sentences that attach to those crimes. Constitutional rules and texts dominate criminal procedure … One of the hot topics of today's comparative law scholarship is convergence: scholars argue that code based justice systems,… increasingly resemble common law systems. That is code-based justice systems become more proceduralized. Meanwhile, Mill-type bans (harm principle) on criminalizing harmless conduct or on punishments that are less than "obviously necessary" are largely absent from the world's constitutions. One wonders whether the rest of the world is following the right model.'

[258] See *Stuntz/Hoffmann*, 31-32.

[259] It has thus decided that the death penalty cannot be imposed for rape (*Coker v. Georgia*, 433 U.S. 584 (1977)), for felony murder (*Tison v. Arizona*, 481 U.S. 137 (1987)), as well as for defendants who are mentally retarded (*Atkins v. Virginia*, 536 U.S. 304 (2002)), or under the age of 18 (*Roper v. Simmons*, 543 U.S. 551 (2005)).

latter, i.e. non-capital punishment cases, the Supreme Court has been rather reluctant to hold a statute unconstitutional on the basis of its disproportionate sanction under the Eighth Amendment. This was the case in *Graham v. Florida* (560 U.S. 48 (2010)), where the Court held that life imprisonment without parole for juveniles who commit crimes other than homicide contravenes the Eighth Amendment. However, this is thought to have been more of a corollary to *Roper v. Simmons* (543 U.S. 551 (2005)), which excluded the death penalty for defendants under the age of 18, than an indication that the Court intends to begin applying the Eighth Amendment more aggressively to non-capital offences in general[260]. The third and last observation is that, in the US criminal law literature, the doctrine of proportionality is in some cases directly associated also with non-capital punishment cases, and indeed with cases decided under federal criminal law[261]. The doctrine is derived from 'moral blameworthiness', which determines both 'who' can be punished and 'how much punishment' can be imposed on the guilty. According to this view, disproportionately severe punishment, like punishment of blameless conduct, is not morally deserved. Through its decisions on *mens rea* in federal cases, the Supreme Court has shown that it treats culpability as a necessary prerequisite to criminal liability. On the contrary, as has already been pointed out, case law concerning proportionality is rather limited, while the dimension of blameworthiness referring to *stricto sensu* proportionality ('how much punishment can be imposed on the guilty') is virtually absent from the Court's decisions. Thus, it has been aptly pointed out that 'once proportionality of punishment is taken into account, it becomes clear that the proper approach is not just to require culpability, but to require enough culpability to make the sanctions provided by the statute commensurate with the defendant's degree of fault'[262]. Besides, 'The most common formulation of the proportionality standard in the criminal context is that the punishment authorized by the legislature and imposed by a court must "fit" the crime committed by the defendant'[263].

The above analysis makes it possible to draw certain important conclusions:

– Aiming at harmonizing sentences on the federal level, or in other words at reducing – if not diminishing – the disparity of sentences for the same crimes, is an understandable goal arising out of concerns for equality and proportionality. Every federal crime is the same all over the US, it is prosecuted by federal prosecutors and tried by federal courts. Cases of like severity and blameworthiness should thus, as a general rule, be treated in the same, or at least in a similar manner.

[260] *Stuntz/Hoffmann*, Defining crimes, 31-32.
[261] See *Smith*, Proportionality and federalization, 930 et seq., 949 et seq.
[262] Ibid., 890-891.
[263] *Ewing v. California*, 538 U.S. 11, 31 (2003).

– A federal criminal law system like the US one, which exists in parallel to State criminal law, ought to take into consideration the relevant range of sanctions applicable under State criminal law, at least in cases entailing offences also proscribed at the State level. This requirement is essential, especially given that federal crimes are so broadly defined that their application in practice covers even cases that should have been prosecuted (exclusively) under State law. However, even assuming the federal jurisdictional element were properly applied in all cases, and even in the presence of a sharp distinction between federal and (the corresponding) State crimes, thoughts pertaining to the correlation between the same classes of crime under federal and State law, respectively, are not only relevant, but essential too. Any difference in the range of sanctions threatened under the pertinent State criminal statutes has to be justified by the federal jurisdictional element which distinguishes the federal offence from the corresponding one under State law. In other words, the inherent difficulty of criminal law systems which function on more than one level, like the US one, is the unavoidable correlation that has to be made between federal and State sanction levels with respect to offences of 'common interest', as well as the need to justify sentencing differences between them. Such correlation does not seem to have been an issue in US federal criminal law. On the contrary, as we have seen, additional problems seem to have been caused by the fact that federal criminal law statutes have been construed rather broadly, and are thus excessively applied in practice.
– The Federal Sentencing Guidelines, especially in their initial binding form of 1984, should be viewed as an 'intermediary' between the ranges of sanctions provided under law and the sentencing of a defendant for a given criminal conduct by the court. The Guidelines in fact aim at restricting the extremely broad penalty ranges of federal criminal law statutes by employing elements pertaining to the severity of each offence as well as the individual offender. These elements lead to a much narrower range of sanctions that can actually be imposed in each particular case. The Guidelines are thus a second step of legislatively providing for narrower ranges of sanctions for federal crimes on the basis of elements that have not been described in the criminal statutes, but are to be traced in each adjudicated case (or even in virtually every criminal case). This is why they call for concretization by the judge and cannot emanate from the Sentencing Guidelines Act as such. The narrower range of the sanction emanating from the application of the Guidelines is determinate and strict, as the judge may not depart from it, unless he/she finds an aggravating or mitigating factor, which has not been (adequately) considered (in the Guidelines themselves).
– At first glance, one could say that although the doctrine of proportionality has not been fully developed or supported by the Supreme Court with respect to non-capital punishment cases, the

Federal Sentencing Guidelines appear to be a 'proportionality-friendly' approach when it comes to sanctions imposed for federal crimes, as they help individualize the penalty according to the severity of each crime, the culpability of the offender and other relevant elements that have to do with his/her former criminal record. In other words, by taking into account the severity of each particular offence and the blameworthiness of the offender for his criminal conduct, the Guidelines practically serve proportionality.

– Nevertheless, the reality behind the Sentencing Guidelines is different. As has already been mentioned, through the Sentencing Guidelines the Department of Justice has tried 'to stamp out every vestige of judicial leniency at federal sentencing'. Federal criminal law on the whole is deemed to be very punitive. On the other hand, its application by the courts has not only caused additional problems, by expanding its scope in practice, but it also seems to have put aside the rule of leniency.
– Under such conditions, the Supreme Court's decision in *United States v. Booker* (543 U.S. 220 (2005)), having confined the Sentencing Guidelines to a merely advisory role, seems to provide – in practical terms – the appropriate approach. The American experience with the Sentencing Guidelines shows that one cannot serve harmonization and proportionality of sanctions in a federal criminal law system spanning so many States with different criminal laws and featuring areas of 'common interest' between the federal and the State criminal jurisdiction, by setting *strict* limits on sanction ranges, especially in respect of their lower threshold. In other words, even if the Sentencing Guidelines *per se*, i.e. on an abstract level, aim at serving proportionality, the strict form they adopt with regard to the sanction ranges, and especially their lowest thresholds, cannot meet the needs of a system that has to take into consideration the broader picture, which is how State and federal law meet and function at their points of convergence. In such cases, what is actually required is a scheme that allows *variability*, in order to serve proportionality by taking into account existing differences, *as well as by enabling the application of fundamental principles for the State level*, like the rule of lenity in criminal law.

3.2 EU minimum rules on sanctions and the principles of proportionality and coherence

In the course of the development of EU criminal law, one can distinguish four methods of EU action in the field of prescribing penalties for criminal offences.

At an initial stage, the Union confined itself to asking its Member States to ensure that an offence 'is punishable by effective, proportionate and dissuasive

penalties'[264]. This formula was practically an expression of the EU's decision that the conduct be proscribed as a criminal offence. Such a general rule allowed Member States in practice to choose any kind of penalty for the conduct described by the European legislature, as long as they ensured that the sanction threatened had the characteristics defined by the Union (effective, proportionate and dissuasive). Thus, the formula reflects a very *'soft'* intervention of the Union in the field of sanctions.

At a subsequent stage, the EU made use of a second method. Specifically, the above general characteristics for the sanctions to be provided by national legislatures were supplemented, in certain cases, with an additional element, which implied a penalty of a certain severity, thus revealing the aim behind it. According to this second method, the Union was asking its Member States to ensure that a certain offence 'is punishable by effective, proportionate and dissuasive penalties, *which may entail extradition*'[265], or '*surrender*'[266]. Under these provisions, the intervention of the EU in the field of sanctions was not as soft as in the former scheme. A minimum level of sanctions thus became unavoidable. According to bilateral or even multilateral treaties concerning extradition, a certain level of sanctions for the offence addressed[267] is normally a prerequisite for states to allow this kind of judicial assistance in criminal matters. Although surrender has replaced extradition in the EU on the basis of the European Arrest Warrant[268], the condition relating to the level of sanctions has remained[269]. This scheme actually revealed that the Union's interest in the penalties threatened against certain offences was pegged to its desire to facilitate judicial cooperation between Member States, which is actually one of the main goals declared in the Treaty. The aspiration was that the common area of freedom, security and justice would be especially promoted by police and judicial cooperation of the Member

[264] See, e.g., Art. 2 of the Convention on the Protection of the European Communities' financial interests, OJ C 316, 27 November 1995, 48 et seq.

[265] See, e.g., Art. 6 of the Framework Decision on combating fraud and counterfeiting of non-cash means of payment, 2001/423/JHA, OJ L 149, 2 June 2001, 1 et seq.

[266] See, e.g., Art. 4 para 4 of the Directive on preventing and combating trafficking in human beings, 2011/36/EU, OJ L 101, 15 April 2011, 1 et seq.

[267] This has been set, e.g., by the European Convention on Extradition of the Council of Europe to one year (Art. 2: 'Extradition shall be granted in respect of offences punishable under the laws of the requesting Party and the requested Party by deprivation of liberty or under a detention order for a maximum period of at least one year or by more severe penalty').

[268] See Framework Decision on the European Arrest Warrant, 2002/584/JHA, OJ L 190, 18 July 2002, 1 et seq.

[269] Art. 2 para. 1.

States in the field of criminal matters (see former Article 29 TEU under the Amsterdam Treaty[270]).

However, as the Amsterdam Treaty gave the Union the possibility to introduce, via Framework Decisions, minimum rules not only concerning the definition of crimes but also concerning their sanctions, a new method of delimiting penalties emerged. At this stage, the Union started elaborating a much more sophisticated scheme. Without giving up the former two methods, it now proceeded to also setting specific (minimum) thresholds for the maximum level of sanctions to be imposed by Member States (at least for certain offences)[271]. Besides, over time the designation of the least maximum limit of a custodial sentence by the EU has become inflexible, for it is now defined by a rigid numerical value (e.g. one or three years) and not in the form of a range (e.g. one to three, or two to five years) as before. Thus, Framework Decisions and – after the Lisbon Treaty – Directives require Member States to ensure that the offences proscribed by means of minimum rules are 'punishable by a maximum penalty of at least one, three, five[272]and so forth years of imprisonment'. The Union thus mandates a (minimum) threshold for the maximum level of a sanction, and national legislators have to adopt it with regard to the offence defined therein. As the

[270] Article 29: 'Without prejudice to the powers of the European Community, the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia. That objective shall be achieved by preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud, through:
– closer cooperation between police forces, customs authorities and other competent authorities in the Member States, both directly and through the European Police Office (Europol), in accordance with the provisions of Articles 30 and 32;
– closer cooperation between judicial and other competent authorities of the Member States in accordance with the provisions of Articles 31(a) to (d) and K.4;
– approximation, where necessary, of rules on criminal matters in the Member States, in accordance with the provisions of Article 31(e).

[271] See, for example, Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting victims Article 4 – Penalties: '1. Member States shall take the necessary measures to ensure that an offence referred to in Article 2 is punishable by a maximum penalty of at least five years of imprisonment. 2. Member States shall take the necessary measures to ensure that an offence referred to in Article 2 is punishable by a maximum penalty of at least 10 years of imprisonment where that offence: (a) was committed against a victim who was particularly vulnerable, which, in the context of this Directive, shall include at least child victims; (b) was committed within the framework of a criminal organisation within the meaning of Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime; (c) deliberately or by gross negligence endangered the life of the victim; or (d) was committed by use of serious violence or has caused particularly serious harm to the victim. 3. Member States shall take the necessary measures to ensure that the fact that an offence referred to in Article 2 was committed by public officials in the performance of their duties is regarded as an aggravating circumstance. 4. Member States shall take the necessary measures to ensure that an offence referred to in Article 3 is punishable by effective, proportionate and dissuasive penalties, which may entail surrender', where one can also see that the Union combines more than one methods in the same legal act referring to different form of a crime.

[272] See, e.g., Art. 4 and 5 of the Directive on combating the sexual abuse and sexual exploitation of children and child pornography, 2011/93/EU, OJ L 335, 17 December 2011, 1 et seq.

European provisions are *minimum* rules, Member States are evidently free to opt for an even higher level of sanction, but not for a lower one. On the other hand, the Union gradually started differentiating penalty levels among different types of conduct, even within the confines of the same offence. Adding aggravating[273] or mitigating[274] circumstances, it sometimes asks national legislators to take such factors into consideration, by increasing or lowering the initial (minimum) threshold for the maximum level of the sanction to be imposed for the offence. A look at the procedural instruments employed by the EU makes it clear that delimiting sanctions in this way helps the Union designate when certain instruments might apply with respect to judicial cooperation in criminal matters. The EAW, for instance, can be issued for offences punishable with a custodial sentence of a maximum period of at least 12 months (Art. 2 FD 2002/584/

[273] See, for example, Art. 9 ibid.:
Aggravating circumstances
'In so far as the following circumstances do not already form part of the constituent elements of the offences referred to in Articles 3 to 7, Member States shall take the necessary measures to ensure that the following circumstances may, in accordance with the relevant provisions of national law, be regarded as aggravating circumstances, in relation to the relevant offences referred to in Articles 3 to 7:
(a) the offence was committed against a child in a particularly vulnerable situation, such as a child with a mental or physical disability, in a situation of dependence or in a state of physical or mental incapacity;
(b) the offence was committed by a member of the child's family, a person cohabiting with the child or a person who has abused a recognised position of trust or authority;
(c) the offence was committed by several persons acting together;
(d) the offence was committed within the framework of a criminal organisation within the meaning of Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime;
(e) the offender has previously been convicted of offences of the same nature;
(f) the offender has deliberately or recklessly endangered the life of the child; or
(g) the offence involved serious violence or caused serious harm to the child.

[274] See, for example, Art. 4 of the Framework Decision 2008/841/JHA on the fight against organised crime (OJ L 300, 11 November 2008, 42 et seq.).
Special circumstances
Each Member State may take the necessary measures to ensure that the penalties referred to in Article 3 may be reduced or that the offender may be exempted from penalties if he, for example:
(a) renounces criminal activity; and
(b) provides the administrative or judicial authorities with information which they would not otherwise have been able to obtain, helping them to:
(i) prevent, end or mitigate the effects of the offence;
(ii) identify or bring to justice the other offenders;
(iii) find evidence;
(iv) deprive the criminal organisation of illicit resources or of the proceeds of its criminal activities; or
(v) prevent further offences referred to in Article 2 from being committed.
Also see Art. 9a of the Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, which refers to the recognition of previous convictions: 'Every Member State shall recognise the principle of the recognition of previous convictions under the conditions prevailing under its domestic law and, under those same conditions, shall recognise for the purpose of establishing habitual criminality final sentences handed down in another Member State for the offences referred to in Articles 3 to 5 of this Framework Decision, or the offences referred to in Article 3 of the Convention, irrespective of the currency counterfeited'.

JHA), while the recognition or the execution of a European Investigation Order (EIO) can be refused, 'if the conduct for which it has been issued does not constitute an offence under the law of the executing State … if it is punishable in the issuing State by a custodial sentence … for a maximum period of at least three years' (Art. 11 para.1 g of Directive 2014/41/EU).

Although the above method of delimiting sanctions is not a 'soft' one, it still leaves some margin of discretion to Member States. The latter can solve problems of proportionality and coherence in their national legal orders by at least being able to define the threshold of the minimum levels for the sanctions to be imposed for offences deriving from EU minimum rules.

The fourth – and final – EU method of delimiting sanctions, which has yet to be applied in practice, emerged rather recently – under the Lisbon Treaty – in the Commission's proposal for a directive on combating fraud against the Union's financial interests[275]. In this proposal, the Commission made a further step toward a more dynamic form of intervention in the field of sanctions, defining the full range of penalties for fraudulent conduct against the Union's budget. It thus fully supplanted Member States in their role of prescribing sanctions for a given criminal conduct. According to the proposal, the Union is supposed to set the threshold of both the maximum and the minimum penalty to be prescribed by national legislators for such offences. In particular, Article 8 para. 1 of the Commission's initial proposal provides: 'Member States shall take the necessary measures to ensure that criminal offences as referred to in Articles 3 and 4, paragraphs 1 and 4 (fraud and certain fraud related offences) involving an advantage or damage of at least € 100,000 shall be punishable by: (a) *a minimum penalty of at least 6 months imprisonment*; (b) *a maximum penalty of at least 5 years of imprisonment*'. As one easily understands, such a formula leaves practically nothing for Member States to define, as they can only *redefine the (minimum) thresholds set by the EU upwards*. It could be argued, of course, that even if the Commission's proposal were to prevail[276], this would be an exceptional situation, because the legal interest protected in this case is held to be a *direct* legal interest belonging to the Union. The Union practically wishes to set, in this manner, a uniform range of penalties for criminal conduct violating its own property. However, as long as the criminal justice system in the EU retains its current form (necessitating a transposition of the legal instruments into the national legal order of Member States, national prosecutions, and trials before national courts), the problems caused by such a method should not be underestimated.

The Commission's proposal on delimiting sanctions can first and foremost create serious problems in relation to the principle of proportionality. In contrast to US law, the said principle holds a prominent place not only in the context of EU law itself (Article 5 para. 3 TEU), but also in the criminal law of all EU Member

[275] COM (2012) 363 final, 11 July 2012.
[276] This does not seem to be the case, however: see Council doc. 13472/14, 22 September 2014, 34.

States, some of which enshrine it in constitutional provisions. In particular, if the minimum threshold of a penalty is set too high with regard to the offence, proportionality is inevitably violated. This is not necessarily the case, however, when the EU only sets the threshold of the maximum level of penalties because, in this latter case, national courts still have the possibility not to apply it. On the contrary, the threshold of the minimum level of penalty applicable to a given offence cannot be circumvented, unless the respective legal order is familiar with an institution allowing for a downward modification of such a threshold (e.g. in cases of mitigating circumstances, which of course are not always available).

In attempting to identify the actual reasons for the choices made in the field of penalties in the above proposal for a directive, one finds that the main concern of the Commission has been to achieve deterrence throughout the Union by means of an equivalent protection in all Member States. Paragraph 14 of the preamble reads: '*The introduction of minimum maximum imprisonment ranges is necessary in order to guarantee that the Union's financial interests are given an equivalent protection throughout Europe*' (emphasis added). However, this goal does not consider at all the need to also safeguard proportionality.

