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Is There an EU Criminal Policy?

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Introduction

The topicality of this chapter's subject, 'EU criminal policy', is expressed by the frequent use of the term by both EU institutions – see the Commission's communication entitled 'Towards an EU Criminal Policy'[1] – and by scholars – see the so-called European Criminal Policy Initiative, which gathers criminal law academics from ten Member States of the European Union, and which especially elaborated the 'Manifesto on European Criminal Policy'.[2] Yet, this chapter aims to show that the meaning and the content of such expression – EU criminal policy – are far from evident. As Helmut Satzger explains,[3] so far there is only an 'embryonic' EU criminal law. The relevant set of norms is made of all sources of approximation of substantive criminal law and procedural criminal law. At present, there is no EU criminal law in the strict sense of the word: there is no EU criminal code as continental criminal lawyers understand it at national level, no EU supranational, unified criminal law, which could only be adopted via regulations directly applicable in all Member States.[4] And, so far, there is

[1] European Commission, 'Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law', COM(2011) 573 final, 20 September 2011. See also the Decision of the Commission on setting up an expert group on EU criminal policy, adopted 21 February 2012, OJ C 53, 23.2.2012, pp. 9-10.

[2] 'Manifesto on European Criminal Policy', *European Criminal Review*, 1–1 (2011), 86–103. See also especially M. Delmas-Marty (ed.), *What Kind of Criminal Policy for Europe?* (The Hague: Kluwer, 1996), and more recently S. Miettinen, *Criminal Law and Policy in the European Union* (London: Routledge, 2013).

[3] See H. Satzger, *International and European Criminal Law* (Munich: Beck, 2012), p. 43 *et seq*.

[4] The Lisbon Treaty grants the competence to enact Directives in the criminal field (Article 82 and 83 TFEU) however they can only have a limited direct effect. The case law of the Court of Justice has limited the potential direct effect of Directives in criminal matters: such direct effect is indeed barred if it has the effect of determining or increasing the criminal liability of those accused (joined Cases C-387/02, *Silvio Berlusconi*, C-391/02, *Sergio Adelchi*, C-403/02, *Marcello dell'Utri and Others*, 2005 ECR I-0000). Admittedly, some discussion exists on whether criminal law regulation can be based on Article 325(4) TFEU dealing with the

no 'EU criminal policy'[5] properly speaking. Some indications on how the EU should intervene in the criminal field can be found in the Justice and Home Affairs multi-annual programmes, or in other recent documents specifically dealing with EU intervention in criminal matters, yet a discussion of a proper EU criminal policy is at a very early stage.[6] EU criminal developments have not followed, until now, a consistent policy or strategy, nor have they implemented a 'vision'. Mireille Delmas-Marty has interestingly observed that supranational and international harmonisation can be criticized for upsetting national legal systems' inner coherence, without actually creating any supranational coherence.[7] EU legislative developments have been described as following a 'patchwork-structure' leading to some sort of 'legislative chaos'.[8] John Vervaele has referred to the approach of the EU Council and Commission as predominantly *ad hoc* and eclectic.[9] In another publication, one of the authors of this chapter has provided several examples of how EU criminal law developments have been *de facto* event-driven, and very responsive to public opinion.[10] To speak of an EU criminal policy is therefore premature.

To build an EU criminal policy would also definitely be a challenging task. Indeed, scholars, policy-makers and legislators and lawmakers have written and developed the concept of criminal policy with respect to the nation-state. How that same notion can be translated to the EU supranational context, which has its institutional specificities, is however a matter of discussion.

Our aim in this chapter is precisely to reflect on the concept of 'EU criminal policy' and on the conditions required for its realization, its

protection of the financial interests of the EU, but scholarship is divided on the point, see V. Mitsilegas, *EU Criminal Law* (Oxford: Hart, 2009), p. 109; Satzger, *International and European Criminal Law*, p. 56; R. Sicurella, 'Setting up a European Criminal Policy for the Protection of EU Financial Interests: Guidelines for a Coherent Definition of the Material Scope of the European Public Prosecutor's Office', in K. Ligeti (ed.), *Toward a Prosecutor for the European Union: A Comparative Analysis*, (Oxford: Hart, 2012), vol. I, p. 896.

5 See Miettinen, *Criminal Law and Policy in the European Union*, p. 236.

6 On this see *infra* Section 3.

7 M. Delmas-Marty, 'Introduction: Objectifs et méthodes', in M. Delmas-Marty, U. Sieber and M. Pieth, *Les chemins de l'harmonisation pénale – Harmonising Criminal Law*, (Paris: Société de législation comparée, 2008), pp. 19–31, see in particular p. 21.