On the other hand, the Commission associates the choices made, and especially that of the minimum level of penalties introduced (six months), with the possibility of issuing a EAW for such cases. Paragraph 14 of the preamble makes this intention clear: 'The minimum sanction of six months ensures that a European Arrest Warrant (EAW) can be issued and executed for the offences listed in Article 2 of the Framework Decision on the European Arrest Warrant, thus ensuring that judicial and law enforcement cooperation will be as efficient as possible'. However, setting a range of penalties as a mere vehicle to enable the application of a procedural tool not only circumvents the principles of proportionality and guilt, but actually upsets the relationship between substantial and procedural criminal law. The latter is there to ensure the application of the former and can never become a criterion for the enactment of substantive criminal law rules. Thus, setting the ranges of penalties cannot depend on whether this range facilitates the issuance of an EAW. Quite the contrary, an EAW should only be issued for offences whose gravity – ascertained on the basis of other substantive criteria – justifies the application of such a severe procedural tool.

Turning now to the evaluation of this latter EU method of delimiting sanctions in light of its influence on *the coherence* of national criminal justice systems, one also comes across significant problems. The principle of coherence is fundamental, especially for a criminal law system evolving in the framework of a supranational organization, like the EU. As aptly pointed out:

> The invasive character of criminal law makes it especially important to ensure that every criminal law system is a coherent one. Such inherent coherence is a necessary condition, if criminal law is to be able to reflect

> the values held to be important by society collectively and by individuals and their understanding of justice. Inner coherence is, furthermore, necessary in order to ensure acceptance of criminal law. When enacting instruments which affect criminal law, the European legislator should thus pay special attention to the coherence of the national criminal law systems, which constitute part of the identities of the Member States, and which are protected under Article 4 (2) of the Lisbon Treaty on the European Union (vertical coherence). This means, first and foremost, that the minimum-maximum penalties provided for in different EU instruments must not create a need for increasing the maximum penalties in a way which would conflict with the existing systems. In addition, the European legislator must pay regard to the framework provided for in different EU instruments. To be in line with the principle of good governance the European legislator should therefore, before enacting any instrument in this field, evaluate the consequences for the coherence parameters of the national criminal law systems, as well as for the European legal system, and on this basis explicitly justify the conclusion that the legal instrument is satisfactory from this point of view[277].

In light of the nature and function of the principle of coherence one has to emphasize, first of all, that the aforementioned provisions of the proposed directive would cause significant problems, first and foremost, to Member States that are not familiar with a system of minimum level of penalties. Introducing such a system is a fundamental choice that should be entirely left to each national legal order, and in any case it should not be imposed through a directive adopted for only a number of offences and just for the sake of European harmonization. Even for Member States that are already familiar with such a system, however, the minimum level of six months imprisonment, established in Article 8 for cases of fraud or fraud-related offences involving an advantage or damage of at least € 100,000 or € 30,000 respectively, may very well be higher than the tariff a national legal order provides for the same level of fraudulent advantages or damages concerning their own financial interests. In other words, setting an mandatory threshold for the minimum level of sanctions, the European legislator can easily disturb the balance of national legal systems, which would have no way to avoid such a threshold. In contrast, a way out exists as far as the least maximum level of the sanction is concerned, because the latter can be at least avoided by the judge when selecting the concrete penalty for the offender.

On the other hand, under a system of setting a minimum threshold of penalties, additional questions arise: for instance, would the suspension of sentences on parole or the stay of execution for such cases still be possible? Could Member States, which are familiar with a system of deviating from minimum punishment thresholds, still enforce such a system? These are important questions, triggered

[277] *ECPI*, A manifesto on European criminal policy, 709.

by the Commission's proposal, and should not be overlooked when planning a new system of introducing penalties on an EU level. This is why it can be seen as a positive development that, up to this point of the legislative process, the Commission's proposal on minimum sanctions has not been accepted[278].

Drawing a conclusion about the EU's criminal law minimum rules on sanctions, one could say that the Union's constant advancement toward the national legislature's powers to define sanctions is evident. Such development does not only expose the 'instrumentalization' of substantive criminal law in order to satisfy procedural needs – and especially needs pertaining to judicial cooperation in criminal matters – but it also raises questions concerning compatibility with the EU's primary law, as well as its overall conformity to fundamental principles of criminal and European law.

3.3 Defining minimum sanctions in the EU criminal law system: the significance of a structure allowing for variable proportionality and internal coherence within each national legal order

The above analysis allows us to make some comparative remarks and try to suggest a viable solution for the problems that have to be addressed in the EU regarding the delimitation of sanctions in the framework of minimum rules adopted in areas falling within the EU's competence.

It is evident that the EU, though not a federal state with the power to enact its own (autonomous) criminal law, has an interest in at least harmonized levels of sanctions for offences that are defined pursuant to its initiatives in the legal orders of its various Member States. Equally evident, however, is that these sanctions have to be proportionate to the offences for which they are imposed, abiding by the principle of proportionality.

Comparing the EU criminal law system with the US federal criminal law system, one could argue that the latter, being autonomous and functioning in parallel to State criminal laws, can practically set its own scale of proportionality for federal crimes, and ought to take exclusive care of the coherence of its own (internal) system. On the contrary, things are much more complicated in the framework of EU criminal law. The supranational organization can intervene in the national criminal law of its Member States by co-drafting crimes with national legislators, i.e. by setting mandatory minimum elements as well as the minimum threshold of sanctions to be imposed on them. It then follows that, under EU criminal law, observing proportionality and coherence has a twofold dimension, a European and a national one, respectively, and is therefore much more difficult to attain. Still, even in the US federal criminal law system some correspondence between federal and State criminal law statutes (covering crimes

[278] See Council doc. 13472/14, 22.9.14,34.

of common interest to the national government and the States) is inevitable in terms of the applicable sanctions. Indeed, there is a need not only to restrict the application of federal criminal law to exclusively federal crimes, but also to achieve *stricto sensu* proportionality of the sanctions provided to the severity of each offence and the blameworthiness of each defendant. In the EU criminal law system, such correspondence between the EU's and Member States' choices concerning sanctions is even more important. The EU's legal instruments do not comprise a distinct, autonomous system of criminal law, but rather *co-determine* the content of Member States' criminal laws, thereby exerting a heavy influence thereupon, able to affect their proportional character as well as their internal coherence.

The EU law on defining sanctions has evolved into an elaborate system, featuring characteristics similar to the Sentencing Guidelines of US federal criminal law. Although the latter refer to a different stage, i.e. to sentencing by a court as opposed to the legislative function of setting the range of sanctions for a particular offence, the Sentencing Guidelines actually constitute an intermediate category, placed between the legislative act of prescribing sanctions and the actual sentencing itself. The Guidelines aspire to determine a much narrower range of a sanction than the one determined by the criminal statute, taking into consideration elements relating to the criminal conduct and to the offender. Such elements also determine the minimum levels of sanctions defined by the European legislator, which are binding on the Member States, just as the Sentencing Guidelines were from their outset until 2005.

In the EU criminal law system, however, there exists another notable difference, making the task of prescribing sanctions on EU level even more arduous. Contrary to the Treaty defining the pertinent competence, the European legislator not only sets in practice minimum rules for crimes with a cross-border dimension or crimes that could affect EU policies, but also practically regulates the entire array of crime areas enumerated in the Treaty without any further distinction[279]. One could argue that this is also true of US federal criminal law, since the latter also applies to cases featuring no federal element. However, this latter situation is mainly due to a broad interpretation – bordering abuse – of federal criminal statutes, and is not normatively preordained. On the contrary, the European minimum rules define crimes that do not encompass the EU jurisdictional element, which creates the problem already on an institutional level. If EU law asked Member States to criminalize, for example, sexual exploitation of children when having a cross-border dimension and defined minimum sanctions only for such conduct, then sexual exploitation of children with a cross-border

[279] See, for example, Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA and Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, which refers not only to cross-border trafficking or sexual exploitation of children.

dimension, being a distinct category of the offence, could invite a minimum sanction level on the basis of its special elements. Violations of equality, proportionality and coherence would not occur as easily in such a configuration, compared with the same criminal acts in the frame of the national jurisdiction, while different categories of crimes could be addressed with different sanctions. Even with such an improvement, however, the European legislator, in delimiting minimum sanctions, would still have to take into consideration the correlation arising in each case between the national and the European provisions for the same categories of crimes. The reasons are plain: first of all, any new category of offences proscribed in a national legal order has to find its place within a general scale, without disturbing proportionality relations already existing between the different crime categories of this specific legal order; second, crimes of EU interest, just like every crime, are eventually tried by national courts, and the sentences are executed in the same legal order. Thus, the latter should not be upset only to adjust to certain choices of the EU. Even in the US criminal justice system, where federal cases are tried by different courts, a big disparity of sanctions for the same or similar crimes is problematic. Citizens being deprived of their freedom for acts of similar severity and blameworthiness are entitled to expect similar sentences based on equality before the law.

On the other hand, it is no coincidence that the Sentencing Guidelines could not maintain their binding character in the US federal criminal justice system. The problems they caused with regard to the principle of proportionality and the rule of lenity, when compared with sentencing of relevant State criminal law offences, were significant. The example of US federal criminal law makes it clear that in systems of a multi-level criminal law structure one has to acknowledge a leeway for taking into account concerns about *stricto sensu* proportionality and the rule of lenity on the basis of comparisons that are made *on all levels* of the system, even if these levels are not tightly connected to each other.

Keeping this remark in mind, we can now take a closer look at the evolving EU system of delimiting sanctions in the areas of crime within the Union's competence. The task is actually to find, first of all, among the four methods that have appeared in the EU thus far, one or more that delimit sanctions in the context of minimum rules by achieving two goals: minimizing proportionality and coherence concerns, on the one hand, and efficiently supporting judicial cooperation in criminal matters, on the other. One may, of course, enrich the variety of EU methods with further proposals. Still, the main interest lies in identifying *the central concepts* that can lead to an appropriate system for delimiting sanctions on a supranational level, which may be expressed in different forms.

In enacting criminal law provisions within a two-tier system, such as the EU one, one must principally allow adequate room for Member States' action according to the principle of subsidiarity. Thus, a highly invasive way of prescribing sanctions

should certainly not be the first choice, indeed it should only be permitted under special circumstances. In this sense, no problem is generated by provisions like the first method described above ('Member States should provide for effective, proportionate, and dissuasive sanctions'), since they only provide general direction that is consistent with the purposes and principles of criminal law[280]. On the other hand, provisions compelling the national legislator to prescribe a penalty that may allow extradition actually tend to 'instrumentalize' substantive criminal law to best serve judicial cooperation, and may only randomly respond to the principle of proportionality between crime and punishment, according to the guilt principle. That is why such provisions are no longer included in more recent EU legal instruments[281]. Such practice may serve the facilitation of judicial cooperation, which can better be achieved by the EU and not by individual Member States, according to the principle of subsidiarity; however, in determining sanctions, the principle of proportionality has a clear priority, and therefore it cannot be set aside for reasons of effective repression within the EU[282].

Establishing minimum levels of penalties for specific offences through EU legislation, especially in the form of rigid numerical values, to facilitate judicial cooperation between Member States is not justified either. Opting for a particular sanction can never be oriented to facilitating 'processes'. The EU is justified to do so only when considered imperative, e.g. due to the very identity of the offence and for the sake of uniformity (as in the case of purely European legal interests, such as the financial interests of the EU) or due to reasons of harmonized deterrence for an offence with a cross-border dimension. However, even then the imposition of a numerical value for the least maximum limit of the threatened sanctions creates rather than solves problems. The determination of an inflexible numeric value as a least maximum limit for the penalty to be ascribed by the national legislator may cause significant problems for the internal coherence of the national legal orders as regards compliance with the principle of proportionality. On the other hand, the more the distinctions in penalties (e.g. through aggravating or mitigating circumstances), the harder it is to conform

[280] See *P. Asp,* Two notions of proportionality, in Kimmo Nuotio (ed.), Festschrift in honour of Raimo Lahti, 2007, 215-218, *Asp*, Criminal law competence of the EU, 188 et seq.; for the meaning of the principle of proportionality according to Art. 49, para. 3 of the EU Charter of Fundamental Rights and the application of the principle at the EU level see *M. Böse*, The principle of proportionality and the protection of legal interests, EuCLR 2011, 35 et seq., and Albrecht, Die vergessene Freiheit, 2003, 83 et seq.

[281] There is the unique exception of the directive on combating human trafficking (2011/36/EU), which includes the obligation of Member States to ensure that inciting, aiding and abetting or attempting to commit an offence 'is punishable by effective, proportionate and dissuasive penalties, '*which may entail surrender*' (Art. 4, para. 4).

[282] *M. Kaiafa-Gbandi/N. Chatzinikolaou/A. Giannakoula/T. Papakyriakou*, The FD on combating trafficking in human beings. Evaluating its fundamental attributes as well as its transposition in Greek criminal law, in A. Weyembergh, V. Santamaria (eds.), The evaluation of European criminal law. The example of the Framework Decision on combating trafficking in human beings, 2009, 186-190.

to the corresponding fields of national legislations, thus destabilizing their coherence[283].

These objections are made even stronger when the EU sets mandatory minimum thresholds both for the minimum and for the maximum limit of the sanctions, as attempted in the proposal for a Directive on combating fraud against financial interests of the EU. In these instances, the difficulty of respecting the internal coherence of national legislation increases, since some legal orders do not even envisage minimum sanctions. Even those that do subscribe to very different approaches as to the minimum thresholds, given that general deterrence is mainly pursued through maximum sanction levels.

Therefore, in the field of penalties, EU law should first and foremost be confined to the provisions delimiting its competence, which cover *particularly serious* cross-border criminality, or in other words *aggravated* forms of crime. It should also normally refrain from setting minimum sanction levels, even at their upper limits, as this can only be justified either by the particular nature of an offence, such as its reference to legally protected EU interests, or by an empirically documented and justified need to serve the goal of deterrence better than national law with respect to particularly serious crime with a cross-border dimension or crime that significantly affects the EU's harmonized policies, thereby justifying the EU's intervention in the field of sanctions. Even then, however, the least maximum level of the sanction should be fixed in the form of a flexible category with reference either to a crime's gravity scale or a penalty's severity scale[284] or at least a form of a range of sanctions as opposed to a non-flexible numerical value. Only thus is it possible to best serve the internal coherence of Member States' national legislative systems.

Recalling that systems of criminal law developing on more than one level ought to combine a broad array of parameters, in order to make appropriate choices with regard to sanctions prescribed for crimes that are (co)drafted by a multi-state entity (federal or supranational), it becomes evident that the more open a method of defining penalties becomes, the more it can take into consideration different parameters to be served. The EU, in particular, interfering in no less than 28 different national systems via its criminal law minimum-sentencing

[283] Approximating penalties at the EU level is rightly considered even harder than approximating the definition of offences – *P. Asp*, Harmonisation of penalties and sentencing within the EU, Bergen Journal of Criminal Law and Criminal Justice 2013, 58-62, *K. Nuotio*, Harmonization of criminal sanctions in the EU, in E. J. Husabo/A. Strandbakken (eds.), Harmonization of criminal law in Europe, 2005, 97-98.

[284] See *Ath. Giannakoula*, Approximation of criminal penalties in the EU: Comparative review of the methods used and the provisions adopted. Future perspectives and proposals, EuCLR 2015, 159-160, *Giannakoula,* Crime and sanctions in the EU, 474-475, who argues for an alternative method of applying EU definitions of the gravity scale of crimes or the severity scale of penalties in the abstract (i.e. in form of categories: serious, less serious, etc.), which Member States would then have to define concretely in numerical ranges within their own legal order.

rules, has to serve a *variable* proportionality and coherence[285]. Not all national criminal law systems follow the same rules and have the same understanding of proportionality, especially when evaluating the wrongfulness and the blameworthiness of a criminal offence. Thus, the Union needs an 'open' method of setting penalty levels, that still allows Member States to find ways to serve their national scales of appropriate sanctions as well as other particularities of their domestic criminal law system. To follow a different path could lead either to a frequent application of the emergency break clause (Art. 83 para. 3 TFEU) or to the development of autonomous national 'blocks' that do not abide by EU law, or – more likely – to an application of the law in actual practice that would circumvent the Union's choices, rendering the aspired-to EU harmonization of sanctions unfeasible, as was the case with the US Federal Sentencing Guidelines. In democracies it is indeed difficult for a criminal justice system to survive, when it promotes – even unintentionally – inequality and disproportionality on all the levels it affects, and rightly so.

[285] On the need for respect of coherence and national identities in the EU see *Asp*, Criminal law competence of the EU, 206 et seq., and *ECPI,* A manifesto on European criminal policy, 709.

C) The level of protection of procedural rights as a determining factor of the US federal and the EU supranational systems of criminal procedure

1 The main questions worth addressing in a comparison between the US federal and EU systems of criminal procedure

The defining attribute of every system of criminal procedure, regardless of its origin, is the relationship it establishes between the effective administration of criminal justice and citizens' liberties within the rule of law. Striking a balance between these two goals is the main task of democratic societies, even if they are subject to systems of criminal procedure that function on more than one level. However, depending on the particularities of each system, the above task may become even harder. For example, in a cohesive system, with its own enforcement mechanisms, like the federal system of the US, striking a balance between effective criminal law enforcement and respect for citizens' liberties is relatively easier to achieve. On the contrary, in a system where criminal law enforcement exclusively takes place on the level of a supranational organization's Member States, the 'central' authority only intervening in order to facilitate cooperation and set basic harmonized rules to make such a goal possible, the above task may become much more complicated. New questions arise here, for example, how to balance the expansion of the prosecutorial and investigative power of national agencies supported by European organs against the disadvantageous position of suspects or defendants who have to face more than one legal order for the same criminal conduct, or how to regulate a criminal procedure in which more than one legal order intermingle, because, for example, evidence for a given case can originate in different Member States, and so forth.

The main questions one should answer in a comparison between criminal procedural systems developing on more than one level are two. The first concerns the rights of individuals involved in criminal proceedings, particularly the rights of suspects and defendants, as these rights influence all procedural acts and shape the distinct character of a system itself. The second question relates to whether a criminal case can be prosecuted in more than one level (federal and State) or national institutions of criminal enforcement (more than one EU Member States), because a potential recognition of the *ne bis in idem* principle and its particular extent determine the quality of co-existence between the different levels comprising a given criminal justice system. One can pose, of course, a whole range of other questions related to matters of criminal procedure. However, *the non-existence of an EU enforcement mechanism in the field of criminal law* and the resulting dependence of the Union on its Member

States for this purpose, unlike the US federal criminal justice system, shows that a comparison between the two systems can be useful especially on the *legislative* level, especially with regard to the main axes that shape their characters. That is why the two questions addressed above are deemed to be crucial in terms of comparing the two procedural systems addressed in this work.

2 Dealing with the problem of duplicate charges for the same offence

In the US, as far as the relationship between federal and State criminal law is concerned, the *ne bis in idem* principle, which precludes a second charge for the same offence when the defendant has been either convicted or acquitted of the charge, is neither legislatively recognized, nor generally enforced in practice[286].

Briefly put, the issue of a federal prosecution after a prior State prosecution for essentially the same conduct is addressed in the US with a *policy* statement, referred to as the 'Petite policy'. The US Supreme Court established, in two decisions dating back to 1959, the dual sovereignty doctrine (*Bartkus v. Illinois*, 359 U.S. 121, 138-139 (1959) and *Abbate v. United States*, 359 U.S. 187, 195-196 (1959)), according to which neither a State prosecution of a defendant who has already been convicted or acquitted of the same offence in a federal court, nor a federal prosecution commenced after a State conviction or acquittal based on the same conduct constitutes a breach of double jeopardy or due process. Scholars have criticized this doctrine, while one can also trace voices seeking for another solution among federal courts' rulings[287]. On the other hand, although Congress has the power to enact laws that unambiguously preempt State legislation, such a prerogative has not been practised, and thus, absent an explicit statutory provision to the contrary, federal criminal law statutes seldom, if ever, preempt State criminal law[288].

Given that dual prosecutions are not barred by double jeopardy or due process reasons and no other legislative solution has been adopted, the primary tool used in the US by the Department of Justice since 1959 (issued shortly after the Supreme Court's decisions) to address this problem has been a mere

---

[286] For a historical presentation of the development on this issue in the US see *Gómez-Jara Diez*, European federal criminal law, 155-160.

[287] See *Abrams/Beale/Klein,* Federal criminal law, 101-102, using the example of Judge Guido Calabresi in *United States v. Al Assets of G.P.S. Auto Corporation*, 66 F. Ed 483, 498-499 (2d Cir.1995), who argued that changes in the federal role in law enforcement warrant a reassessment of the dual sovereignty doctrine.

[288] The only criminal case in which the Supreme Court ruled that a federal criminal statute superseded State criminal legislation without a particular regulatory scheme is *Pennsylvania v. Nelson*, 350 U.S. 497 (1956); although Nelson is still good law, this ruling of the Supreme Court has not been read broadly, so as to make a difference in practice (see *Abrams/Beale/Klein,* Federal criminal law, 108-109.

policy, the so-called 'Petite policy', named after the Supreme Court case *Petite v. United States* (361 U.S. 529 (1960)), which referred to multiple federal prosecutions arising from the same transaction and actually did not concern a federal-State matter. The phrase 'Petite policy' has come to denote a single policy addressing both problems: multiple federal prosecutions for the same offence and federal-State prosecutions for the same offence. According to it, with particular reference to the aspect that is relevant to this discussion: 'After a state prosecution there should be no federal trial for the same act or acts unless the reasons are compelling'. In particular, the declaration of the Petite policy in the U.S. Attorneys' Manual (USAM) provides that, although there is no general statutory bar to a federal prosecution, where the defendant's conduct already has formed the basis for a State prosecution, a State judgment or conviction or acquittal on the merits shall be a bar to any subsequent federal prosecution for the same act or acts, unless there are compelling reasons. This policy applies only to charging decisions[289] and not to pre-charge investigations. The criteria that might justify – in exceptional cases – the approval needed for a federal prosecution following a State one[290] are: the involvement of a substantial federal interest, the presence of a 'leftover' after 'partial' acquittal, and the defendant's conduct constituting a federal crime according to the government. However, the most important element of this policy is that it is deemed to be 'only internal and it is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural'[291].

On the contrary, in EU law the *ne bis in idem* principle is legislatively recognized and vested with a fundamental rights' safeguard. First of all, according to Article 54 of the Convention Implementing the Schengen Agreement, which is incorporated in EU law (the *Schengen acquis*), final rulings of national criminal courts bar a subsequent prosecution in another Member State of this Agreement for the same acts, if a penalty has been imposed, as long as it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing contracting party. This provision has formed the ground of abundant case law by the ECJ on the matter[292]. On the other hand, the *ne bis in idem* principle is also enshrined in Article 50 of the EU Charter of Fundamental Rights and Freedoms, which recognizes a right of citizens not to be

[289] Prior State or federal prosecution resulting in an acquittal, a conviction, including one from a plea agreement, or a dismissal or other termination of the case.

[290] The Department of Justice requires that a U.S. Attorney obtain an approval before filing the charge or, in other instances, the requirement is to 'consult' with the Department. See *Abrams/Beale/Klein,* Federal criminal law, 96.

[291] See *Abrams/Beale/Klein*, Federal criminal law, 118-119.

[292] See C-187/01, 11.2.2003 (Gözütok), C-385/01, 11.2.2003 (Brügge), C-469/03, 10.3.2005 (Miraglia), C-436/04, 9.3.2006 (van Esbroeck), C-467/04, 28.9.2006 (Gasparini et al.), C-150 /05, 28.9.2006 (van Straaten), C-288/05, 18.7.2007 (Kretzinger), C-297, 11.12.2008 (Bourqain), C-491/07, 22.12.2088 (Turansky), C-261/0, 16.11.2010 (Mantello), C-617/10, 26.2.2013 (Akerberg Fransson), C-390/12, 30.4.2014, Pfeger et al., C-398/12, 5.6.2014, C-129/14 PPU, 27.5.2014.

tried or punished again in criminal proceedings for the same offence after a final acquittal or conviction within the EU[293]. Thus, it is evident that the EU adopts a more favourable position with respect to the prosecution of persons who have been punished or acquitted of the charges for the same offence[294]. This is so not only because the *ne bis in idem* principle is understood and guaranteed as a fundamental right of the individual, but also because the said right knows of no exception. This is why a comparison with regard to the *ne bis in idem* principle cannot contribute to a further improvement of the European system of criminal procedure. Thus, our attention will focus on the other crucial question posed above, i.e. how to regulate rights of individuals in criminal proceedings, and especially the rights of the accused, for which a comparison between US federal and EU criminal law is much more promising.

3 Fundamental procedural rights of suspects and defendants in the framework of federal/supranational and State/national level: raising, maintaining or reducing the requisite level of protection?

3.1 The level of protection of individual procedural rights in the US criminal justice system

In the US criminal justice system, with its two autonomous levels (federal and State, respectively) existing in parallel, different procedural rules, and the corresponding sets of different procedural rights, should pose no real problem. However, the rights of citizens safeguarded by the US Constitution, and especially those which have a direct nexus to criminal procedure (e.g. due process rights), would be devoid of meaning if citizens were unable to make use of them in criminal processes carried out by States[295]. Thus, it becomes apparent that procedural safeguards emanating from individual fundamental rights must cling to the level of protection offered by the US Constitution. On the other hand, the idea of federalism, deeply rooted in US history and tradition, makes it only

[293] *Article 50: Right not to be tried or punished twice in criminal proceedings for the same criminal offence:* 'No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law'.

[294] It is still not clear, though, what is the exact relationship between Art. 54 of the Convention implementing the Schengen Agreement (CISA) and Art. 50 of the Charter of Fundamental Rights and Freedoms (CFRF). Some scholars argue that Art. 50 CFRF supersedes Art. 54 CISA, so that the transnational application of *ne bis in idem* does not depend on any enforcement element, *I. Anagnostopoulos*, *Ne bis in idem* in der Europäischen Union: offeneFragen, FS für W. Hassemer, 2010, 1136 et seq., *M. Heger*, Perspektiven des Europäischen Strafrechts nach dem Vertrag von Lissabon, ZIS 2009, 408, *M. Böse*, Der Rechtsstaat am Abgrund?-Zur Skandalisierung des EU-Geldsanktionengesetzes, ZIS 2010, 612; contra *Satzger,* International and European criminal law, 135-136.

[295] In cases, that is, where State law affords lesser protection.

natural that States are allowed room to 'experiment' with their own rules. These two aspects have co-defined the following 'rights arrangement' in the US criminal justice system[296]: the Bill of Rights, which – as originally enacted – imposed limits only on the federal government, is now considered to be incorporated in the Fourteenth Amendment's 'Due Process Clause', thereby imposing procedural limitations on States also. Thus, the Bill of Rights has become equally binding for States as well. However, the States can still – and actually do – grant *higher* protection through their own constitutional rules.

In order to understand this 'arrangement' better, it is useful to explore briefly certain significant elements of its evolution. In a series of cases, the Supreme Court has held that almost all the protections granted under the Bill of Rights are granted in equal measure against the States through the Fourteenth Amendment's Due Process Clause. This position apparently gives a *prima facie* negative answer to the question whether the limitations imposed by the Fourteenth Amendment on the States are different from those imposed by the Bill of Rights upon the federal government. However, in order to understand the exact function of the 'incorporation doctrine' elaborated in the Supreme Court's decisions, it is important to take into consideration and compare the different approaches adopted in relation thereto until the said position finally prevailed.

According to a presentation by Saltzburg, Carpa and Davis[297], initially, and until the 1960s, the so-called 'fundamental rights approach' was predominant. This approach viewed the Fourteenth Amendment as prohibiting only those practices which were inconsistent with the concept of 'ordered liberty' and required a case-by-case, totality of circumstances approach to determine whether a particular State practice 'so shocks the conscience' that it is unacceptable in the Anglo-American legal system[298]. Under this view, the Bill of Rights protections were relevant indicators of fundamental rights, but they did not necessarily apply to the States[299]. The result of the fundamental rights approach was that the limitations imposed upon State governments were significantly fewer in number than those imposed upon the federal government[300]. At the opposite end of this view stood the 'total incorporation approach', which never prevailed in the Supreme Court

[296] See *J.-I. Turner*, Interstate conflict and cooperation in criminal cases: An American perspective, EuCLR 2014, 119-120; cf. also *Gómez-Jara Diez*, European federal criminal law, 179-182. See also *C. Steiker,* Criminal procedure stories: Introduction, in C. Steiker (ed.), Criminal procedure stories, 2006, vii, who interestingly points out that 'the United States is unique in the world in the degree to which its criminal processes … are governed by federal constitutional law. Constitutional litigation that episodically and unpredictably reshapes the structure of criminal justice systems throughout the nation stands in sharp contrast to other modes of criminal justice reform, such as legislation, specialized commissions, or administrative oversight.'

[297] *St. Saltzburg/D. Carpa/A. Davis*, Basic criminal procedure, 5th Edition (2009), 83 et seq.

[298] See, e.g., *Palko v. Connecticut*, 302 U.S. 319 (1937).

[299] *Saltzburg/Carpa/Davis*, Basic criminal procedure, 84.

[300] Ibid.

as such, but was supported by at least one of its members (Justice Black)[301]. According to this view, the Fourteenth Amendment incorporates the entire Bill of Rights, and makes its rights and protections opposable to States without distinction. The terms 'privileges and immunities' and 'due process', as used in the Fourteenth Amendment, are deemed to be convenient shorthand devices as substitutes for a restatement of the Bill of Rights[302]. As a counterargument to this view it has been suggested, however, that there is little in the legislative history of the Fourteenth Amendment to indicate that the drafters intended such a total incorporation[303]. Thus, since the 1960s the predominant approach of the Supreme Court on the matter has been the so-called 'selective incorporation approach'[304]. The latter is deemed to be a hybrid of the fundamental rights and the total incorporation approach[305]. According to it, the Due Process Clause encompasses rights which are necessary to 'ordered liberty', but the Bill of Rights protections are neither the required nor the exclusive fundamental protections. To determine whether a Bill of Rights protection is 'fundamental', the selective incorporation approach requires that the Court look at the total right guaranteed by the Bill of Rights provision, not just a single aspect of that right, and not as applied to particular factual circumstances. If a particular Bill of Rights provision is fundamental to the Anglo-American system jurisprudentially, it is incorporated in the Fourteenth Amendment in its entirety[306]. The selective incorporation approach has been criticized in turn as an artificial compromise, which has no basis in the language or history of the Fourteenth Amendment, raising federalism concerns, because it places 'a constitutional strait jacket on States' and prevents them from experimenting with local solutions[307]. Despite that criticism, this approach not only prevailed, but it is also considered unlikely that it will be rejected by a majority of the Supreme Court in the future[308]. According to the selective incorporation approach, the Court has held in a number of decisions that most of the Bill of Rights protections equally apply to States[309]. The only clear exception thus far has been the Fifth Amendment requirement of a grand

[301] In *Duncan v. Louisiana*, 391 U.S. 145 (1968).
[302] *Saltzburg/Capra/Davis*, Basic criminal procedure, 84.
[303] Ibid., 85.
[304] See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968).
[305] *Saltzburg/Capra/Davis*, Basic criminal procedure, 85.
[306] Ibid.
[307] Ibid., 86.
[308] Ibid.
[309] See, e.g., a recent decision of the Supreme Court, *Riley v. California*, 573 U.S.; 134 S. Ct. 2473 (2014). In this decision, the Court held that officers must have a warrant to search a cell phone, a question on which State and federal courts were split before.

jury indictment in felony cases, while the application of the Eighth Amendment requirement concerning limitation of excessive bail is debated[310].

Having achieved an equal application of the Bill of Rights on federal and State levels, the main issue to address is whether this equal application has any disadvantages. In the American literature, the risk of a possible erosion of federal protections under the incorporation approach has gained special attention. Specifically, it has been noted that, although the incorporation approach was originally designed to *upgrade* State standards by tying them to federal standards, it may in fact erode the federal protections themselves, in cases where the Supreme Court decides that the States are allowed to 'experiment' with alternative forms of procedure[311]. Allowing States to 'experiment' with lesser protections, within the confines of incorporation, could easily lead to a dilution of the federal standard as well[312].

Turning now to the other pole of the American system, i.e. the States, the important question for them has been how much room they are allowed to modify clauses safeguarding fundamental procedural rights, with particular regard to the rights of criminal suspects and defendants. To begin with, it is important to clarify that States became active in this field following a variation in the predominant approach to the protection of fundamental rights, as the Supreme Court began in the 1970s and 1980s to back away from its criminal procedure 'activism', i.e. from some earlier decisions, which had provided significant constitutional rights to criminal suspects[313]. It was then that many States afforded greater protection under their (State) constitutions. States which are deemed to be in the forefront of relying on their own constitutions are: Alaska, Connecticut, Hawaii, Mississippi, New York, Oregon, and Washington[314].

According to this pattern, greater protection is possible under State law. State courts generally follow a two-step process to define whether their constitution allows for more protection[315]. The first step is looking at the specific language

---

[310] It appears that the provision on bail has been incorporated, whereas the provision on excessive fines has not. The Supreme Court has not directly addressed the question but has confined itself to suggesting this in footnotes. See *Schilb v. Kuebel*, 404 U.S. 357 (1971): 'Bail, of course, is basic to our system of law, and the Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment'. On protection against excessive fines, for a statement, in *dictum*, that the right has not been incorporated, see *McDonald v. City of Chicago*, 561 U.S. 742 fn. 12-13 (2010) (n. 12 suggests that bail has been incorporated, citing *Schilb*; n. 13 suggests that the excessive fines clause has not been incorporated).

[311] See *Saltzburg/Capra/Davis*, Basic criminal procedure, 87, citing the example of *Williams v. Florida* (399 U.S. 78 (1970)), where the Court held that the Sixth Amendment did not require 12 jurors in a criminal case.

[312] *Saltzburg/Capra/Davis*, Basic criminal procedure, 87

[313] *Turner,* Interstate conflict and cooperation in criminal cases, 120.

[314] See *Saltzburg/Capra/Davis*, Basic criminal procedure, 88-89.

[315] Ibid., 89.

of the State constitution, exploring whether it indicates any special protection, while the second refers to an independent policy determination, which the court is allowed to do, at the same time engaging in its own balance of interests. However, it is important to point out that recent limitations have been set on this activism by State courts[316]. One of these limitations derives from amendments of certain State constitutions, which attempt to prevent the granting of broader rights at the State level. The Constitution of Florida is such an example. It now provides that the decisions of the US Supreme Court provide the full extent of protection from search and seizure[317]. Another limitation derives from the so-called 'plain statement rule'. According to this rule, the Supreme Court can review State court decisions, unless the State court makes a clear statement that its decision is solely based on the State constitution[318]. However, if there is no clear statement and the Supreme Court decides that a State court erred in giving the defendant too much protection, the State court can nonetheless have the final word.

Before drawing conclusions from the above, two additional general remarks are in order, helping to place the matter in the broader picture of constitutional rights and criminal procedure. First of all, it is important to take into consideration that, 'By the end of the 20th century, rights-based constitutionalism *centered on the courts* has essentially no serious competitors in the USA'[319]. On the other hand, the following strong, though justified, criticism addressed to the American criminal justice system should not evade our attention either:

> (For) the past thirty-five years the legal system's discussion of criminal defendants' rights has suffered from an air of unreality, a sense that all goals can be satisfied and all values honoured – that we can, for example, have the jury selection process we want at no cost to anything else we might want … If constitutional law's response to criminal justice has failed, it has failed not just from too much intervention but from too little as well … The system might be better off today had Warren and his colleagues worried less about criminal procedure, and more about criminal justice.[320]

---

[316] Ibid., 90-91.

[317] Art. 1 Section 12 of the Florida Constitution 'Searches and seizures – The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated … This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court'.

[318] *Saltzburg/Capra/Davis*, Basic criminal procedure, 90, citing the example of *Michigan v. Long*, 463 U.S. 1032 (1983).

[319] *Tushnet*, A contextual analysis, 233 (emphasis added).

[320] *W. Stuntz,* The uneasy relationship between criminal procedure and criminal justice, Yale Law Journal 107, 1997-1998, 76.

Looking now at this whole picture in order to draw conclusions, it is important to focus on the following significant factors. First of all, the US system demonstrates that, despite its core feature of favouring State disparities based on federalism, it had to find a solution for a rather uniform level of protection as far as individual (and especially suspects' and defendants') procedural rights are concerned. To hold otherwise would be detrimental both for the US Constitution's value throughout the nation, and for the criminal justice system itself, as the tight interconnection of federal and State criminal law is evident in practice. The former is increasingly expanding its scope in fields traditionally belonging to the latter, and practically necessitates the existence of an equal 'base' of individual rights, irrespective of whether a case will be prosecuted federally or on the State level. However, taking into consideration that the selective incorporation approach of the Bill of Rights, which ultimately prevailed, has no basis in the language or the history of the Fourteenth Amendment, it is rather surprising that in the framework of a federal state, with a comprehensive set of constitutional rules, the uniformity achieved is neither absolute nor unwavering[321]. The moral is that, even in a much more cohesive system than that of the EU, like the US one, the effective protection of fundamental rights of individuals related to criminal procedure on both levels is neither self-evident nor derived from strict, binding standards. This might be a peculiarity of the American system, due to the great importance of the Supreme Court in interpreting the US Constitution and 'forming' constitutional rights; on the other hand, however, it brings to mind Stuntz's criticism concerning constitutional law's failure with regard to criminal justice because of too little intervention. One might, of course, argue that the 'moral' highlighted above seems to reveal – rather unsurprisingly – the proclivity of every institution exercising power toward a non-binding system of protection of fundamental rights. A total incorporation approach could not serve such a (desired) system. It could also be argued that this is a rather unavoidable result of federalism. However, even under federalism, States have to find some standards binding to all of them, because otherwise their co-existence may not be possible. The most probable scenario concerning the incorporation of the Bill of Rights is that the Supreme Court has made a primarily political decision, in an attempt to satisfy a twofold strategy: on the one hand, to make the Bill of Rights equally binding on States(as far as possible), and, on the other hand, to meet federalism concerns that might arise out of a strict position on the matter (total incorporation). Addressing the tension underlying every effort to strike a balance between an effective criminal justice system and the protection of individual rights in systems operating on more than one level, it is evident that a strictly binding character of all constitutional fundamental rights of individuals should be made possible in favour of citizens on all levels where criminal proceedings are undertaken, especially given that citizens face the additional difficulty of coping with more than one set of legal provisions in those systems. This is why it is also important to realize and avert the risk revealed by the US system, i.e. the

[321] Though not likely, it could still change through a Supreme Court decision in the future.

possible erosion of constitutional (fundamental) procedural rights, arising out of methods that allow one of the levels to 'experiment' with different procedural rules within their area of competence.