8 *Ibid*.

9 J. Vervaele, 'Harmonised Union Policies and the Harmonisation of Substantive Criminal Law', in F. Galli and A. Weyembergh (eds.), *Approximation of Substantive Criminal Law in the EU: The Way Forward* (Editions de l'Université de Bruxelles, 2012), p. 57.

10 A. Weyembergh, *L'harmonisation des législations: Condition de l'espace pénal européen et révélateur de ses tensions* (Editions de l'Université de Bruxelles, 2004), pp. 261–262.

development and implementation. Part 1 of the chapter elaborates on the general concept of criminal policy and on the prerequisites for building one. Part 2 addresses the specific theme of building an EU criminal policy and the challenges that this process will face. Part 3 takes stock of and assesses the first documents issued by EU Institutions on the theme of an EU criminal policy. The fourth and last Part is a concluding one: it presents some considerations on the implementation of an EU criminal policy.

Some Preliminary Remarks about the Concept of Criminal Policy and about the Basis for Its Development

The Concepts of 'Criminal Policy' and of 'Criminal Law Policy'

The seminal works of Claus Roxin have underlined the importance of developing a criminal policy able to guide legislative developments and to reflect on the objectives of criminal law also in the light of certain social and political considerations.[11] This was in contrast with Listz's positivistic school, which advocated a purely legalistic approach to the development of criminal law.[12] While agreeing on the need of a criminal policy, other commentators have provided various heterogeneous definitions of the concept. We will not proceed to a comparative examination of the various approaches in this respect.[13] Nonetheless, it is worth mentioning that definitions vary significantly in their scope. Depending on the approach, the tradition, and/or the state in question, the notion is defined more or less broadly.

For instance, Jareborg distinguishes between 'criminal policy' and 'criminal law policy'. The first – criminal policy – relates to the 'social or civic debate and decision-making concerning all aspects of criminality and penal sanctions'.[14] Jareborg in particular argues that all sorts of social decision making can have a criminal policy aspect. For instance, criminal policy aspects can be found in fields such as education policy, traffic management

[11] C. Roxin, *Kriminalpolitik und Strafrechtssystem* (Berlin: de Gruyter, 1970), translated in Italian language by S. Moccia, *Politica criminale e sistema del diritto penale* (Naples: Guida Editori, 1986).

[12] F. Von Listz, *Der Zweckgedanke in Strafrecht* (1882) translated in Italian language by A.A. Calvi, *La teoria dello scopo nel diritto penale* (Milan: Giuffré, 1962).

[13] K. Ligeti, 'Kriminálpolitika és pönológia', in K. Gönczöl, L. Korinek, M. Lévay (eds.), *Kriminológia – Szakkriminológia* (Budapest: Complex, 2006), pp. 599–626.

[14] N. Jareborg, 'What Kind of Criminal Law Do We Want?', in A. Share (ed.), *Beware of Punishment: On the Utility and Futility of Criminal Law. Scandinavian Studies in Criminology* (Oslo: Pax Forlag, 1995), vol. 14, p. 18.

policy, social policy, labour market policy and so on. Decisions taken in all these areas may indeed stimulate or counteract crime. The core of this broad societal reaction to criminality is normally represented by what Jareborg calls in turn 'criminal law policy'. Criminal law policy specifically concerns the 'social or civic debate and decision-making in questions concerning the three levels of the criminal justice system'.[15] 'Criminal law policy' therefore is a sub-segment of 'criminal policy' and it deals with shaping the criminal justice system through criminal law.[16]

The Condition for the Building of a Sound Criminal Policy: Empirical Analysis

A theoretical understanding of the scope and content of a criminal policy, such as that one sketched in the paragraph above, is just one pre-requisite for building such a policy. A second fundamental aspect is that of coordinating this 'theoretical criminal policy' with 'practical criminal policy'.[17] A criminal policy should have a solid empirical basis encompassing statistics on crime, as well as on investigations, prosecutions, judgments, convictions, execution of sanctions and all aspects that concern the functioning of the criminal justice system. Naturally, every statistical analysis must not be simply based on routinely gathered statistical data, but rather on thorough and tailored empirical studies aimed at evaluating if each specific criminal policy choice has proved effective in, for instance, reducing levels of crime.

In this context, disciplines such as applied criminology can provide an analysis and understanding of criminality.[18] Actual criminal policy

[15] *Ibid.*, p. 19. The three layers Jareborg mentions are the following: the first is that of criminalisation relating to the definition of punishable conduct, where the main actor is the legislator enacting norms of substantive criminal law; the second relates to conviction and sentencing, where the legislator defines the procedural aspects – namely how and where should criminal judgments take place – by enacting norms of procedural criminal law, and where courts play a prominent role; the third layer is that of execution of punishment, where the legislator sets the general framework, enacting for instance norms regulating the organization of prisons and the conditions of detention, and where administrative authorities are the leading actors. According to Jareborg, criminal law policy choices normally concern each of these levels, and as such contribute to a broader criminal policy.

[16] See the similar distinction between *politique criminelle* (criminal policy) and *politique pénale* (criminal law policy) proposed by Mireille Delmas-Marty, *Les grands systèmes de politique criminelle*, (Paris: PUF, 1992), p. 13.

[17] R, Lathi, 'Towards a Rational and Humane Criminal Policy: Trends in Scandinavian Penal Thinking', *Journal of Scandinavian Studies in Criminology and Crime Prevention*, 1-2 (2000), 142.

[18] On this point, see G. Johnstone, 'Penal Policy Making: Elitist, Populist or Participatory?', *Punishment & Society*, 2–2 (2000), 161–180.

decision-making must thus be based on a model developed on the basis of a theoretical understanding of criminal policy fed with empirical evidence, and it should not be affected by political considerations and high emotions, as it happens more often than it should.[19] Indeed, while criminal policy discussions are meant to happen in advance of and guide criminal law developments, a key issue in criminal justice systems is legitimacy: people must consider the system in line with shared values and convictions, and therefore legitimate.[20] Hence, any criminal policy must also take into account current societal developments if it wants to avoid future delegitimation. This is not to advocate an event-driven criminal policy, but rather the maintenance of a sound connection between legal and societal developments.

Transposing the Concept of Criminal Policy to the EU Level

Once there is agreement on the meaning to be attributed to 'criminal policy' and the pre-requisites for building one, one has to discuss how to transpose the concept to the supranational level. Such an exercise does not simply mean juxtaposing different national criminal policies. On the contrary, it requires the development of a proper EU criminal policy, tailored to the specific geographical and institutional framework of the EU. Below we enumerate a number of challenges that the development of an EU criminal policy faces in the light of the specific EU context.

The Challenge of Developing a Comprehensive EU Criminal Policy in a System Based on the Principle of Conferral

A first fundamental challenge for the development of an EU criminal policy derives from the principle of conferral enshrined in Article 5 of the Treaty on European Union (TEU), according to which the EU can only act within the limits of the competences conferred upon it by the Treaties to attain the objectives set out therein. Competences not conferred upon the Union remain national competences. This implies that when developing a criminal policy in the broad sense, the EU can make criminal policy decisions only in those areas where it is competent to act.[21] Moreover, it also

[19] Lathi, 'Towards a Rational and Humane Criminal Policy', 142.
[20] *Ibid*, 149.
[21] This would exclude only the very few areas in which the EU has no competence at all, for instance direct taxation.

has to respect Treaty limitations in terms of relevant 'strategy' or means of EU legal integration. For instance, when it comes to prevention of crime, Article 84 of the Treaty on the Functioning of the European Union (TFEU) explicitly rules out the possibility of approximating legislation.

Secondly, any attempt to shape an EU criminal *law* policy, thus focusing on the enactment and enforcement of EU criminal norms, must come to terms with the fact that the EU does not have a fully-fledged criminal justice system, but, rather to the contrary, a hybrid one where the main functions are shared between EU and national actors. The EU has considerable, albeit not full, competence to legislate in criminal matters,[22] but very limited operational competence to enforce its legislative choices.