The other pole of the American system, that permitting States to offer greater protection as far as procedural rights are concerned, obviously serves both the idea of federalism (States can experiment) and the protection of citizens (the experimentation by States is only allowed inasmuch as it enhances their rights). Despite the generosity that characterizes the particular features of this pole in the US system[322], it is important to keep in mind that its function has not been left unrestrained. The applicable limitations play an important role in this regard. The tendency of States to abstain from the option of affording higher protection, as evidenced, for example, with the Amendment of the Constitution of Florida, and the requirement that the higher protection afforded by a State constitution be plainly expressed in a court's decision in order to prevail, are obstacles that have their own significance. The former reflects the tendency of every institution exercising power to be subject to the least possible limitations when assuming action affecting the citizens, while the latter indicates a practice of 'making someone think twice before acting' (here, plainly expressing the enhanced State level of protection of a right before actually recognizing it), which sometimes also indirectly leads to restraint of action (here, restraint to enhanced protection). In other words, it must be clear that, in criminal law systems developing on more than one level, like the US one, differentiated, i.e. higher, protection of procedural rights afforded by one level may very well diminish in the course of time, while its unconditional prevalence is not guaranteed either. This state of affairs shows that the possibility of enhanced protection of procedural rights on a certain level should not be used as an argument allowing less satisfactory standards of protection on the level that binds the whole system, because the possibility of greater protection on another level cannot be guaranteed, while limitations to such protection may very well emanate from its application in practice.

3.2 Harmonizing procedural rights in EU criminal law and the principle of mutual recognition of judicial decisions and judgments

As already mentioned, the enforcement of criminal law in the EU belongs to Member States. The prosecution and trial of all criminal cases, even those concerning crimes under the EU's concurrent competence, take place on the national level. National enforcement agencies reserve the concomitant responsibility for all actions, even if they might be supported by European

[322] The higher protection level does not need to emanate from the language of a constitutional provision itself, but it can be the outcome of an independent policy determination made by a State court.

(mainly coordinating) organs (Europol[323], Eurojust[324]), or by joint investigative teams comprised by agents of Member States and Europol[325]. However, after the Lisbon Treaty the EU has acquired the competence also to enact minimum rules in the field of procedural law. Based on Article 82 para. 2 TFEU, such rules may concern:
(a) the mutual admissibility of evidence between Member States;
(b) the rights of individuals in criminal procedure;
(c) the rights of the victims of crime; and
(d) any other specific aspects of criminal procedure which the Council has identified in advance by a relevant decision[326].

The important element with regard to the EU's legislative intervention in the field of procedural criminal law is that the Union aspires primarily to serve the judicial cooperation of its Member States, which is based on the so-called 'principle of mutual recognition of judicial decisions and judgments'. The Union's goal is not to introduce a kind of European criminal procedural code. According to Article 82, paras. 1 and 2 TFEU:

> 1. *Judicial cooperation* in criminal matters in the Union shall be *based on the principle of mutual recognition* of judgments 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 in Article 83.
> 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 the Member States … *Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals*.

It is, of course, evident that in the absence of harmonization of crucial procedural rules, like those referring to the admissibility of evidence and the rights of individuals in criminal proceedings, the significant disparities of the Member States' procedural laws would render the application of the mutual recognition principle, hence the judicial cooperation of EU Member States, impossible.

---

[323] Council Decision on establishing Europol, 2009/371/JHA, 6 April 2009, OJ EU 2009, L 121, 137 et seq.
[324] Council Decision setting up Eurojust 2002/187/JHA, 28 February 2002.
[325] Framework Decision on joint investigation teams 2002/465/JHA, OJ EU 2002, L 162, 1 et seq.
[326] Art. 82 para. 2 TFEU provides that the adoption of such a decision requires that the Council act unanimously after obtaining the consent of the European Parliament.

The nature of the so-called principle of mutual recognition and the serious risks it entails will not be discussed in detail here. Suffice it to briefly mention some of its important features in order to demonstrate how it works in practice with the help of an example, as this principle also affects the minimum procedural rules introduced by the EU. These minimum rules stand at the centre of our attention, as the overall configuration concerning the protection of procedural rights within the EU quite resembles, at least at a first glance, the one adopted in the US criminal justice system.

One could argue that the *principle of mutual recognition*[327], running from the pre-trial phase through to the enforcement of criminal decisions[328], promotes a somewhat 'automatic' recognition of judgments issued by courts of another Member State, as long as a minimum form is observed, and save for some limited power to deny enforcement[329]. This is extremely beneficial for the implementation of measures ordered by individual judicial decisions and doubtless empowers the efficiency of crime control.

The principle of mutual recognition virtually emerges as a sort of procedural *hyper-principle* that claims to shelter the procedural systems of all Member States under its umbrella. The existence of common, or at least inter-compatible, procedural rules and principles is considered almost self-evident for its application. However, considering the philosophy and the actual methods in which the principle of mutual recognition is implemented in various contemporary EU legal instruments, the essential question is whether it can possibly lead to an emasculation of existing procedural principles that are common to Member States.

Selecting the pre-trial field, where the utmost need for judicial cooperation emerges and where most of the problems surface in terms of transnational suppression of crime, it is useful to attempt to answer the above question by means of the example of the EAW, which was introduced by virtue of Framework Decision 2002/584/JHA[330].

---

[327] See *Kaiafa-Gbandi,* Harmonisation of criminal procedure on the basis of common principles. The EU's challenge for a rule-of-law transnational crime control, in C. Fijnaut/J. Ouwerkerk (eds.), The future of police and judicial cooperation in the European Union, 363, with further citations. Also see *V. Mitsilegas,* The constitutional implications of mutual recognition in criminal matters in the EU, Common Market Law Review 2006, 1278 et seq.

[328] In addition to the Framework Decision concerning the European Arrest Warrant (2002/584/JHA, OJ EU 2002, L 190, 1 et seq.), also see the Framework Decision on mutual recognition of financial penalties, 2005/214/JHA, OJ EU 2005, L 76, 16 et seq., the Framework Decision on the mutual recognition of supervision measures 2009/829/JHA, OJ EU 2009, L 294, 20 et seq., the Framework Decision on mutual recognition of probation decisions, 2008/947/JHA, OJ EU 2008, L 337, 102 et seq., the Framework Decision on mutual recognition of custodial sentences or measures involving deprivation of liberty, 2008/909/JHA, OJ EU 2008, L 327, 27 et seq., and the Directive on a European Investigation Order, 2014/41/EU, OJ EU 2014, L 130, 1 et seq.

[329] *Kaiafa-Gbandi*, Harmonisation of criminal procedure, 363.

[330] OJ EU 2002, L 190, 18 July 2002, 1 et seq.

The pre-trial phase poses serious conundrums to every procedural system. It is at that phase that quite diverse interests – i.e. of the State, on the one hand, and affected individuals, on the other – must be counterbalanced. Despite differences among individual procedural systems, one could say that – at least in theory – there is a common *purpose* of pre-trial proceedings, i.e. to investigate the facts of the case, qualified by the *presumption of innocence*[331]. In practice, things often develop differently, as the authorities attempt to secure the defendant's 'foreordained' guilt. Hence, it is imperative to ensure a status that enables the accused to put up an effective defence during the pre-trial investigations, to empower the *principle of fair trial*, and to recognize adequately the *rights of the defence*[332]. Both the defendant and the State are interested in an expeditious pre-trial phase (*principle of speediness of the procedure),* which should not, however, be allowed to obstruct the fulfilment of the aforementioned interests.

The most sensitive issue of the pre-trial phase relates to the onerous investigative measures that seriously undermine fundamental rights[333]. It is precisely due to their invasive character, that European legal tradition and the ECHR recognize that, in enforcing such measures, *the citizen is never to be used as an object*. By all means it must be acknowledged that these are measures taken against individuals who are presumed innocent, and should thus not have a punitive nature, but should merely be confined to securing the procedure[334]. Due to their nature as forms of infringing on fundamental rights, they should be consistent with the *principle of proportionality*: the more intense the impairment, the more vital the *reservation in favour of judicial review*[335].

Examining the provisions concerning the EAW in view of the aforementioned observations, one can arrive at the following conclusions: first of all, the need to serve *the principle of speediness of the procedure* is obviously evident in the short time limits provided under Article 17 paras. 1, 3 and 4 of Framework Decision 2002/584/JHA[336]. On the other hand, *the principle of proportionality is not at all guaranteed*, as is made clear both by the penalty level applicable to offences for which a EAW can be issued and by the absence of reasonable suspicion of guilt as a precondition of issuance or by the lack of a common ('European') set of grounds for keeping a person in pre-trial detention, all of which would serve to consolidate the principle. However, the most important deficiency of the

---

[331] See, indicatively, *H.-H. Kühne,* Strafprozessrecht, 8th edition, 2010, 221-223, 249 and *N. Androulakis,* Basic notions of criminal procedure [in Greek], 4th edition, 293-294.

[332] See *Kühne*, Strafprozessrecht, 222.

[333] *U. Nelles,* Grundrechte und Ermittlungsverfahren, Neue Kriminalpolitik 2006, 70 et seq.

[334] *Kühne*,Strafprozessrecht, 249.

[335] Ibid., 253 et seq.

[336] Even though this is a declaration of political stature, it still makes it clear that delays in the proceedings will not be tolerated, since according to Art. 17 para. 7 of the framework decision, if a State is subjected to repeated delays concerning the execution of the EAW due to another Member State, the Council is informed in order to conduct an appropriate evaluation on the Member States' level.

EAW is that its structure and function *do not permit respect for the presumption of innocence*. As mentioned earlier, measures of procedural constraint are to prevent procedural abuses against persons presumed innocent, and are thus not allowed to wield a punitive force. In order to achieve this, however, it must be possible to account for two factors within the context of the principle of proportionality: the *predictable value of the measures* to the procedure as a whole, and *the specific harm or risk incurred by the defendant*. By definition, the judicial authority issuing a EAW against an individual located in another Member State cannot weigh these factors, since it is not *au fait* with the actual circumstances concerning the particular accused[337]. Thus, the decision is perforce arbitrary. Provided that the enforcement of a measure cannot merely rely on facilitating the procedure, the measure inexorably becomes punitive, even though the individuals harmed by it are to be presumed innocent. It then becomes obvious that blindly pursuing the speediness of the procedure may actually prove detrimental to the rights of individuals[338].

Similar prospects are traced in the provisions of the Framework Decision for the enforcement of Orders Freezing Property[339], while even the European Investigation Order (EIO)[340], which initiated a positive development compared with the European Evidence Warrant[341], leaves the Union broad discretion in terms of unsuccessful claims[342]. Both aim to supplement the EAW, thus covering a wide spectrum of evidence collected at the pre-trial stage and procedural constraint measures enforced in the field of transnational crime control.

Adding to the picture, this adverse impact on procedural rights could occur even in the absence of dual criminality, at least with respect to offences included in an extensive enumeration of various categories of acts which is incorporated

---

[337] Also see *B. Schünemann*, Verteidigung in Europa, Strafverteidiger 2006, 367, with the additional argument on the need for a new definition of the clause 'risk of absconding', considering the EU as a common area for the purpose of establishing valid grounds for pre-trial detention.

[338] Also see, pertinently, the criticism of *S. Broß,* Konstruktive Problemebei den Einigung Europas – dargestellt am Beispiel des Europäischen Haftbefehls, FS für K. Nehm, 38, who argues that, in the context of the EAW, the citizen is reduced to a mere object of crime control.

[339] 2003/577/ JHA, OJ EU 2003, L 196, 2 August 2003, 45 et seq. This framework decision has been replaced by the European Investigation Order (EIO) (Directive 2014/41/EU-Art. 34 para. 2) as far as orders freezing evidence are concerned.

[340] Directive 2014/41/EU, OJ EU 2014, L 130, 1 et seq.

[341] 2008/978/JHA, OJ EU 2008, L 350, 72; also see the criticism of the proposal for a framework decision on the European Evidence Warrant (COM (2003) 688 final, 14 November 2003) by *P.-A. Albrecht*, Der Rahmenbeschluss – Entwurf der Europäischen Beweisanordnung – einekritische Bestandsaufnahme, NStZ 2006, 74-75; *St. Braum,* Das Prinzip der gegenseitigen Anerkennung. Historiche Grundlagen und Perspektiven europäischer Strafrechtsentwicklung, GA 2005, 695-696; *N. Gazeas,* Die Europäische Beweisanordnung – Ein weiterer Schritt in die falsche Richtung, ZRP 2005, 21; *A. Wehnert,* Deutsches u. Europäisches Strafrecht, Fragen und Widersprüche, FS für H. Dahs, 536. For a rather positive appraisal see, however, *N. Kotzurek,* Gegenseitige Anerkennung und Schutzgarantien bei der Europäischen Beweisanordnung, ZIS 2006, 139. Also see the pertinent legislative resolution of the European Parliament: T6-0486/2008.

[342] See *F. Zimmermann*, Die Europäische Ermittlungsanordnung: Schreckgespenst oder Zukunftsmodell für grenzüberschreitende Strafverfahren?, ZStW 2015, 175.

in the Framework Decisions concerning the EAW (Art. 2 para. 2), the Orders for Freezing Property (Art. 3), and the EIO (Art. 11 para.1 g and Annex D), respectively. It then becomes apparent that there is a real problem of systematically deleting essential prerequisites aimed at safeguarding fundamental procedural rights and the principle of legality[343]. Indeed, the aforementioned infringement of rights could not otherwise have justified similar enforcement measures in the absence of a proven offence.

In a nutshell, one could say that, in the example of the EAW, *the presumption of innocence* and *the principle of fair trial* fall far short of a creative improvement upon common principles of transnational criminal procedure. On the contrary, both principles are actively questioned, diluting the status of the defendant compared with its recognition in a national context[344].

Obviously, the principle of mutual recognition is not by definition deprived of any potential of becoming a *positive* factor in shaping transnational crime control. Nevertheless, this might only come about if it subjects itself to *another* acknowledged procedural principle, namely the *ne bis in idem* principle as understood in the European legal tradition (see Art. 54 et seq. of the Convention Implementing the Schengen Agreement and Art. 50 of the Charter on Fundamental Rights and Freedoms of the EU).

Unfortunately, the principle of mutual recognition dictates even the adoption of minimum EU procedural rules in fields which could actually contribute to the cultivation of common procedural principles. For instance, even with respect to the directive on the right of access to a lawyer in criminal proceedings[345], which recognizes one of the most important rights for an effective defence in light of the principle of equality of arms, the EU did not intervene only to alleviate the differences emerging in individual Member States regarding the precise content and the exercise of the right. Rather, the main motive behind such intervention was to assist mutual recognition, which was being hampered by these differences[346], rather than to elevate the standard of protection of the right itself.

---

[343] For this criticism see *M. Kaiafa-Gbandi,* Harmonisation of criminal procedure, 364 et seq., with further references concerning the problematic 'disengagement' from the double criminality requirement in the EAW and the proposed model of a European Programme for a European criminal justice, in *Schünemann* (Ed.), A programme for European criminal justice, 270 et seq. On the other hand, see the decision of the ECJ of 3 May 2007, Case C-303/05 (Thoughts 48-54), in which the Court does not seem to find a problem with the exclusion of the double criminality requirement, as far as the principle of legality is concerned; see a critical appraisal of this decision in *M.Kaiafa-Gbandi*, Poiniki Dikaiosini 2007, 576 et seq.

[344] Also see the criticism of *B. Schünemann,* Die Rechte des Beschuldigten im internationalisierten Ermittlungsverfahren, StraFo 2003*,* 348 et seq.

[345] 2013/48/EU, OJ EU 2013, L 294, 1 et seq.

[346] See *E. Symeonidou-Kastanidou*, The right of access to a lawyer in criminal proceedings: The transposition of Directive 2013/48/EU of 22 October 2013 on national legislation, EuCLR 2015, 69.

On the other hand, one could furnish quite a few examples showing the insufficiency of recognition of crucial rights to suspects. Suffice it to give the following example[347]: the debate concerning the content of the right of access to a lawyer has demonstrated that the establishment of what would be minimum standards may in fact tend to undermine procedural rights. An important deficiency of the wording adopted by the Council – in the form of a compromise[348] leading to the directive on the right of access to a lawyer – was that confidentiality of legal advice would not have been protected in absolute terms. Fortunately, these restrictions were removed in the wording of the directive as adopted by the Parliament and the Council[349], thus preventing the emasculation of a core right under the rule of law, which would have eroded the right to an effective defence. However, the directive stops short of recognizing a right of the suspect to freely choose a lawyer, nor is the lawyer entitled to examine the conditions of detention of his/her client.

It should be noted that the harmonization of criminal law within the EU is an entirely different undertaking than the unification of a common market; therefore, the former cannot be subject to the considerations underlying the latter. This is why, as strongly argued in the Manifesto on European Criminal Procedure Law of the European Criminal Policy Initiative (a group of European scholars also known as 'ECPI'), transnational crime control on the EU level should restrict the principle of mutual recognition as practised thus far[350], especially through safeguarding the rights of suspects, however hard this may seem in the current momentum in the EU. Besides, the EU legislature should elevate the standard of protection of the rights of individuals, and especially those of suspects and defendants, to an even higher level than the protection provided under the ECHR (where applicable), so that such rights can correspond to the new needs of transnational processes, i.e. constitute pan-European standards compensating for the disadvantageous position of suspects in cross-border

[347] *European Criminal Policy Initiative (ECPI),* A manifesto on European criminal procedure law, 2014, 42.

[348] Council doc. 10467/12, Art. 4 para. 2.

[349] Directive 2013/48/EU, OJ EU 2013, L 294, 1 et seq.

[350] See *ECPI*, A manifesto on European criminal procedure law, 8 et seq. According to the manifesto, the first demand addressed to the Union legislator is the limitation of mutual recognition through: (a) the rights of the individual, and especially through the rights of the suspect, the victim and third persons affected by the proceedings, (b) the national identity and *ordre public* of Member States, and (c) the principle of proportionality.
The demand to limit the principle of mutual recognition is supplemented by another five demands: for balance of European criminal proceedings, for respect of the principle of legality and judicial principles in European criminal proceedings, for preservation of coherence, for observance of the principle of subsidiarity, and for compensation of deficits in European criminal proceedings.

criminal proceedings, rather than being reduced to minimum common rules leading a relentless 'race to the bottom'[351].

3.3 The level of protection of fundamental procedural rights in the EU criminal law system as compared with the US experience

Having introduced the overall configuration of procedural rules in the EU, we can now focus our attention on a comparison with the US system, in terms of EU minimum rules on the rights of individuals in criminal proceedings and the competence of Member States to offer additional protection. In the EU configuration, one can discern both of the crucial parameters that also shape the US system in this field, namely: (i) the transposition of procedural guarantees from one level (European or national) to the other, and (ii) the (anticipated, at least) operation of a system based on a common (mandatory) standard of procedural guarantees, potentially supplemented with an extended protection afforded by Member States.