Article 83 TFEU grants the EU the competence to legislate on the criminalisation phase through the approximation of substantive criminal law in a listed number of areas identified through some general (serious and cross border crime) and functional requirements (whether criminal law is essential to ensure the effective implementation of a Union policy where there has been some harmonisation).[23] Article 82 TFEU further grants the EU the competence to approximate certain aspects of criminal procedural law, contributing to the shaping of national criminal justice systems. Criminal procedural law may be approximated regarding the admissibility of evidence gathered abroad, or in the field of victims' rights and suspects' rights. Both provisions (Art. 82 and Art. 83) allow the Council to expand, via unanimous decisions, the number of areas of competence where the EU can enact approximating legislation. There has been debate about the extent of this legal competence: see for instance the debate on whether the approximation of the conditions of detention may be considered an aspect of criminal procedure, and therefore something that falls within the scope of EU competence to approximate.[24] Finally, the EU also has competence

[22] On the fragmented character of the EU competence, see Hans G. Nielsson who underlines that this will necessarily lead to an undesirable piecemeal approach in criminal matters, which will hinder the achievement of an area of justice. For this reason, he calls for a Treaty amendment. H.G. Nielsson, 'Where Should the European Union Go in Developing Its Criminal Policy in the Future', *EuCrim*, 1 (2014), 21.

[23] However, see also the discussion on having EU approximation of criminal law in the field of the protection of the financial interests of the EU based on Article 325(4) TFEU, *supra* note 4. The Commission has proposed a Directive on this basis which is however still under negotiation on various points among which also the adequateness of the legal basis (COM/2012/0363).

[24] On this, see A. Weyembergh, I. Armada, and C. Briere, *Critical Assessment of the Existing European Arrest Warrant Framework Decision*, Research Paper, 63. Available

to legislate in order to ease cooperation in criminal matters, and especially judicial cooperation (see Art. 82), including the phase of execution of sanctions. Article 82 TFEU states that the Council can enact legislation to facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions. Remarkably, this legislative competence is still an indirect one, because national parliaments have the duty to transpose EU Directives into national law.[25]

However, on the operational level, the capacity of the current EU bodies to enforce EU legislative policy choices remains limited. The main EU agencies currently dealing with criminal matters, namely Eurojust and Europol, only have coordination powers but no direct and binding investigative or prosecutorial powers. The Commission submitted in 2013 a proposal for the establishment of a European Public Prosecutor's Office (EPPO).[26] The proposal includes certain direct investigative and prosecutorial powers for the Office. If and when approved, and if the Commission's proposal is not substantially modified in the course of the negotiations, the EPPO will boost further EU's operational competence in criminal matters.[27] However, the current version of the Treaty does not allow the establishment of other supranational actors such as a pan-European police force, an EU criminal court or an executive agency in charge of the execution of criminal sentences.

With regard to this odd situation whereby the EU may legislate in criminal matters but may not enforce its legislative choices, Carlo Sotis refers to an entity with the power to 'criminalise without punishing' (*criminaliser sans punir*).[28] Thus developing a criminal policy in a fragmented system subject to the principle of attributed powers is a challenge in itself. But it is not the only one.

at www.europarl.europa.eu/RegData/etudes/etudes/join/2013/510979/IPOL-JOIN_ET%282013%29510979%28ANN01%29_EN.pdf (Last accessed: 22 Sept. 2014).

[25] On the possibility of enacting directly applicable criminal law, see *supra* note 4.

[26] COM(2013) 534 final.

[27] On the current powers of Eurojust, see A. Weyembergh and K. Ligeti, 'The European Public Prosecutor's Office: Certain Constitutional Issues', in L. H. Erkelens, A. W. H. Meij and M. Pawlik (eds.), *The European Public Prosecutor's Office: An Extended Arm or a Two-Headed Dragon?* (The Hague: T.M.C. Asser Press, 2015), pp. 53–77.

[28] C. Sotis, 'Criminaliser sans punir: Réflexion sur le pouvoir d'incrimination (directe et indirecte) de l'Union européenne prévu par le traité de Lisbonne', in *Revue de science criminelle et de droit pénal comparé*, 65–4 (2010), 773–785.

The Challenge of Respecting Subsidiarity and Proportionality in Criminal Matters

A second challenge is that of respecting the EU's constitutional principles. Article 5 TEU imposes respect for the principles of proportionality and subsidiarity in the exercise of EU's competences. Evidently, this includes the exercise of the EU's competence in criminal matters. The main question flowing from the principles of proportionality and subsidiarity concerns the degree of possible EU intervention.[29] As a matter of principle, strategies of integration that are less intrusive for the autonomy of Member States, such as cooperation between national authorities instead of the approximation of legislation, should be preferred.

In the Area of Freedom, Security and Justice (AFSJ) the possibility of opting for different strategies of integration is stated in Article 67 TFEU. This provision sets the goal of establishing an Area of Freedom, Security and Justice and lists, as means to ensure a high level of security, the prevention of crime, judicial and police cooperation and, *if necessary*, approximation as well. Approximation, being the most intrusive strategy, is placed in a subordinate position, with the consequence that cooperation should be prioritized. The question therefore is: when is the 'necessary' threshold met? Is respect for subsidiarity enough, or does a higher or different threshold apply? It is noteworthy that subsidiarity is conceived as a test based on comparative efficiency in which arguments of economic efficiency are often raised. At this point, one might even wonder whether an efficiency criterion is appropriate to assess the division of powers between the EU and Member States in a delicate and fundamental rights sensitive field like criminal matters.[30]

The Challenge of Coping with and Respecting Diversity

Any EU criminal policy must come to terms with the diversity between the various national legal systems, both for practical and constitutional reasons. On the one hand, the EU largely relies on Member States' criminal

[29] For a more sophisticated distinction between proportionality and subsidiarity, see G. Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time' *Common Market Law Review*, 43–1 (2006), 63–84.

[30] On this see more extensively P. De Hert and I. Wieczorek, 'Testing the Principle of Subsidiarity in Criminal Matters: The Omitted Exercise in the Recent EU Documents on Principles for Substantive European Criminal Law', *New Journal of European Criminal Law*, 3–4 (2012), 394–411.

justice systems for the enforcement of EU policy choices. This implies that the supranational level must necessarily cope with national diversity in relation to how systems are shaped, as well as with the different prosecutorial choices within each system. On the other hand, the EU has a constitutional duty to respect and accommodate diversity between Member States even when acting within its competences, as established in Article 4(2) TEU and Article 67(3) TFEU. A few examples may explain why coping with and respecting diversity might prove a challenging task when designing and enforcing an EU criminal policy.

Firstly, there are the differences between national criminal laws, both in procedural and substantive terms, which can represent a hindrance to effective cooperation. In this case, in order to ensure effective co-operation the EU must somehow cope with this diversity. One way to do it would be to approximate substantive and procedural criminal law, for which the EU has the competence to do, albeit in a limited amount of areas.

Concerning *procedural* criminal law, suspects' rights have been the main object of discussion. Discrepancies in the prerogatives granted to suspects in the course of criminal proceedings have for a long time been a hindrance to smooth judicial cooperation and mutual recognition (the cornerstone principle of judicial cooperation which imposes the automatic recognition and execution of judicial decisions issued by foreign authorities).[31] The EU has now engaged in approximation in this field.[32] Moreover, concerning *substantive* criminal law, the EU has the competence to approximate a number of areas of crime identified at Article 83 TFEU, and levelling the differences in the definitions of offences can help to meet the double criminality requirement (the requirement imposed by some cooperation instruments that behaviour should be criminalised in both countries in order to establish cooperation).[33] Yet, there are other aspects such as conditions of detention, which are equally important for the smooth functioning of judicial cooperation, but for which the EU's competence to intervene through approximation of national legislations is contested.[34] Nevertheless, in those areas where the EU does have the competence, it is still constitutionally bound to respect diversity. Indeed, the Treaty itself refers to 'minimum approximation', both in the field of

[31] See, among others, S. Peers, 'Mutual Recognition and Criminal Law in the European Union: Has the Council Got It Wrong?', *Common Market Law Review*, 41-1 (2004), 5–36, esp. 34.

[32] See further on this *infra* note 43.

[33] On approximation and double criminality, see A. Weyembergh, *L'harmonisation des législations*, 138 *et seq*.

[34] See *supra* note 23.

procedural and substantive criminal law, as a more far-reaching approach would risk violating the respect of diversity (see Articles 82 and 83 TFEU). Interestingly, Member States have a special tool to police the respect for diversity by draft EU legislation in the criminal field. If they believe a proposal in this area might affect the fundamental aspects of their criminal justice systems, they can halt the legislative process and have the matter referred to the European Council. This procedure is known as the emergency-break.[35] One could thus conclude that EU criminal policy makers are constrained by a double obligation, one (practical) to *cope* with diversity, and one (constitutional) to *respect* diversity.