3.3.1 The protection of fundamental procedural rights in the EU: 'Bottom up' and 'Top down' incorporation of guarantees – The challenge for the future

Exploring the first parameter, we can easily confirm that there has been an incorporation of procedural guarantees in EU legal instruments. Historically, however, this incorporation originated in the opposite direction compared with the US system. In the EU, the said incorporation – at least in its initial stage – did not involve EU rules becoming binding on Member States, but it was the other way around. It related to fundamental rights emanating from the ECHR or derived from the constitutional traditions common to Member States, which were incorporated into EU law *in the form of general principles* (under Article 6 TEU). Besides, the incorporation of guarantees was initially not of a 'strict' character, i.e. it did not necessarily refer to guarantees as actually conceived in Member States or the ECHR environment. Last but not least, it took place in a 'bottom-up' (Member States' law and international law binding on Member States being incorporated into EU Law) rather than a 'top-down' direction. The ECJ has been shaping, of course, fundamental rights through its interpretation

[351] *ECPI*, A manifesto on European criminal procedure law, 7-9, 14, 39. The following EU directives are currently in force concerning the rights of suspect and defendants: Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings (OJ EU 2010, L 280, 1 et seq.), Directive 2012/13/EU on the right to information in criminal proceedings (OJ EU 2012, L 142, 1 et seq.), Directive 2013/48/EU on the right of access to a lawyer (OJ EU 2013, L 294, 1 et seq.). Still pending are: A proposal for a directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings (COM (2013) 821 final, 27 November 2013, and a proposal for a directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in EAW proceedings (COM (2013) 824 final, 27 November 2013).

of the Treaties[352]. However, the Union acquired a Charter on Fundamental Rights of its own only after the Treaty of Nice (2000). Even then, the Charter was not binding on either the Union or its Member States, being confined to an advisory role. The Charter on Fundamental Rights and Freedoms only became binding after the Treaty of Lisbon (2009), by virtue of which the EU also decided to accede to the ECHR.

This order of things has been strongly – and justifiably – criticized by scholars of European law, and especially European criminal law[353]. The Union was too late in setting its own standards of protection of fundamental rights, because it was consumed in the meantime by the task of actively and continuously introducing criminal law measures, severely affecting fundamental rights. Particular problems were created by the enactment of legal measures without a clear protective 'shield' for individuals, the establishment of organs coordinating penal repression (Europol, Eurojust), which gradually acquired competence for enforcement without an attendant protection of fundamental procedural rights on the EU level, and the one-sided development of judicial cooperation between Member States so as to facilitate the prosecution of criminal acts without adequate safeguards for suspects/defendants, who have to face multiple legal orders in the context of the same criminal proceedings. It is only reasonable that this obvious imbalance of the evolving European criminal law system provoked criticism, triggering many proposals to change course[354]. Thus, both the binding character of the EU Charter on Fundamental Rights and Freedoms and the EU's accession to the ECHR, which is currently in progress[355], have been significant steps forward, even if they are not expected to solve the existing problems all by themselves.

Focusing on the EU system as it currently stands, it should be emphasized, first of all, that, having developed (from its very conception) in a 'bottom-up' fashion so as to form its own binding standards for the protection of fundamental rights, it thereafter claimed a 'top-down' incorporation; in other words, having established its own binding rules for the protection of fundamental rights with

---

[352] For the relevant development of the protection of fundamental rights in the EU see *P. Stagos*, The judicial protection of fundamental rights in the legal order of the European Communities (in Greek), 2004, 9-34, 35-50. On the ECJ's 'activism' in the field of the contemporary protection of fundamental rights after the Lisbon Treaty see *E. Sachpekidou*, European Law, 2011, 163-164.

[353] See, indicatively, *M. Kaiafa-Gbandi*, Aktuelle Strafrechtsentwicklung in der EU und rechtsstaatliche Defizite, ZIS 2006, 521 et seq., with further citations.

[354] See especially *B. Schünemann* (ed.), A program for a European criminal justice, 2006, and *ECPI*, A manifesto on European criminal policy, 522 et seq., *ECPI*, A manifesto on European criminal procedure law.

[355] The accession agreement is still pending and is raising difficulties: see *M. de Werd,* Renegotiating EU accession to the ECHR: new perspectives and better chances, in ACELG.blogactiv.eu/2015/07/15/renegotiating-eu-accession-to-the-echr-new-perspectives-and-better-chances/, as well as the final report of the Council, Council doc. 47+1 (2013)008rev2, and the Opinion of the ECJ 2/13(Full Court) (18 December 2014).

the help of national constitutional traditions and the ECHR (in a process of '*soft* incorporation'), it has initiated, in reverse, a process of '*strict* incorporation', consisting in imposing its own protection standards in the form of binding norms. This twofold development is understandable for a supranational organization like the EU. Its own standards to protect fundamental rights could not have been shaped without taking into consideration the level that was already binding on its Member States. The problem, however, was that this last step (setting binding standards of its own) was unjustifiably delayed.

On the other hand, looking at the actual normative content of the EU's guarantees, one has to acknowledge that the picture is much more complex than that of the US system. Fundamental rights, as guaranteed by the ECHR, and as derived from the constitutional traditions common to Member States, are still treated as *general principles* of the Union's law according to Article 6 para 3 TEU. At the samecharter time, the Union has vested its Charter on Fundamental Rights with the same legal (binding) value of the Treaties (Article 6 para. 1 TEU), and has also decided to accede to the ECHR (Article 6 para. 2 TEU). The question arises here, naturally, as regards the exact function of this triple set of rules that bind the Union and its Member States.

In order to gain a better grasp of the above arrangement, two remarks are in order: first of all, based on the legal status of the Treaties, and, accordingly, the EU Charter, of Fundamental Rights, European law emanating from these instruments is binding on Member States, and – as claimed by some scholars – its binding force indeed supersedes their own constitutions ('primacy of EU primary law')[356]. In any event, as the Member States acceded to the Union in conformity with their constitutions, it is argued that EU Treaty law and the domestic law of Member States (including their constitutions) cannot contradict each other[357]. On the other hand, Article 52 of the Charter itself, trying to configure the relationship of the standards of protection provided under the three poles (EU, ECHR and Member States) reads as follows:

> 3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection. 4. In so far as this Charter recognizes fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.

[356] For the relevant discussion see *L. Papadopoulou,* National constitution and community law: Addressing the subject of superiority, 2009, 575 et seq.
[357] Ibid., 667 et seq.

Thus, the standard of protection in the EU *is primarily set by its own Charter* and *may be higher than that of the ECHR.* As far as the ECHR is concerned, its incorporation in EU law is obviously of a 'strict' character, as implied by the rule referring to the meaning and scope of rights encompassed in the EU Charter and their correspondence to rights guaranteed by the ECHR. On the contrary, when it comes to rights derived from the constitutional traditions common to Member States, the incorporation seems to be of a 'soft' character, a conclusion also drawn from the wording of Article 52. The point of reference in this respect is not fundamental rights as protected in the constitutions of Member States, but as 'resulting from constitutional *traditions common to the Member States*'. This provision connotes not only that there might be fundamental rights protected in the constitutions of Member States that will not be taken into consideration, but also that the understanding of their content is not necessarily the one resulting from *the language* of the respective constitutional provisions. However, the Union's level of protection cannot be lower than that afforded by the ECHR or recognized under the constitutional traditions common to Member States; it can only be the same or *higher*. *This is actually the new element that will have to be incorporated in national legal orders*, marking a reversal of the development described above.

One still ought to be aware of the inherent risks of such an arrangement: 'Soft' incorporation of fundamental rights, based on standards derived from the constitutional traditions common to Member States, can actually diminish the protection offered on a national level before reintroducing this level of protection to Member States via EU law. On the other hand, using archetypes developed in national legal orders as 'blueprints' for fundamental rights is not sufficient for a supranational organization, considering the new challenges the latter poses for fundamental rights. Suffice it to note the additional difficulties for suspects and defendants emanating from the transnational proceedings that they have to face in the EU. Thus, the phase of 'reverse incorporation' ('top-down' direction) seems to be of particular importance for the citizens, because it will determine whether they can enjoy the merits of an adequate level of protection of their fundamental rights, which is actually responsive to the new challenges of a Union with no internal borders but different national legal orders. In order to achieve such a goal, the Union has to set its standards for the protection of fundamental rights keeping two significant factors in mind. First, the respect that is owed to the level of protection already provided by EU Member States should not be diminished; citizens have a justifiable expectation that nationally protected fundamental rights emanating from fundamental values shall accompany them in a common European area of freedom, security and justice. At the same time, the new challenges for protecting fundamental procedural rights in a supranational environment must also be duly addressed. In such an environment, citizens should be charged with offences in a manner that balances the desire to facilitate police and judicial cooperation with the obvious need to protect individuals involved in criminal proceedings. These individuals may have to face more

than one legal order with all the attendant difficulties this entails, defending themselves in a Union, which has thus far introduced no special institution for their support, contrary to its 'prosecutorial' authorities (Europol, Eurojust and the proposed EPPO). As shown by the experience of the US criminal justice system, effectively safeguarding fundamental rights of individuals involved in criminal proceedings at *all* levels of a system is neither easy nor self-evident, while the binding standards of such protection may be uncertain, to the citizen's detriment. This has to be averted, especially in the framework of the EU, where citizens face a number of additional difficulties: the evolving EU criminal justice system, unlike US federal criminal justice, not only has to overcome a greater degree of divergence among Member States (causing real problems arising out of the unlimited enforcement of the principle of mutual recognition), but is also based on the cooperation of many national enforcement mechanisms[358]. Thus, working with more than one set of legal provisions, which are foreign to citizens and are not institutionally designed to support them, causes significant problems. This is why the new challenge is to define the requisite standard of protection of fundamental procedural rights of individuals, and especially of suspects and defendants, through the European minimum procedural rules enacted to offset the aforementioned difficulties.

In such an environment, the EU has to establish first of all *clear* rules laying down pan-European standards of criminal procedure. These rules are expected to incorporate not only the level of protection afforded by the ECHR or the constitutional traditions common to its Member States, but an even more elevated level, addressing procedural rights in light of the new challenges of transnational criminal processes in the EU and the expanding possibilities available to prosecutorial authorities via judicial cooperation in criminal matters[359]. To expect a demarcation of the precise level of protection through an interpretation of the Charter by the ECJ – in a manner similar to the US Supreme Court's contribution – is neither desired nor acceptable. Apart from the danger of 'erosion through interpretation', the citizens of Europe deserve at least clarity as to the exact content of their procedural rights, which derive from a complex set of both European and national provisions. Thus, the relevant standard of protection should emanate, first and foremost, from the language of

[358] In regard to this perspective see *Turner,* Interstate conflict and cooperation in criminal cases, 116-117, 146, who argues that 'as a result of their English common law origin and a long process of cross fertilization, the criminal laws and procedures of the fifty states are less diverse than the criminal laws and procedures of the EU member States. In addition, the incorporation doctrine ensures that all US states must provide a constitutionally mandated baseline of procedural protections in criminal cases. This minimum standard of procedural fairness (which is enforced by state and federal courts alike) strengthens mutual trust among state courts and enforcement authorities and thus helps to encourage deterrence and cooperation in multi-state cases … The American experience suggests, however, that mutual recognition operates more effectively when certain minimum standards of procedural fairness are achieved among the cooperating states. Harmonization of substantive criminal law also aids mutual recognition but it does not appear to be as central to the process as harmonization of procedural safeguards.'

[359] *ECPI*, A manifesto on European criminal procedure law, 14.

the EU's minimum procedural rules. Such rules should at the same time ensure the binding level of protection afforded by the EU Charter on Fundamental Rights (adapted to the particularities of a criminal process evolving within a multi-state environment sustained by a supranational organization) and strike the right balance between the effectiveness of criminal repression and the safeguards of individual rights in line with due process.

Although significant steps in the right direction have been taken, the present situation is still far from satisfactory. The Manifesto on European Criminal Procedure Law has made this clear through many examples[360]. The most significant ones include: the *lack of a general* acknowledgement of fundamental rights as a limitation on mutual recognition[361]; the largely *optional* grounds for refusal of judicial co-operation relating to the *ne bis in idem* principle[362]; the palpable loss of rights through the separation of the competence to order and execute a measure between different legal orders[363]; the risk of 'patchwork proceedings' involving legal orders of different Member States which the 'average' suspect cannot avoid (due to lack of ability to coordinate, much less fund, his or her defence in multiple Member States)[364]; the violation of the principle of proportionality in the context of onerous procedural measures, like the EAW, which can be issued even for minor offences[365]; and the danger of harmonizing rights by virtue of common minimum standards that are liable to lead to a 'race to the bottom', as debates on the content of the right of access to a lawyer have shown[366]. Thus, one can hardly disagree with the Manifesto's concluding words, according to which 'considerable efforts still need to be taken in order to make the Union a genuine area of freedom, security and justice with regard to criminal prosecution'[367].

3.3.2 Optional higher levels of protection of individual procedural rights: separating reality from myth

Turning now to the second common feature of the US and the EU criminal justice systems, i.e. the anticipated operation of a system based on a common (mandatory) standard of procedural guarantees, potentially supplemented with

[360] Ibid., 15 et seq.

[361] Cf. Art. 23 para.4 of the EAW (FD 2002/584/JHA, OJ EU 2002, L 190, 1 et seq.) and Art. 20 para. 3 of the FD on mutual recognition of financial penalties (FD 2005/214/JHA, OJ EU 2005, L 76, 16 et seq.); also see *ECPI*, A manifesto on European criminal procedure law, 16.

[362] Cf. Art. 4 para.3 of the EAW (FD 2002/584/JHA) and Art. 7 para.1 a (FD 2005/214/JHA); also see *ECPI,* A manifesto on European criminal procedure law, 17.

[363] See relevant examples in ibid., 18.

[364] See relevant examples in ibid., 18-19; also see Art. 10 paras. 1 and 4 of the Directive on the right of access to a lawyer in criminal proceedings 2013/48/EU, OJ EU 2013, L 294, 1 et seq., which provides – for the first time – that a person arrested on the basis of an EAW has the right of access to a lawyer in the issuing as well as in the executing State.

[365] Art. 2 para. 1 of the EAW (FD 2002/584/JHA, OJ EU 2002, L 190, 1 et seq.) and *ECPI,* A manifesto on European criminal procedure law, 25.

[366] See above, ch. 3.2.

[367] *ECPI*, A manifesto on European criminal procedure law, 42.

an extended protection afforded by Member States, it is worth noting that the notion of EU minimum rules is not the same in the fields of substantive criminal law and procedural criminal law, respectively. In substantive criminal law, minimum rules define the minimum content of a crime, i.e. the threshold of 'punishability'. This is why Member States cannot introduce more elements to a given offence, being confined to either adopting the minimum rules as such or requiring fewer elements for a given offence. In procedural criminal law the minimum rules for individual rights have to be adopted by Member States in order to establish a common basis of judicial cooperation between them, and thus cannot be modified either. Still, Member States could afford increased protection to such rights. Despite this difference, in both cases a Union threshold (of 'punishability' or protection of fundamental rights, respectively) prevails; when such a threshold is modified on the initiative of Member States, it cannot favour the citizen in matters of EU interest (in substantive criminal law, as Member States can only punish more, not less, than the EU requires; in procedural criminal law, the increased protection of individuals is only conceivable outside the framework of judicial cooperation in the EU, i.e. for purely national purposes). Accordingly, the EU defines – for its own purposes – all applicable thresholds, pertaining to both 'punishability' and the protection of fundamental procedural rights.

Therefore, the question arises with respect to the potential application of a higher standard of protection of procedural rights afforded by Member States for non-EU purposes or for matters of non-EU interest[368]. Given the lack of experience with such rules on the part of Member States, one can only expect such a development to occur based on indicators available in the Member States' institutional framework. First of all, in contrast to the US federal system, which evolved alongside federalism, EU Member States have no background of 'experimenting' with different solutions than those applied by the EU. Member States are expected to act in solidarity with the Union (Article 4 para. 3 TEU), on the basis of their own constitutional frameworks. EU minimum procedural rules – if not conflicting with Member States' constitutions – are to be transposed as such (otherwise they would have probably activated the emergency brake, under Art. 82 para. 3 TFEU). Rules introducing some degree of protection of procedural rights are normally the product of a counterbalance between the convenience of a prosecuting state striving for efficiency and the preservation of its democratic identity. The contemporary imbalance in the EU between security, on the one hand, and freedom and justice, on the other, makes it highly improbable that Member States will opt for an increased level of protection in the field of procedural rights.

[368] Cf. *Gómez-Jara Diez*, European federal criminal law, 196: 'EU law as interpreted by the ECJ provides that in certain situations European nations are prohibited from offering a greater level of constitutional protection than found in the Charter, Article 53 notwithstanding.'

One might argue, of course, that favouring security over freedom and justice is also the contemporary trend in the US, even on the State level. However, contrary to the US federal criminal law system, the procedural rules encompassing the two different levels of protection for the same individual rights have to be applied in the EU *in the same (national) legal order*, absent an autonomous enforcement mechanism of the Union. This makes the configuration so complicated in practice that it stands almost no chance of survival, even assuming it is adopted by some Member States. It is recalled that police and prosecutorial authorities normally find it difficult to master even one set of rules applicable to the criminal cases they have to handle. Thus, it cannot be expected that they will be able to differentiate easily among more sets of rules which would apply to the same proceedings, particularly as matters of EU and non-EU interest are not always clearly distinguished. On the other hand, increased national protection levels, if enacted, would refer to concrete procedural rights, and thus would co-exist with standards of other procedural rights emanating from EU minimum rules. Such amalgamation of different levels of protection in one and the same national legal order – and indeed in one and the same criminal process – cannot guarantee internal coherence, and may easily put the system out of balance. The US framework does not run such a risk, because of its different institutional frameworks and enforcement mechanisms in federal and State criminal law, respectively.

On the other hand, the different – complementary – model of EU and national protection level of procedural rights, included in the proposal for the EPPO, regrettably leads to the same problems. A look at the law applicable to the rights of suspects based on the Council's proposal in its current form[369] (beyond the obvious requirement that the activities of the EPPO shall be carried out in full compliance with the rights of suspected persons enshrined in the Charter on Fundamental Rights of the EU), reveals a twofold division: one category refers to rights that have not yet been harmonized on an EU level and are still governed by national laws, and the other entails rights that have already been harmonized in an EU context at a minimum[370] and are acknowledged to suspects and defendants 'as provided for in Union law'. This first impression is not correct, however. Article 32 para. 3 of the more recent version of the said proposal clarifies that '*without prejudice to the rights provided in this Chapter, suspects and accused persons* … shall have all the procedural rights available to them under

[369] See Council doc. 9372/15, 12 June 2015. The initial proposal of theCommission (COM (2013) 534 final, 17 July 2013 was withdrawn after a 'yellow card' procedure from national parliaments and the reaction of the Council: see *S. Drew*, How will the European Public Prosecutor's Office be born?, in European Criminal Policy Initiative (ed. P. Asp), The European Public Prosecutor's Office-Legal and Criminal Policy Perspectives, 2015, 13 et seq.

[370] The right to interpretation and translation, the right to information and access to the case file, the right to a lawyer – Art 32 para.2 a, b, c, as well as the right to remain silent and be presumed innocent and the right to legal aid, which are 'next in line' to be harmonized (Art. 32 para. 2 d and e).

the applicable national law'[371]. Therefore, EU law is applicable even to rights for which the regulation specifically refers to national law. The consequences of such an approach are significant. First of all, a directive-driven harmonization on the rights to silence, presumption of innocence and legal aid would imply that both legal frameworks are applicable, in the sense that EU law guarantees a minimum protection and national laws offer higher standards (as foreseen in Art. 82 para. 2 TFEU). Moreover, even though harmonization (on an EU level) has not yet been attained in the field of the aforementioned rights, the combination of applicable national legislation and EU law is already in place, and can in practice lead to a higher level of protection, e.g. through the application of the provisions of the EU Charter of Fundamental Rights.