A second example of diversity between Member States' legal systems that might have an impact on the effective achievement of EU criminal policy objectives relates to the division of powers between judicial and police authorities. If in different Member States the same investigative activity is carried out in one case by police authorities and in another case by judicial authorities, it might be hard to identify whether police or judicial cooperation instruments should apply. In addition to this practical problem, there may also be cultural obstacles, as for example an Italian judge belonging to a system where judicial authorities frame police activities might be reluctant to cooperate with, for instance, English police forces belonging to a legal system where the police enjoys a great deal of autonomy. Given that the EU has no power to approximate the division of competences between police and judicial authorities in Member States, the EU cannot cope with diversity through legislative means. As a consequence diversity is respected to the extent that Member States are not bound to modify their legislation. Nonetheless, effectiveness of cooperation might be boosted by trying to develop a common EU legal culture among criminal justice practitioners, would they be members of the judiciary or of the police forces, thus developing mutual trust across all levels of national criminal justice system. This would be an alternative way to cope with diversity.

A last example concerns the exercise of prosecutorial discretion. In this regard, the difference between Member States with a legality principle and those that apply the opportunity principle is essential. In the nineteen Member States that apply the principle of legality, this principle is implemented more or less rigorously depending on the particular national legal system. In most Member States it is tempered by exceptions or correctives, whereas it is applied more strictly in some other

[35] Article 83(3) TFEU.

countries, like Poland. The remaining nine Member States apply the opportunity principle, according to which prosecutors can exercise their discretionary power to decide what offences to prosecute, leading to a more pragmatic approach of the enforcement of criminal law. In those legal systems where prosecutors are not bound by the principle of legality, EU criminalisation efforts may be neutralised. Take for instance the example of the Directive on the fight against fraud to the Union's financial interests by means of criminal law (PIF Directive): even if duly transposed into national law, the approximation pursued may be frustrated if national prosecutors chose to give priority to other crimes and set aside fraud and other offences against the EU's financial interests.[36] Another situation where prosecutorial discretion could be relevant is where the EU legislator enacts very broad criminalisation provisions guided by general prevention aims. Ideally, prosecutors should follow a more special prevention oriented policy and only rely on the most severe sanction when the specific case so requires.[37] What is more, prosecutors should also ideally issue judicial cooperation requests only for the most severe cases. The paradigmatic example is that of the lack of proportionality of the Polish European Arrest Warrant issued for very minor offences.[38] However, the EU cannot be sure that choosing to define certain crimes broadly will be counterbalanced by caution and focus on special prevention in all national criminal justice systems, since the exercise of prosecutorial discretion can be very different in each Member State. In this context, the most effective way to cope with diversity would be the creation of an integrated enforcement system, as in the case of the proposal for the establishment of a European Public Prosecutor's Office (EPPO proposal).[39] This would nonetheless be the most intrusive option, significantly challenging respect for diversity in an area where the EU has hardly entered so far, namely actual law enforcement at the operational level

[36] See the Commission in its impact assessment for the proposal on the establishment of a European Public Prosecutor's Office which puts forth exactly this argument to justify the establishment of a supranational prosecutor, SWD (2013) 274 final, pp. 11–15.

[37] See Jareborg who claims that each layer of the criminal justice system should be entrusted with a different function, the criminalisation phase with general prevention aims, and the sentencing and execution of sentence phase with special prevention and retribution: Jareborg, 'What Kind of Criminal Law Do We Want?', p. 19

[38] On this point, see S. Haggenmüller, *The Principle of Proportionality and the European Arrest Warrant*, Oñati Socio-legal Series [online], 3–1 (2013), pp. 95–106. Available from: www.opo.iisj.net/index.php/osls/article/viewFile/194/102 (Last accessed: 22 Sept. 2014).

[39] European Commission, 'Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office', COM(2013) 534 final.

of criminal justice.[40] A less intrusive and more diversity-friendly option would be to issue prosecutorial guidelines, and to issue non-binding requests to national prosecutors, as it is currently the case within the framework of Eurojust.[41] Yet, it is not for granted that this softer option would be the most effective way to cope with diversity and to ensure the effective implementation of the EU criminal policy priorities.[42]

The Challenge of Balancing Freedom, Security, and Justice

A fourth challenge is that of coordinating the various dimensions of freedom, security, and justice. Article 67 TFEU sets the goal of building an Area of Freedom, Security and Justice, while respecting fundamental rights and the different legal systems and traditions of the Member States. The Treaty therefore explicitly calls for a criminal policy that is respectful of fundamental rights,[43] and which is able to strike a balance between different values such as freedom, security, and justice. Finding that balance within a Union which encompasses 28 Member States is a considerable challenge. The way in which balance is conceived is indeed different and depends on each national legal culture. The EU developments in the AFSJ have been criticized for some time for being too security oriented, and for disregarding justice and fundamental rights. In particular, the EU has

[40] The fact that establishing the EPPO is a very sensitive issue for Member States, and hence it is potentially affecting diversity is shown by the heated reaction of national parliaments to the proposal. Indeed, in the framework of the Early Warning Mechanism a sufficient number of national parliaments raised subsidiarity objections to the proposal and forced the Commission to reconsider it. All the reasoned opinions and the observations sent by national parliaments in the framework of the political consultation are available on IPEX, both in the original language and in English (in some cases only summaries in English are available): www.ipex.eu/IPEXL-WEB/dossier/document/COM20130534.do#dossier-APP20130255 (Last accessed: 22 Sept. 2014).

[41] Article 9a to 9d of Eurojust Decision (2002/187/JHA) as amended by Council Decision 2009/426/JHA).

[42] For instance, in the EPPO Proposal, the Commission makes precisely the argument that national prosecutions alone are not sufficiently effective: see recital 5 of EPPO Proposal's preamble.

[43] A fundamental rights based policy would be what Jareborg calls a 'defensive' criminal policy, meaning a criminal policy which also tries to protect individuals against power abuse (Jareborg, 'What Kind of Criminal Law Do We Want?', p. 21). Nevertheless, one should notice that also criminalisation obligations can be based on human rights provisions, and that is an increasing trend. See P. De Hert, S. Gutwirth, S, Snajcken and S. Dumortier, 'La montée de l'Etat pénal: Que peuvent les droits de l'homme?', in Y. Cartuyvels, H. Dumont, F. Ost, M. van de Kerchove and S. Van Drooghenbroeck (eds.), *Les droits de l'homme: épée ou bouclier du droit pénal?* (Bruxelles: Bruylant, 2007), pp. 235-290.

arguably focused too much on cooperation between judicial and police authorities, rather than on the rights of the persons subject to such cooperation, namely suspects and convicted persons.[44] Before the Treaty of Lisbon, this was admittedly also a problem of competence. The EU did not have a clear power to legislate on procedural aspects.[45] At present however, Article 82 TFEU, which grants the EU the competence to approximate criminal procedural law, specifically mentions the rights of victims of crime and the rights of individuals in criminal proceedings. Concerning the rights of victims, a new Directive was adopted on 25 October 2012.[46] With regard to the approximation of suspects' rights, three Directives out of the six envisaged in the 2009 legislative roadmap[47] have been adopted, concerning interpretation and translation rights,[48] the right to information in criminal proceedings,[49] and the right to access to a lawyer in criminal proceedings and to communicate upon arrest.[50] Three other Directives are under negotiation and concern the presumption of innocence,[51] special safeguards for children suspected and accused in criminal proceedings,[52] and access to legal aid.[53]

[44] On the imbalance between security and liberty see, among the others, D. Bigo, 'Liberty, Whose Liberty? The Hague Program and the Conception of Freedom', in Balzacq T. and S. Carrera (eds.), *Security vs Freedom? A Challenge for Europe's Future*, (Hampshire: Ashgate, 2006), pp. 35–44, as well as the criticism advanced by the organization Fair Trials International, outlined in S. Jakobi, S. de Mas, 'Achieving Balance among Liberty, Security and Justice: An Agenda for Europe', *ERA Forum*, 33 (2002), 87.

[45] The Council nonetheless adopted the Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings.

[46] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315, 14.11.2012, pp. 57–73.

[47] Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C 295, 04.12.2009, pp. 1–3.

[48] Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010, pp. 1-7.

[49] Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1.6.2012, pp. 1-10.

[50] Directive 2013/48/EU of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294, 6.11.2013, pp. 1–12.

[51] COM(2013) 821 final.

[52] COM(2013) 822 final.

[53] COM(2013) 824 final.

The Challenge of Gathering EU Wide Empirical Data

Finally, there is the challenge of basing an EU criminal policy on sound empirical data. So far, the main mechanism that includes collection of empirical data at EU level is the so-called 'intelligence-led policing cycle' or 'EU policy cycle'. The policy cycle was established in 2010 and the first full cycle started in 2013.[54] It comprises four phases including threat assessment, plan setting and implementation, and finally review and assessment. Within this cycle a prominent role is played by Europol and the Standing Committee on Internal Security (COSI),[55] which includes high-level officials from national ministries of the interior and Commission representatives. Eurojust, Europol, Frontex, and other relevant bodies may also be invited to attend COSI meetings as observers.[56]