However, one also has to consider the noteworthy practical disadvantages that accompany such a system of complementarity between EU and national laws. One such disadvantage relates to the acknowledgement and protection of fundamental rights, due to the additional level of awareness and skills required when the system of protection is produced by a combination of provisions, and the other to the inability of affected persons to be fully aware of their rights, contrary to the dictates of legality[372]. It follows that such a system of complementary protection of procedural rights, though favourable for individuals, may become extremely dysfunctional and ineffective, due to its high complexity resulting not only from the combination of EU and national law, but also from the multitude of applicable national provisions. Moreover, it does not ensure legal certainty or foreseeability for suspects and defendants, thus precluding effective defence patterns, nor does it avert the risk of patchwork proceedings that allow the existence of different levels of protection within the same criminal proceedings, even with respect to the same right (e.g. with regard to the rights to silence and non-self-incrimination of suspects interrogated in more than one country). Hence, the solution can only lie in the introduction of a uniform European standard to safeguard these rights, especially in view of the proposed creation of an EPPO. In other words, it is not acceptable for the EU to intensify its intervention upon the criminal repression systems of its Member States, presumably enhancing their efficiency, without also balancing the risks posed to the accordant rights.

Therefore, it is rather expected, out of practical considerations, that the harmonized EU level of protection of individual rights will prevail in the long run, and that the option of Member States to offer increased protection or

[371] The precise content of Art. 32 of the proposal for a regulation on the establishment of the EPPO is still being reviewed since, according to Council doc. 10577/15, 10 July 2015, the Council's Presidency was asked, among other things, to pay special attention to Article 32 and especially how procedural safeguards should be met, i.e. whether para. 2 of this Article should be replaced by a general reference to the EU instruments on procedural safeguards 'as currently in force and implemented by national law'.

[372] On the need to uphold that principle see *ECPI*, A manifesto on European criminal procedure law, 16–17.

the combination of EU and national standards in the context of the EPPO's action will end up occurring as a rare exception, if ever. This is also one more reason why the EU should apply a standard of protection for procedural rights of individuals high enough to address all the particularities of transnational criminal proceedings in the EU. Thus, it is not prudent for the Union to rely on the possibility of a higher level of protection in the national framework of its Member States, because such a level is either irrelevant (to cases of its own interest) or, in any event, highly improbable. Besides, US experience shows that, despite the strength of the idea of federalism and its influence, the higher level of protection afforded by States in the framework of their different criminal enforcement mechanisms faces limitations. This is the case either because the practice of offering a higher level of protection to individual procedural rights becomes 'annoying' for the States themselves, which then opt for a general abolition of such possibility by themselves, or because an interconnection mechanism of the different levels of the system, like the one introduced by the US Supreme Court, may pose constraints as far as the protection of fundamental rights is concerned (see the 'plain rule' limitation mentioned above), thus favouring – at least in practice – the standard which is binding on all levels (federal) rather than that of the increased protection afforded by certain States.

If the EU minimum rules defining crimes encompassed a jurisdictional element, as proposed in this work, it would become easier to apply different procedural rules to these crimes than the ones applicable to all other cases in the national framework, thus enabling Member States to offer an increased level of protection of individual procedural rights in cases of non-EU interest. However, regardless of the above choice, which would lead to a separate (substantive and procedural) framework for EU crimes, what is at stake at the moment for EU citizens is to introduce minimum rules for the procedural rights of individuals, especially for suspects and defendants, dictated not by extraneous concerns, such as the enhancement of judicial cooperation between Member States through the so-called principle of mutual recognition, but rather by the need to reinforce the rights of individuals so as to enable them to defend themselves against potentially more punitive practices (enhanced by the EU's support) and to respond better to the difficulties that inhere in the initiation of criminal proceedings in multiple legal orders. In this framework, the EU should also seriously consider introducing clearly defined, binding remedies or exclusionary rules for the violation of certain procedural rights affected by its rules. Indeed, establishing levels of protection of procedural rights without a common mechanism imposing sanctions for their violation has little meaning. The procedural rules adopted by Member States in this matter vary to such an extent that they can in practice cancel out any level of protection established by European minimum rules.

III Deriving useful conclusions from the comparison with a view to addressing present and future challenges for EU criminal law

Throughout this work, it has been demonstrated repeatedly that, in systems of criminal law developing on more than one level, one has to be extremely cautious in adopting provisions which affect the very heart of the system and are liable to upset the necessary balance between the effective protection of basic legal interests and citizens' liberties. The arguments put forward do not stem from some formal conformity to the letter of rules or principles, but are firmly established on the deeper essence of the multi-level systems discussed and, ultimately, the very nature of criminal law.

As already mentioned, criminal law is the harshest mechanism States employ to achieve social control. In democratic societies, this specific part of the law should not be viewed merely as an instrument to preserve legally protected interests, but also as a mechanism which curbs or even infringes on the fundamental liberties of those contravening it. This is why *any* criminal justice system, irrespective of the particular framework in which it develops, necessarily presupposes a set of principles and restraints to keep the state's counter-crime activities in check.

This is even more essential when criminal law can be enacted and enforced on citizens by more than one competent power, as is the case with multi-level criminal justice systems. In such cases, there is *a priori* an empowerment of 'the punishing state', and the citizen has to face – in one form or another – more than one mechanism tasked with the repression of criminal acts. The manner in which these systems organize the functions of their multiple levels is apparently of focal importance. For instance, if one level operates independently of the other, and if its criminal law provisions apply regardless of whether an offence has already been punished on another level of a State's criminal justice system (even on the federal level), then the effectiveness of protection of legal interests is achieved at the cost of civil liberties. On the other hand, if one level intervenes in order to make the other operate more efficiently or according to its own selected goals, it might very well be that this intervention upsets the fragile balance of the elements expressing the dual character of criminal law. For example, the unbridled enhancement of judicial cooperation between Member States to

achieve better protection of legal interests may very well result in diminishing the identity of criminal law as a yardstick of civil liberties.

Besides, the main ideas underlying political systems enacting criminal law on more than one level are also decisive as factors shaping the criminal law itself. If, for example, a system is built upon the idea of federalism, the primacy of States in introducing criminal law rules is deeply rooted in the belief that it is important to give them room to experiment, testing their own solutions. These solutions are expected to be successful, since they stem from the immediate social environment they purport to regulate. If the system is built upon the idea of a 'European Sympoliteia', i.e. a union of sovereign states and peoples of Europe to achieve common goals – while preserving their different identities and traditions – then the primacy of states seems to be even more important, since action on the union level presupposes a certain degree of competence, a given common goal that should be achieved through the mechanism of criminal law, and a necessity for such action, to the extent that it is not possible for Member States to succeed in attaining the goal all by themselves. In both these configurations, criminal law rules enacted on a level that is more proximate to citizens should have priority, as criminal law provisions are deeply rooted in the beliefs of a given society about wrongfulness and guilt. Besides, the democratic legitimization of criminal law provisions is more direct on that level. Criminal law itself, deeply affecting civil liberties, needs such legitimization much more than any other part of the law.

Thus, *both the need for balance between the elements of the dual nature of criminal law*, and *the deeper essence of the political systems* to which models of criminal law developing on multiple levels attach, *underline the importance of restraints* to keep state counter-crime activities in check. In this sense, they maintain a close link between criminal law, the protection of fundamental rights, and the rule of law.

Assessing the US and EU criminal law systems from the perspective of *institutional restraints that are supposed to limit the use of criminal law* by the US federal government and the EU supranational organization, respectively, one finds that the institutional limits of competence in criminal law matters are better configured on the US federal level than in the EU. Despite existing definitional issues relating to provisions of the US Constitution and the Supreme Court's interpretative practice, which tends to sustain an ever more 'centralized' use of criminal law, the fact that the US system *makes the competence of the federal government to use criminal law an element of federal crimes*, at least to a certain extent, is a significant tool for limiting an unjustified expansion of the central power in criminal matters. A similar tool could provide a practical and effective solution to face comparable or even more serious flaws characterizing the EU institutional framework and its implementation. The legislative enactment of such an element would limit the expansion of the use of criminal law on the EU level, thereby showing respect for citizens' freedoms against the dynamics

of globalized economics and politics, which encourage the 'centralization' of criminal law, without regard to the internal disparities of multi-level systems.

For all the reasons highlighted above, *supporting and enhancing the proper function of institutional limits to the use of criminal law in the EU* proves to be of utmost importance and, in particular, would require the EU:

- To accept that its competence to define the minimum content of the so-called 'euro-crimes', enumerated in Article 83 para. 1 TFEU, cannot extend to crimes featuring no European characteristics whatsoever, i.e. crimes of exclusively national interest;
- To define precisely the content of the 'cross-border dimension' that the Treaty requires for the so-called 'euro-crimes', especially with regard to 'a special need to combat them on a common (European) basis';
- To include in the minimum content of every 'euro-crime' its requisite 'cross-border dimension', thereby expressly justifying and, at the same time, limiting its competence;
- To refrain from transforming merely administrative offences, which infringe on the implementation of its harmonized policies, to criminal conduct through the annex-competence of Article 83 para. 2 TFEU, and to pay due respect to the 'essentiality' required for the criminalization of a given conduct;
- To include as an element in the minimum content of every crime under Article 83 para. 2 TFEU a possible risk of a significant delay, obstruction or other impact to the effective implementation of an EU policy emanating from the criminalized conduct.

One would have *to complement the proper function of institutional limits to the EU's criminal law competence – as described above – with the requirements posed by fundamental principles* like, for example, the requirements of subsidiarity and proportionality which play a significant role in the European legal tradition. However, such principles only come into play as long as one presupposes a given EU competence, and sometimes they even help safeguard the principle of conferral of powers, from which the EU's criminal law competence emanates.

On the other hand, systems of criminal law operating on more than one level, and especially that of the EU, which reserves for itself a decisive role in determining the conduct to be criminalized by its Member States, may trigger particular *risks for the fundamental principles* which shape the very core of criminal law. The comparison with the US federal criminal law system, with all its shortcomings, is a valuable resource for exploring and understanding such risks, and for trying to propose means to avert them, which is of paramount importance. Fundamental principles of criminal law are the outcome of a long and difficult historical process in the effort to preserve civil liberties. It should therefore be a matter of priority for every theoretical and practical approach to respect and reinforce them.

In this perspective, *three core principles of criminal law* are placed at the centre of attention, as the experience of the US federal criminal law has revealed that the particular features and needs of the federal system make it necessary – whether explicitly or implicitly – to address them, cautiously, anew. Thus, an attempt was made – through the preceding comparison – to shed light on the principles of legality, guilt and proportionality, especially in light of the difficulties and risks triggered by the multi-level development of criminal law in the framework of the EU.

Safeguarding the *principle of legality* would serve to limit arbitrary prosecutions, thereby securing civil liberties. However, in multi-level systems of criminal law, and especially in the presence of a division of tasks in defining offences, coupled with a binding effect of one level's intervention on the other (see the EU's minimum criminal law rules), the principle of legality becomes important in limiting the action of both Member States and the supranational organization. Defining the elements of a crime by means of an EU legal instrument entails that some of the crime's elements (i.e. those of 'EU origin') shall not be modified by Member States. This is why the latter have to be able to identify the precise substantive content of these elements based on the language of the European legal instrument introducing them. Otherwise, Member States cannot properly transpose such rules into their national law, unless they take the risk of violating the European provision by incorporating a different content than the one imparted by the European. Thus, the degree of limiting arbitrary prosecutions and safeguarding civil liberties through the principle of legality also depends on EU law, which is supposed to ensure the 'foreseeability' of an offence. Besides, there are elements of an offence that only the European (co-)legislator can define. These are the elements expressing the EU-origin of the offence, like its cross-border dimension, its ability to hinder the effective implementation of an EU policy or the violation of a direct EU legal interest. Such elements, piecing together classes of offences distinct from those featuring exclusively national characteristics, are – as per the Lisbon Treaty – by definition imprecise, and thus ought to be further elaborated in the minimum rules in a manner that respects the limits of the Union's competence. One can in fact discern an interconnection of the principle of legality with the principle of conferral of powers revealed by the US federal criminal law system. In describing the precise 'European' elements of the conduct to be criminalized, the Union would not only serve the principle of legality – to the extent its Member States cannot –, but also abide by the principle of conferral of powers, acting within the confines of its conferred competence. This link becomes even more significant today, since the EU is about to establish its own prosecutorial institution, the European Public Prosecutor's Office (EPPO); indeed, any European legal instrument defining the elements of crimes within the EPPO's competence will automatically be playing a key role by effectively limiting the Union's powers *vis-à-vis* EU citizens. The added value of this link is expected to be even greater in the future, as the Treaty leaves

open the possibility to expand the scope of the EPPO's powers to practically every EU-origin crime. This is why both facets of legality emerging from US federal criminal law, i.e. the broad ambit of federal crimes, used as a vehicle for trespassing the limits of federal competence, and the association of legality with the idea of federalism, can be especially useful in view of proposals trying to improve European criminal law.

In this regard, the Union should, as already outlined above, encompass (in its minimum criminal law rules defining crimes) the elements demonstrating the crimes' 'European character' with adequate precision, while also ensuring that all other elements contained in a minimum rule are also unambiguous. Put differently, it is important for the EU legislature to recognize that, after the Lisbon Treaty, co-defining crimes is not just a privilege but also creates *the obligation* to abide by the exigencies of clarity and self-restraint in criminalizing conduct, lest citizens' freedoms be overly constricted.

Criminal law systems developing on more than one level may also bring about particular difficulties with respect to the *principle of guilt*. In every legal order, citizens are normally required to be aware of the law. This is why ignorance of the law normally provides no excuse for committing a criminal offence. However, 'being aware of the law' can sometimes prove extremely difficult for the individual. Even in the context of US federal criminal law, which simply co-exists with State criminal law in certain areas of crime, as opposed to intermingling elements derived from different levels (federal/State) in the definition of an offence, the Supreme Court has felt the need to uphold a much more 'generous' understanding of ignorance of law as a defence, in areas characterized by an exceptional proliferation or especially complex provisions, which are not easily grasped by the average citizen (e.g. provisions of federal economic criminal law). The difficulty in 'being aware of the law' (especially of the law that makes a conduct punishable), becomes even greater, indeed almost insurmountable, for the average citizen faced with many instances of European criminal law. This exceptional difficulty arises either because of the law's vagueness (owing to the lack of clarity either on the part of the European legislature or ambiguity in the transposition into national law), or because of the plethora or complexity of the EU or Member States' provisions involved in the definition of a criminal offence[373]. One even detects cases where a need in fact arises to be aware of the criminal law of all other Member States. These occur as a result of the so-called principle of mutual recognition of judicial decisions, which permits the prosecution of certain conduct (not proscribed as a criminal offence in the country where it was carried out) in a Member State which has issued a EAW. All these situations, in which a multi-level criminal law system

[373] See 'blanket' national economic criminal laws referring to specific EC/EU provisions for the definition of elements of crimes, or European criminal law provisions requiring the criminalization of a long list of infringements of other European provisions.

does not facilitate citizens in 'being aware of the law', call for respect of the principle of guilt.

For this purpose, both the European and the national legislator should not only refrain from enacting vague criminal provisions, but should explicitly introduce a defence of *error concerning the illegality* of the proscribed conduct (applicable to the situations mentioned above, provided the perpetrator has taken all possible and reasonable measures to avoid ignorance). A Union that places the individual at the centre of its attention has to care about the inability of the citizen to know the law, when avoiding such ignorance is beyond the citizen's power. This is a 'burden' that multi-level systems, like the EU one, should not shift to their citizens, especially when their freedoms are at stake.

Criminal law systems developing on more than one level also generate special difficulties in the field of *setting penalty levels*, which have to be proportionate to the gravity of wrongfulness and blameworthiness of each crime. The comparative analysis between US federal and EU criminal law has shown that such difficulties are greater in systems where the different levels involved in the repression of criminal conduct are tightly interwoven, as is the case with European criminal law.

Even the experience of US law shows that correlations in the field of sanctions between federal and State criminal law statutes referring to crimes of common interest are inevitable. A big disparity of sanctions for the same or similar crimes (when compared with State offences), contrary to the principle of proportionality and the rule of lenity, cannot be accepted. To a certain extent, this is also the reason why the US Federal Sentencing Guidelines, an intermediate category between legislatively authorized levels of sanctions and actual sentencing by a court, lost their binding force subsequent to a debatable decision by the Supreme Court. Citizens who commit acts of like gravity and blameworthiness have a right to expect similar sentences for reasons of equality toward the law.

Much more complicated is the task of setting penalty ranges when the different levels of a criminal law system are tightly interwoven. When the EU intervenes to define the minimum content of a criminal offence and the minimum level of the penalty to be legislatively authorized (in fact making use of many of the elements addressed in the Federal Sentencing Guidelines), it inevitably poses a challenge to the national criminal law systems of all its 28 Member States, as far as proportionality and coherence are concerned. This challenge becomes even greater in the EU, which in practice oversteps the limits of its competence and assumes action over the entire – even national – field of crime areas listed in the Lisbon Treaty, not confining itself to establishing minimum rules concerning crimes of an exclusively cross-border dimension or crimes affecting the effective implementation of its policies. In multi-level criminal law systems, and especially in those where different levels are intermingled, it is of utmost importance to

find a method of setting penalty levels that leaves enough room for taking into account concerns of *stricto sensu* proportionality, of coherence, as well as lenity on the basis of a balancing taking place *on all levels* of the system.

The above analysis demonstrates that *the more open a method of defining penalties is, the more it can take into consideration the different concerns that have to be respected*. Such an 'open' method is evidently appropriate for the EU. It is true, of course, that the EU has a reasonable interest in supporting judicial cooperation in criminal matters between its Member States, which it normally pursues by means of adjusting penalty levels. However, the need for effective judicial cooperation cannot possibly outweigh *stricto sensu* proportionality, the rule of lenity or even the coherence required in national legal systems. In other words, facilitating judicial cooperation in criminal matters (with a view to realizing a common area of freedom, security and justice) can never outweigh the requirement to respond to a crime with a justified punishment, which is proportionate to the gravity and blameworthiness of the impugned conduct (or even reflect lenience according to a legal order's fundamental decisions for social control as expressed via criminal law). Otherwise, the Union cannot perceivably serve the values proclaimed in its Charter of Fundamental Rights and Freedoms. Thus, a method suitable for serving *variable proportionality and coherence* is the only viable way, because only such a method could aspire to accommodate a broad range of different legal orders without putting them out of balance. Looking for an appropriate solution, one may either stick to the three methods thus far employed by the EU (correcting for proportionality as regards the least maximum level of a penalty, which should bear the form of a range rather than a strict numerical value), or use an alternative method of establishing (and categorizing) distinct 'scales' of offences (based on their gravity) or penalties (based on their severity), which Member States would then have to transpose in their national legal orders according to the specific scale of their own penalty ranges.

Last but not least, multi-level criminal law systems face significant difficulties in the field of *criminal procedure*. It is there that the main task of striking a balance between effective criminal repression and respect for citizens' liberties reveals new challenges, arising precisely out of the multi-level structure. The crucial questions are, on the one hand, to what extent these systems recognize the *ne bis in idem* principle when charging someone for the same offence under different levels, and, on the other, how they consolidate *the protection of fundamental procedural rights of individuals, and especially of suspects and defendants*. The reason is plain: when a criminal justice system is built upon more than one level, the question whether a criminal act can be punished twice becomes relevant, because the multi-level structure may express different sovereign entities, and thus reflect distinct claims for punishing the same offence. On the other hand, it is also important to ask whether different levels of protection of individual rights emanate from the different levels, because such rights in practice determine all procedural acts, and thus the identity of a criminal procedural system itself.

As regards the first question, the evolving European criminal justice system stands in a much better position than the American one. Questions of the sovereignty of different entities, though existing, have not been able to preclude the recognition of the *ne bis in idem* principle, which is indeed acknowledged as an individual right. On the contrary, the US criminal justice system employs a 'soft' mechanism to address the problem, i.e. a mere policy of the Department of Justice, forbidding federal prosecution for an offence regarding which a defendant has been charged or acquitted from charges on the State level under exceptional circumstances. However, citizens may not rely upon it to claim any relevant right. Thus, the US 'Petite policy' is by no means a model for addressing the problem, as it should be the multi-state entity that bears the burden of configuring a system of multiple 'sovereigns', rather than the citizen who commits one and the same offence.

From a comparative perspective, the most interesting question, troubling both the US and the EU criminal justice systems, is the one concerning the *level of protection of fundamental procedural rights* of individuals, especially of suspects and defendants. The particular nature of multi-level criminal law systems makes it necessary to clarify whether the protection afforded on a certain level is binding to the other, and whether there is also room for protecting procedural rights to a different extent despite the existence of such binding force. The comparison with the US federal system has revealed that both crucial parameters, i.e. the question of transposing procedural guarantees from one level to the other, as well as the adoption of a common mandatory standard of procedural rights, supplemented with the possibility to elevate the applicable standard of protection on the lower (State) level, are significant for the evolving EU criminal procedure as well.

Historically, the binding level of protection has evolved in the EU from a 'bottom-up' and 'soft' approach (i.e. from Member States to the Union, without strictly being adopted) to a 'top-down' and 'strict' (i.e. from the Union to Member States and strictly binding) incorporation of fundamental rights guarantees. To a certain extent, this is understandable for a supranational organization of sovereign states, like the EU, which initially had to rely on the relevant standards of its Member States in order to then craft its own. This configuration of guarantees now consists of a three-layered system (EU Charter of Fundamental Rights, ECHR, and guarantees emanating from the constitutional traditions common to Member States), according to which the standard of protection of fundamental procedural rights is primarily set by the EU Charter, which may offer higher protection than the ECHR. The EU Charter, on its part, has incorporated (in a strict fashion) the ECHR guarantees and (in a soft fashion) those emanating from the constitutional traditions common to Member States. There are two main risks emanating from such a system. First, the 'soft', hence by definition imprecise, incorporation of guarantees derived from the constitutional traditions common to Member States can diminish the level of protection offered nationally, and then reintroduce it to the Member States through EU

law. The second risk relates to the inefficiency of both the ECHR and national levels of protection of fundamental procedural rights, as both have been developed with regard to purely national criminal proceedings. Such standards are not sufficient considering the new challenges posed for fundamental rights in the framework of a criminal procedure developing transnationally, alongside significant imbalances owing to the expansion of EU-wide prosecutorial and investigative powers against the difficulties of suspects/defendants having to face 'multi-layered' criminal processes without any institutional assistance by the EU. The experience of the US system is valuable in that regard as well, as it shows that the effective protection of fundamental rights related to criminal procedure on *all* levels of a multi-state system should not be taken for granted. The binding standard of one level may end up being emasculated through 'interpretative erosion' by competent courts, with detrimental consequences to citizens.

This is why the EU ought to avoid allowing unlimited space for interpretation to the ECJ, and set *clear standards of protection* (in its minimum procedural rules) of fundamental procedural rights, especially those of suspects and defendants. Through such rules it should endeavour not only to realize but also to raise the standard of protection afforded by the ECHR and the constitutional traditions common to Member States, striking the right balance between effective repression of criminal conduct and individuals' rights to due process. The solution opted for should, in other words, pay due respect to the protection afforded by the EU's own Charter in light of an 'atypical' ever-expanding transnational criminal procedure which is based on a multi-state structure and is supported by a strong European centre, at least as far as crime repression agencies are concerned.

On the other hand, the US criminal justice system is an ideal example of the difficulties inherent in maintaining and implementing a system of multi-level protection of fundamental procedural rights, in terms of the theoretical option of the States to afford increased protection compared with the binding standard. This is so not only because such 'option' can easily be excluded by any State which finds the higher standard of protection 'vexing', but also on account of practical limitations to such higher standard of protection which are imposed from the centre. In the EU context, the existence of a system featuring increased national protection of procedural rights is even more improbable. This is so not so much because of the general trend favouring security over freedom and justice, but because – contrary to US federal criminal law – the two different levels of protection of the same individual rights have to be applied in the framework of the *same* national legal order by its own enforcement mechanisms (i.e. in one and the same proceeding). This fact engenders serious complications[374], which will most likely lead to prevalence of the binding (lower) EU standard of

[374] See, for instance, the difficulty of mastering different levels of protection of fundamental rights by police and prosecutorial agencies, the 'intermingling' of different levels of protection of different rights in one and the same process (predictably resulting in procedural imbalances), etc.

protection of procedural rights. Thus, the EU cannot rely on the possibility of a national higher level of protection as an 'excuse' for its own inaction in this field. On the contrary, it should apply an elevated standard itself, appropriate to meet the particularities of criminal proceedings developing transnationally among its Member States. If the EU minimum rules defining crimes encompassed the European jurisdictional element, thereby confining EU competence to crimes with a European dimension, it would be easier to make a system of optional (higher) national protection work, because 'European crimes' could then be subject to their own 'special' procedural rules. Presently, however, the urgent need for the EU is to establish minimum rules for procedural rights of individuals, and especially for suspects and defendants, defined on the basis of the *essence* of such rights rather than the desire to facilitate mutual recognition of decisions and judicial cooperation. Procedural rights of individuals in the EU, and especially of suspects and defendants, are there to enable them to defend themselves against a potentially much more punitive state, and assist them in addressing the immense difficulties inherent in criminal processes developing in multiple legal orders. This is in fact the most pressing and important need in contemporary EU criminal law; not just because the main deficiencies lie therein, but also because Member States are highly unlikely to afford increased protection in their own right (while, as already analysed, even if they did, such increased protection would not have a bearing on matters of 'European interest'). Thus, the adoption of minimum rules establishing procedural rights is called for, lest the immense difficulties of citizens *vis-à-vis* European transnational criminal proceedings remain unaddressed.

Bibliography

Abrams N./Beale S. S./Klein S.R., Federal criminal law and its enforcement, 6th Edition, 2015.

Albrecht P.-A., Der Rahmenbeschluss – Entwurf der Europäischen Beweisanordnung – einekritische Bestandsaufnahme, NStZ 2006, 70 et seq.

Albrecht P.-A., Die vergesseneFreiheit, Strafrechtsprinzipien in der europäischen Sicherheitsdebatte, 2003.

Ambos K./ Rackow P., Erste Überlegungenzu den Konsequenzen des Lisabon-Urteils des Bundesverfassungsgerichts für das EuropäischeStrafrecht, ZIS 2009, 397 et seq.

Anagnostopoulos I., Ne bis in idem in der Europäischen Union: offene Fragen, FS für W. Hassemer, 2010, 1121 et seq.

Androulakis I., Die Globalisierung der Korruptionsbekämpfung, 2006.

Androulakis N., Article 79 grCC, in N. Androulakis/G.-A. Mangakis/I. Manoledakis/D. Spinellis//K. Stamatis/A. Psarouda-Benakis, Systematic interpretation of the Criminal Code (in Greek), 1030 et seq.

Androulakis N., Basic notions of criminal procedure (in Greek), 4th Edition, 2012.

Androulakis N., Criminal law, General part, A theory of crime (in Greek), 2000.

Asp P., Harmonisation of penalties and sentencing within the EU, Bergen Journal of Criminal Law and Criminal Justice 2013, 53 et seq.

Asp P., The substantive criminal law competence of the EU, 2012.

Asp P., Two notions of proportionality, in Kimmo Nuotio (ed.), Festschrift in honour of Raimo Lahti, 2007, 207 et seq.

Barkow R., Federalism and criminal law: What the feds can learn from the states, 109 Michigan Law Review 519 2010/2011, 519 et seq.

Beale S. S., Prosecutorial discretion in three systems: balancing conflicting goals and providing mechanisms for control, in M. Caianiello/J. Hodgson (eds.), Discretionary criminal justice in a comparative context, 2015, 27 et seq.

Beale S. S., An honest services debate, 8 Ohio State Journal of Criminal Law (2010), 251 et seq.

Bermann G., Taking subsidiarity seriously: Federalism in the European Community and the United States, in M. Tushnet, Comparative constitutional law, 2nd Edition, 2006, 1012 et seq.

Bernardi A., 'N.C.N.P.S.L.' between European law and national law, 2008.

Bitzilekis N./ Kaiafa-Gbandi M./ Symeonidou-Kastanidou E., Theory of the genuine European legal interests, in B. Schünemann (ed.), A programme for European criminal justice, 2006, 467 et seq.

Blomsa J., Mens rea and defences in European criminal law, 2012.

Böse M., Der RechtsstaatamAbgrund? – Zur Skandalisierung des EU-Geldsanktionengesetzes, ZIS 2010, 607 et seq.

Böse M., The principle of proportionality and the protection of legal interests, EuCLR 2011, 35 et seq.
Braum St., Das Prinzip der gegenseitigen Anerkennung. Historiche Grundlagen und Perspektiveneuropäischer Strafrechtsentwicklung, GA 2005, 681 et seq.
Braum St., Europäische Strafgesetzlichkeit, 2003.
Broß S., Konstruktive Problemebei den Einigung Europas – dargestellt am Beispiel des Europäischen Haftbefehls, FS für Kay Nehm, 27 et seq.
Brüner F. H. /Spitzer H., Besondere Einrichtungenzur Unterstützung der Europäischen Strafverfolgung, in Sieber/Satzger/v. Heintschel-Heinegg (eds.), EuropäischesStrafrecht, 768 et seq.
Drew S., How will the European Public Prosecutor's Office be born?, in European Criminal Policy Initiative (ed. P. Asp), The European Public Prosecutor's Office – Legal and criminal policy perspectives, 2015, 13 et seq.
Eser A., Konkurrierendenationale und transnationale Strafverfolgung-ZurSicherung von „ne bis in idem*ne bis in idem*" und zurVermeidung von positivenKompetenzkonflikten, in Sieber/Satzger/v. Heintschel-Heinegg, EuropäischesStrafrecht, 2. edition, 638 et seq.
European Criminal Policy Initiative (ECPI), A manifesto on European criminal procedure law, 2014.
European Criminal Policy Initiative (ECPI), A manifesto on European criminal policy, ZIS 2009, 707 et seq.
Gazeas N., Die Europäische Beweisanordnung – EinweitererSchritt in die falsche Richtung, ZRP 2005, 18 et seq.
Giannakoula Ath., Approximation of criminal penalties in the EU: Comparative review of the methods used and the provisions adopted – Future perspectives and proposals, EuCLR 2015, 133 et seq.
Giannakoula Ath., Crime and sanctions in the European Union (in Greek), 2015
Gless S., Legal certainty in a European area of freedom, security and justice [in Greek translation], in Bar Association of Piraeus/Association of Greek Penologists/ Centre of International and European Economic Law (eds), Modern developments of European economic criminal law, 2010, 23 et seq.
Gless S., Strafeohnesouverän?, ZStrR 2007, 24 et seq.
Gómez-Jara Díez C., European federal criminal law: What can Europe learn from the US system of federal criminal law to solve its sovereign crisis?, EuCLR 2013, 170 et seq.
Gómez-Jara Díez C., European federal criminal law, the federal dimension of EU criminal law, 2015.
Günther K., Schuld und kommunikative Freiheit, 2005.
Halberstam D., Federalism: a critical guide, in Michigan Law, Public Law and Legal Theory Working Paper Series, No. 251, September 2011.
Hamilton A./Madison J./Jay J./Ford P.L., The Federalist. A commentary on the Constitution of the United States, 1898.

Hassemer W., Die Freiwilligkeitbeim Rücktrittvom Versuch, in K. Lüderssen (ed.), Vom Nutzen und Nachteil der Sozialwissenschaftenfür das Strafrecht, Bd. 1, 229 et seq.

Hecker B., Strafrechtsangleichung in harmonisierten Politikbereichen, in Sieber/ Satzger/v. Heintschel-Heinegg, Europäisches Strafrecht, 2. edition, 273 et seq.

Heger M., Perspektiven des Europäischen Strafrechtsnachdem Vertrag von Lissabon, ZIS 2009, 406 et seq.

Herlin-Karnel E.l, The Lisbon Treaty. A critical analysis of its impact on EU Criminal Law, 2010.

de Hert P./ Wieczorek I., Testing the principle of subsidiarity in EU criminal policy, New Journal of European Criminal Law 2012, 394 et seq.

Jähnke B., Zur Erosion des Verfassungssatzes 'Keine Strafeohne Gesetz', ZIS 2010, 463 et seq.

de Jong C., The European Parliament Resolution of 22 May 2012 on an EU approach to criminal law, in F. Galli/A. Weyembergh (eds), Approximation of substantive criminal law in the EU – The way forward, 37 et seq.

Kahan D., Ignorance of law is an excuse – but only for the virtuous, 96 Michigan Law Review 127 1997-1998, 127 et seq.

Kaiafa-Gbandi M., Harmonisation of criminal procedure on the basis of common principles. The EU's challenge for a rule-of-law transnational crime control, in C. Fijnaut/J. Ouwerkerk (eds.), The future of police and judicial cooperation in the European Union, 2010, 357 et seq.

Kaiafa-Gbandi M., Remarks on the ECJ decision about the EWA (C-303/2005), in Poiniki Dikaiosini 2007, 576 et seq.

Kaiafa-Gbandi M. / *Chatzinikolaou N./ Giannakoula A. / Papakyriakou T.*, The FD on combating trafficking in human beings. Evaluating its fundamental attributes as well as its transposition in Greek criminal law, in A. Weyembergh, V. Santamaria (eds.), The evaluation of European criminal law. The example of the Framework Decision on combating trafficking in human beings, 2009, 131 et seq.

Kaiafa-Gbandi M., Aktuelle Strafrechtsentwicklung in der EU undrechtsstaatliche Defizite, ZIS 2006, 521 et seq.

Kaiafa-Gbandi M., Approximation of substantive criminal law provisions in the EU and fundamental principles of criminal law, in F. Galli/A. Weyembergh (eds), Approximation of substantive criminal law in the EU – The way forward, 85 et seq.

Kaiafa-Gbandi M., Die allgemeinen Grundsätze des Strafrechtsim Statut des Internationalen Strafgerichtsshofs: Auf dem Wegzueinemrechtsstaatlichen Strafrecht der Nationen? FS für H.-L. Schreiber, 199 et seq.

Kaiafa-Gbandi M., European criminal law and the Lisbon-Treaty, 2011.

Kaiafa-Gbandi M., in M. Kaiafa-Gbandi/N. Bitzilekis/E. Symeonidou-Kastanidou, The law of criminal sanctions [in Greek], 2008, 294 et seq.

Kaiafa-Gbandi M., The development towards harmonization within criminal law in the European Union – A citizen's perspective, European Journal of Crime, Criminal Law and Criminal Justice 2001, 239 et seq.
Kaiafa-Gbandi M., Punishing corruption in the public and the private sector: the legal framework of the European Union in the international scene and the Greek legal order, European Journal of Crime, Criminal Law and Criminal Justice 2010, 139 et seq.
Kaiafa-Gbandi M., The importance of core principles of substantive criminal law for a European criminal policy respecting fundamental rights and the Rule of Law, EuCLR 2011, 7 et seq.
Kotzurek N., Gegenseitige Anerkennung und Schutzgarantienbei der Europäischen Beweisanordnung, ZIS 2006, 123 et seq.
Kühne H.-H., Strafprozessrecht, 8th. edition., 2010.
Lenaerts K, Federalism: Essential concepts in evolution – The case of the European Union, Fordham International Law Journal 21 (1997), 746 et seq.
Low P., Federal criminal law, 2nd Edition (2003).
Manoledakis I., General theory of criminal law (in Greek), 2004.
Manoledakis I., The new internationalization of criminal law and the risk of downgrading our legal civilization, in I. Manoledakis, Thoughts about the future of criminal law (in Greek), 2000, 11 et seq.
Manoledakis I./ Kaiafa-Gbandi M. /Symeonidou-Kastanidou E., Criminal law – General part (abridged) (in Greek), 7th Edition, 2005.
Margarites L. /Paraskevopoulos N., Penology (in Greek), 7th Edition, 2005.
Mitsilegas V., The constitutional implications of mutual recognition in criminal matters in the EU, Common Market Law Review 2006, 1277 et seq.
Mylonopoulos Chr., Community criminal law and general principles of community law (in Greek), Poinika Chronika 2010, 161 et seq.
Mylonopoulos Chr., Internationalisierung des Strafrechts und Strafrechtsdogmatik. Legitimationsdefizit und Anarchieals Hauptcharakteristika der Strafrechtsnormenmitinternationalem Einschlag, ZStW 2009, 68 et seq.
Naziris Y., 'A tale of two cities' in three themes – A critique of the European Union's approach to cybercrime from a 'power' versus 'rights' perspective, EuCLR 2013, 319 et seq.
Nelles U., Grundrechte und Ermittlungsverfahren, Neue Kriminalpolitik 2006, 68 et seq.
Nieto Martín A., Americanisation or Europeanisation of corporate crime?, in M. Delmas-Marty/M. Pieth/U. Sieber (dir.) Les chemins de l' harmonization penale/Harmonizing Criminal Law, Sociéte de Législation Comparée, Paris 2008, 327 et seq.
Nuotio K., Harmonization of criminal sanctions in the EU, in E. J. Husabo/A. Strandbakken (eds.), Harmonization of criminal law in Europe, 2005, 79 et seq.
Papadopoulou L., National constitution and Community law: Addressing the subject of superiority (in Greek), 2009.

Paraskevopoulos N., The constitutional dimension of harm and guilt (in Greek), Yperaspise 1993, 1251 et seq.
Paraskevopoulos N., The influence of the modern criminal policy in criminal procedure law (in Greek), Poinika Chronika 2002, 583 et seq.
C. Peristeridou, The principle of *lex certa* in national and European perspectives, in A. Klip (ed.), Substantive criminal law of the European Union, 2011, 69 et seq.
Petrig A./Zurkinden N., Swiss criminal law, 2015.
Prittwitz C., Der fragmentarische Charakter des Strafrechts-Gedanken zu Grund und Grenzengängiger Strafrechtspostulate, in H. Koch (ed.), Herausforderungen an das Recht: Alte Antworten auf neue Fragen?, 1997, 145 et seq.
Sachpekidou E., European law, 2011.
Salzburg St./Carpa D./Davis A., Basic criminal procedure, 9th Edition, 2009.
Satzger H., Art. 83 AEUV, in R. Streinz/T. Kruis/S. Bings/P. Huber (eds.), EUV/AEUV. Vertragüber die Europäische Union und Vertragüber die Arbeitsweise der Europäischen Union, 2. edition, 2012, 993 et seq.
Satzger H., International and European criminal law, 2012.
Schünemann B. (ed.), A programme for European criminal justice, 2006.
Schünemann B., Die Rechte des Beschuldigten im internationalisierten Ermittlungsverfahren, StraFo 2003*,* 344 et seq.
Schünemann B., Verteidigung in Europa, Strafverteidiger 2006, 367.
Sicilianos L.-A. (ed.), European Convention of Human Rights (in Greek), 2013.
Sieber U., Einführung: Entwicklung, Ziele und probleme des Europäischen Strafrechts, in Sieber/Satzger/v. Heintschel-Heinegg (eds.), Europäsches Strafrecht, 29 et seq.
Smith St., Proportionality and federalization, Virginia Law Review 91, 2005, 880 et seq.
Stagos P., The judicial protection of fundamental rights in the legal order of the European Communities (in Greek), 2004.
Steiker C., Criminal procedure stories: Introduction, in C. Steiker (ed.), Criminal procedure stories, 2006, vii et seq.
Stuntz W./ Hoffmann J., Defining crimes, 2011.
Stuntz W., The uneasy relationship between criminal procedure and criminal justice, 107 Yale Law Journal (1997-1998), 6 et seq.
Symeonidou-Kastanidou E., The right of access to a lawyer in criminal proceedings: The transposition of Directive 2013/48/EU of 22 October 2013 on national legislation, EuCLR 2015, 68 et seq.
Tsatsos D., The notion of democracy in the European Sympoliteia (in Greek), 2007.
Turner J.-I., Interstate conflict and cooperation in criminal cases: An American perspective, EuCLR 2014, 114 et seq.
Tushnet M., Comparative constitutional law, 2nd Edition, 2006.
Tushnet M., The Constitution of the United States of America. A contextual analysis, 2009.

Vogel J., Die Strafgesetzgebungskompetenzen der EU nach Art. 83, 86, and 325 AEUV, in K. Ambos (ed.), Europäisches Strafrecht post-Lissabon, 2011, 41 et seq.

Vogel J., Art. 83 AEUV, in E. Grabitz/M. Hilf/M. Nettesheim/M. Athen (eds.), Das Recht der Europäischen Union, 2015, DritterTeil, Kapitel 4, Rn. 1 ff.

Wechsler H., The political safeguards of federalism: The role of the states in the composition and selection of the national government (1954), 54 Columbia Law Review, 543 et seq.

Wehnert A., Deutsches u. EuropäischesStrafrecht, Fragen und Widersprüche, FS für H. Dahs, 523 et seq.

Weigend Th., Strafrecht der Europäischen Union nach dem Vertrag von Lissabon - Eine deutsche Perspective, in P. Kardas/T. Sroka/W. Wrobel (eds.), Ksiega Jubileuszowa Profesora Andrzeja Zolla, 205 et seq.

de Werd M., Renegotiating EU accession to the ECHR: new perspectives and better chances, in ACELG.blogactiv.eu/2015/07/15/renegotiating-eu-accession-to-the-echr-new-perspectives-and-better-chances/.

Weyembergh A., Approximation of substantive criminal law: The new institutional and decision making framework and new types of interaction between EU actors, in F. Galli/A. Weyembergh (eds), Approximation of substantive criminal law in the EU – The way forward, 9 et seq.

Young E., Protecting Member State autonomy in the European Union, in M. Tushnet, Comparative constitutional law, 2nd Edition , 1025 et seq.

Zimmermann F., Die Auslegungkünftiger EU-Strafrechtskompetenzen nach dem Lissabon - Urteil des Bundesverfassungsgerichts, Jura 2009, 844 et seq.

Zimmermann F., Die Europäische Ermittlungsanordnung: Schreckgespenst oder Zukunftsmodell für grenzüberschreitende Strafverfahren?, ZStW 2015, 143 et seq.

Svensk sammanfattning

Straffrätten anses utgöra det mest repressiva medel som står till buds för att kontrollera antisociala beteenden. Även om straffets funktion kan anses vara legitimt, genom att det syftar till att motverka att personer begår allvarliga överträdelser mot andra personers grundläggande rättsliga intressen, så får straffet samtidigt ingripande konsekvenser för den person som påförs en straffrättslig sanktion. För att nå sitt mål (det vill säga att definiera vad som ska vara brottsligt och vilka sanktioner som ska följa av brottsligt agerande) brukar man säga att straffrättslig lagstiftning ska antas så nära folket som möjligt. Under de senaste decennierna har utvecklingen dock gått mot att staten förlorar mer och mer av sin tidigare roll som exklusiv lagstiftare i straffrättsliga frågor. Den senaste tidens internationalisering av straffrätten är delvis en följd av den snabba teknikutvecklingen och delvis ett resultat av den ökande ekonomiska globaliseringen, processer som gör att staterna söker efter fler och fler gemensamma lösningar. Detta leder i sin tur till att de i högre utsträckning också vill samarbeta om hur man kan skydda sin lagstiftning.

Även om EU:s straffrättsliga system är *kvantitativt* begränsat, genom att endast ett antal stater kan göras föremål för det, ingår det *kvalitativt* sett kanske i den mest dynamiska internationaliseringsprocessen av de nationella straffrättsordningarna som går att finna idag. Systemet förvärvar fler och fler egenskaper som liknar en flerstatsstruktur, där suveräna befogenheter istället för att utövas av staterna, utövas centralt i ett system som bäst liknas vid en kvasifederation. Internationaliseringen av straffrättssystemen är inte oproblematisk för den enskilde medborgaren, då det finns tendenser att det repressiva inslaget i straffet ökar när rätten internationaliseras. I denna rapport anläggs ett tudelat perspektiv på utvecklingen av EU-straffrätten och i fokus sätts det som sker på både EU-nivå och nationell nivå. Den utveckling som synliggörs tar sig liknande uttryck i USA:s federala respektive delstatliga system, varför jämförelsen lämpar sig väl. Frågan som ställs i rapporten är om det går att lära sig något nytt om EU-straffrätten genom att jämföra med den utvecklingen av USA:s straffrättssystem.

Rapporten inleds i första delen med en överblick över hur EU:s respektive USA:s olika system för att straffa är uppbyggda. Den bild som växer fram visar att det finns tre huvudsakliga teman att hänga upp jämförelsen på, nämligen: i) de respektive centrala systemens befogenheter att kriminalisera olika antisociala beteenden; ii) hur kriminalpolitiken, inklusive olika straffrättsliga principer, utformas på både federal/överstatlig nivå respektive delstatlig/nationell nivå och hur deras ömsesidiga relationer ser ut samt; iii) hur grundläggande processrättsliga principer (särskilt de till skydd för enskilda med betoning på misstänkta och åtalade) utformas på federal/överstatlig respektive delstatlig/nationell nivå och om det finns åtgärder att vidta för att stärka dem, upprätthålla dem eller minska skyddsnivån av dem i ljuset av den ökande internationaliseringen av straffrätten.

I rapportens andra del diskuteras de teman som lyftes fram i den första delen. För det första konstateras den tydliga tendensen att straffrätten i ökad grad harmoniseras på både federal nivå i USA och på EU-nivå. Som nämnts ovan kan det förklaras av globaliseringseffekter vilka gör att ekonomi och politik närmar sig varandra i såväl de amerikanska delstaterna som i EU:s medlemsländer. Detta faktum – att ekonomi och politik växer samman – gör att delstaternas/medlemsstaternas straffrättssystem leds in på samma spår trots att det finns stora skillnader i deras uppbyggnad. I ljuset av den utvecklingen blir det allt viktigare att tydliggöra och stärka de institutionella ramar som finns för den federala/överstatliga nivån att påverka den lägre nivåns straffrättsordningar. Detta gäller särskilt i EU-sammanhang, eftersom principen om tilldelade befogenheter skapar en konstitutionell begränsning som sätter ramarna för det överstatliga inflytandet.

Inom ramen för det andra temat, där några nyckel-aspekter av USA:s materiella straffrätt diskuteras i syfte att öka förståelsen för vad som är viktigt att tänka på i EU-kontexten, behandlas först frågan om varför det är viktigt att koppla ihop den så kallade legalitetsprincipen med principen om tilldelade befogenheter inom ramen för EU-straffrätten. Vidare visar exemplet med USA att en högre nivå av skydd för skuldprincipen (*mens rea*) tillämpas på federal nivå jämfört med den delstatliga. Skälet är att lagarnas komplexitet ökar när de antas på federal/överstatlig nivå, vilket gör det svårare för medborgarna att skaffa sig kunskap om dem. Denna effekt beaktas i det federala systemet genom ökad hänsyn för skuldprincipen.

Andra straffrättsliga principer som beaktas i rapporten är proportionalitetsprincipen och koherensprincipen. Rapportens genomgång av hur utvecklingen med gemensamma straffskalor i USA har sett ut, visar att straffen tenderar att bli oproportionerliga i förhållande till brotten när stater med olika strafflagar vill skydda ”gemensamma intressen” på federal nivå. Denna slutsats diskuteras sedan i ljuset av hur EU ökar sitt användande av riktlinjer för vilka straffskalor som ska gälla i medlemsstaterna vid brott mot EU-rätten.

Det sista temat som diskuteras i rapportens andra del rör vilka konsekvenser den harmoniserade straffrätten får i ett processrättsligt hänseende. I rapporten konstateras att när straffrätten antas på en mer central och överstatlig nivå ökar behovet av att man anlägger ett ”ovanifrånperspektiv” på lagarna för att säkerställa att enskildas rättigheter respekteras. Slutsatsen i denna del är att det krävs tydliga gemensamma processrättsliga principer för att motverka att personer kommer i kläm till följd av det ökade straffrättsliga samarbetet. I rapporten nämns vidare att det finns en övertro på att den delstatliga/nationella nivån ska tillämpa en högre skyddsstandard för enskildas processrättigheter än den som anges på federal/överstatlig nivå. I rapporten beskrivs detta snarast som en myt.

I rapportens tredje och sista del ges en rad policyrekommendationer, varav de viktigaste är:

I) EU-straffrättens rättsliga ramar måste förtydligas i syfte att skapa en mer enhetlig EU-straffrätt som visar respekt för att det rör sig om ett samarbete mellan suveräna stater och deras respektive medborgare. För att möjliggöra detta mål behöver EU:

   – acceptera att dess behörighet att anta straffrättslig lagstiftning enligt artikel 83(1) FEUF endast gäller om det rör sig om ”EU-brott” som har en tydlig europeisk karaktär;
   – definiera vad som omfattas av uttrycket ”gränsöverskridande inslag” som uttrycks i fördraget och att därtill definiera vad som avses med att lagstiftning endast får antas om det finns ”ett särskilt behov av att bekämpa dem på gemensamma grunder”;
   – se till att det i samtliga lagstiftningsakter som antas inom straffrättens område framgår att det ska finnas ett gränsöverskridande inslag i brottets natur för att det ska kunna klassificeras som ett ”EU-brott”;
   – undvika att kriminalisera förseelser som bättre hanteras genom administrativa sanktioner som exempelvis böter, samt respektera att gemensam straffrättslig lagstiftning enligt artikel 83(2) FEUF endast får antas om det är ”nödvändigt” för att nå ett effektivt genomslag av EU-rätten;
   – genom tydligare regler säkerställa att EU-straffrätten endast används när det finns skäl till det. När EU antar lagstiftning med artikel 83(2) FEUF som rättslig grund, bör rättsakten innehålla ett krav på att straff endast ska tillämpas om det föreligger ett hot mot att EU-rätten annars inte får ett effektivt genomslag.

II) När EU beslutar att använda sin befogenhet att anta gemensam straffrättslagstiftning bör EU se till att inte grundläggande straffrättsprinciper påverkas på ett sätt som är negativt för enskilda. Detta innebär att EU bör:

   – säkerställa att legalitetsprincipen respekteras, exempelvis genom att motverka att den gemensamma lagstiftningen leder till godtyckliga åtal i medlemsstaterna och att visa respekt för principen om tilldelade befogenheter;
   – identifiera ett område där straffrättsligt ansvar inte ska utkrävas i fall där EU:s lagstiftning är särskilt komplex och svårtillgänglig. Det ansvarsfria området bör aktiveras i fall där den enskilde gjort allt som kan krävas för att rätta sig efter lagen;
   – anta straffrättslig lagstiftning i en öppen process som beaktar medlemsstaternas olika syn på vad som utgör ett proportionerligt straff samt deras behov av att hålla ihop sina interna.

III) Avslutningsvis visar jämförelsen mellan USA:s federala straffrättssystem och EU:s överstatliga system att också det förra har problem med överföringen av de processuella rättigheterna från den ena nivån till den andra. Den visar också att det är viktigt att anta gemensamma obligatoriska standarder för processrätten jämte möjligheter för den lägre nivån att tillämpa högre processuella standarder. Mot den bakgrunden bör EU:

- motverka att EU:s tillämpning av flera parallella system till skydd för de processuella rättigheterna (EU-stadgan, Europakonventionen till skydd för mänskliga rättigheter (EKMR) och de allmänna rättsprinciper som härrör från EU:s medlemsstater) leder till att rättigheterna urholkas. Detta görs bäst genom att ”paneuropeiska” standarder till skydd för de processuella rättigheterna antas. En sådan reglering är särskilt viktig för att skydda misstänkta och åtalade;
- utgå från att medlemsstaternas möjligheter att anta ytterligare processrättsligt skydd för enskilda är av närmast teoretisk karaktär, varför EU bör vidta egna åtgärder för att åstadkomma ett sådant skydd;
- utveckla minimi regler för att skydda enskildas processuella rättigheter. Åtgärderna måste vara anpassade för att möta de utmaningar som följer av att enskilda, som en konsekvens av EU:s straff- och processrättsliga samarbete, kan utlämnas till andra stater som tillämpar hårdare regler. Detta bör vara fokus snarare än att lägga det vid att förenkla det ömsesidiga erkännandet av beslut och judiciellt samarbete.

Sieps publications in English

2016

2016:4
The EU and US criminal law as two-tier models A comparison of their central axes with a view to addressing challenges for EU criminal law and for the protection of fundamental rights
Author: Maria Kaiafa-Gbandi

2016:3
Humanitarian aid policy in the EU´s external relations: The post-Lisbon framework
Authors: Peter Van Elsuwege, Jan Orbie and Fabienne Bossuyt

2016:1
Is there flexibility in the European Semester process? Exploring interactions between the EU and member states within post-crisis socio-economic governance
Author: Sonja Bekker

2016:5epa
The EU and Russia: managing the new security environment in the wider Europe
Author: Derek Averre

2016:4epa
The infringement proceedings over intra-EU investment treaties – an analysis of the case against Sweden
Authors: Joel Dahlquist, Hannes Lenk and Love Rönnelid

2016:3epa
A Critical Insight into Europe's Criminalisation of Human Smuggling
Author: Ilse van Liempt

2016:2epa
Irregular Immigration in the European Union
Authors: Pia M. Orrenius and Madeline Zavodny

2016:1epa
Overseeing the rule of law in the European Union Legal mandate and means
Author: Christophe Hillion

2015

2015:6
The EU-China Strategic Partnership: Challenges and Prospects in a Changing World
Authors: Anna Michalski and Zhongqi Pan

2015:5
Energy Union and EU global strategy: The undefined link
Authors: Shahrazad El Far and Richard Youngs

2015:4
Union regulatory criminal law competence
Author: Jacob Öberg

2015:3
The accession of the EU to the European Convention on Human Rights
Author: Joakim Nergelius

2015:2
Investor-state arbitration under TTIP
Author: Hannes Lenk

2015:1
Homophobia and genderphobia in the European Union: Policy contexts and empirivcal evidence
Author: Judit Takács

2015:1op
Same, same but different: The Nordic EU members during the crisis
Authors: Pernilla Bäckman (ed.), Julie Hassing Nielsen, Juha Jokela, Jakob Lewander (ed.) and Göran von Sydow (ed.)

2015:27epa
The challenge om completing the EU internal market for natural gas
Author: Tim Boersma

2015:26epa
Big Brussels is Watching You? Enhancing Transparency in EU External Energy Deals
Author: Sijbren de Jong

2015:25epa
Completing the Union: Is the European Energy Union Really Real?
Author: Harold James

2015:23epa
The constitutional and historical relevance of the AFSJ and the CFSP/ESDP
Author: Massimo Fichera

2015:22epa
Intelligence and decision-making within the Common Foreign and Security Policy
Author: Björn Fägersten

2015:20epa
The Regulatory Cooperation Chapter of the TTIP Challenges and Opportunities
Author: Alberto Alemanno

2015:19epa
Low Inflation and Deflation in EU Countries Outside the Euro Area Should Policymakers be Concerned?
Authors: Plamen Iossifov and Jiří Podpiera

2015:18epa
Could it be Brexpulsion rather than Brexit?
Author: Iain Begg

2015:17epa
Social Housing in Europe
Authors: Kathleen Scanlon, Melissa Fernández Arrigoitia and Christine Whitehead

2015:15epa
The Balance of Power over the EU Budget: European Expenditure since the Lisbon Treaty
Author: Giacomo Benedetto

2015:14epa
The Usefulness of the Scoreboard of the Macroeconomic Imbalances Procedure in the European Union: Potentials for Reform
Author: Tobias Knedlik

2015:13epa
The impact of mega regional agreements on international investment rules and norms
Author: Steve Woolcock

2015:12epa
The Impact of the Transatlantic Trade and Investment Partnership (TTIP) on the Spanish Regions – A Preliminary Analysis
Authors: José Villaverde and Adolfo Maza

2015:11epa
Transatlantic Market Integration, Business and Regulation: Building on the WTO
Authors: Bernard Hoekman and Petros C. Mavroidis

2015:10epa
Juncker's investment plan: what results can we expect?
Author: Martin Myant

2015:9epa
Russia's economic troubles – a perfect storm of falling oil prices, sanctions and lack of reforms
Author: Torbjörn Becker

2015:8epa
Entering a World of Footloose Tax Bases: Can the EU Generate Its Own Income?
Author: Daniel Tarschys

2015:7epa
Britain and the EU: a negotiator´s handbook
Author: Roderick Parkes

2015:6epa
Europe´s pivotal peace projects: Ethnic separation and European integration
Author: Lynn M. Tesser

2015:5epa
Groundhog Day in Greece
Author: Thorsten Beck

2015:4epa
The Greek elections of 2015 and Greece´s future in the eurozone
Author: Dionyssis G. Dimitrakopoulos

2015:3epa
The diplomatic role of the European Parliament´s parliamentary groups
Author: Daniel Fiott

2015:2epa
Social Policy and Labour Law during Austerity in the European Union
Author: Niklas Bruun

2015:1epa
International Trade Union Solidarity and the Impact of the Crisis
Authors: Rebecca Gumbrell-McCormick and Richard Hyman

"EU criminal law, in particular, albeit 'quantitatively' confined to a handful of Member States, qualitatively presents the most dynamic system of internationalizing criminal law in existence today."

Maria Kaiafa-Gbandi

SIEPS carries out multidisciplinary research in current European affairs. As an independent governmental agency, we connect academic analysis and policy-making at Swedish and European levels.

www.sieps.se • info@sieps.se • +46-8-586 447 00