Whereas the policy cycle is important, it is essentially based on police information. A criminal policy requires, however, a broader empirical basis; it cannot only rely on police information. As already stated in the first Section, statistics on investigations, prosecutions, judgments, convictions, execution of sanctions, and so forth are also crucial. Studies need to be carried out on crimes occurring within each Member State as well as on cross-border crimes. Moreover, statistics on the functioning of each Member State's criminal justice system are needed. For the time being, for a series of reasons, statistics are not comparable across Member States and figures are frequently not reliable.[57] Nonetheless, some progress has been made in the field. In 2011 the Commission published a 'Statistic Action Plan on measuring crime in the EU' which covers the period from 2011 to 2015.[58] In the future a greater involvement of Eurojust and, when adopted,

[54] 'Council Conclusions on the creation and implementation of an EU policy cycle for organised and serious international crime', 15358/10 COSI 69 ENFOPOL 298 CRIMORG 185 ENFOCUSTOM 94.

[55] COSI was established on the basis of Article 71 TFEU: see Council Decision 2010/131/EU of 25 February 2010 on setting up the Standing Committee on operational cooperation on internal security.

[56] On the policy cycle and the Internal Security Strategy, see M. Busuioc and D. Curtin, 'The EU Internal Security Strategy, the EU Policy Cycle and the Role of (AFSJ) Agencies: Promise, Perils and Pre-requisites', Research Paper available at: www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453185/IPOL-LIBE_ET%282011%29453185_EN.pdf (Last accessed: 22 Sept. 2014).

[57] On the lack of reliable data, see Weyembergh, Armada and Briere, *Critical Assessment of the Existing European Arrest Warrant Framework Decision*, p. 62.

[58] European Commission, 'Measuring Crime in the EU: Statistics Action Plan 2011-2015', COM(2011) 713 final, 18 January 2012.

of the EPPO is desirable in order to gather data also on the investigation, prosecution and conviction sides.[59]

Current Development of EU Criminal Policy

The previous sections have presented and discussed the challenges to the development of a criminal policy within the specific EU constitutional framework. We devote this Section to the assessment of the first attempts of the EU Institutions to address the topic.

Since 1999 the European Council has enacted so-called multi annual programmes that broadly deal with the development of the whole Area of Freedom, Security and Justice. These programmes contain references to EU developments in criminal matters, but they have mainly concerned the areas of crime that should be prioritized, and stress the need for further approximation to support mutual trust and ease mutual recognition.[60] Moreover, the aspects relating to EU criminal law are addressed in a fragmented way; when discussing approximation, these programmes encompass both civil and criminal approximation, and when discussing cooperation, they similarly touch upon both civil and criminal cooperation. There is no general discussion on an EU *criminal* policy in the way envisaged in Section 2. The last strategic guidelines of the European Council of 26 and 27 June 2014[61] are extremely synthesizing if compared with the previous multiannual programmes. The few references that can be found to criminal matters include the identification of priority crime areas (such as trafficking in human beings, terrorism and a mention of cybercrime), support for the establishment of the EPPO and an affirmation of the importance of strengthening suspects' and victims' rights. No general broad criminal policy theme is addressed, such as the

[59] On the theme and the problems related to crime statistics in Europe, see W. De Bondt and G. Vermeulen, 'Esperanto for EU crime statistics – Towards common European offences definition in a EU level offence classification system', in M. Cools *et al.* (eds.), *Reading in Criminal Law, Criminal Justice and Policing*, (Antwerp: Maklu, 2009), vol. II, pp. 87–124.

[60] Tampere Conclusions, paras. 33 and 53 ('Tampere European Council: Presidency Conclusions', 15 and 16 October 1999, available at: www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00200-r1.en9.htm [Last accessed: 22 Sept. 2014]), Hague Programme, paras. 33–32 ('The Hague Programme: Strengthening freedom, security and justice in the European Union', OJ C 53, 3.3.2005, pp. 1-14), Stockholm Programme, paras. 3.1.1 and 3.3.1. ('The Stockholm Programme: An open secure Europe serving and protecting citizens', OJ C 115, 4.4.2010, pp. 1-38).

[61] Conclusions of the European Council of 26 and 27 June 2014, EUCO 79/14, 27 June 2014.

ones sketched in Section 2, that is, diversity, freedom and security, or the balance between approximation and cooperation.[62]

It is only in the past five years that EU institutions have started to discuss the issue of an EU criminal policy in a more tailored way. Nevertheless, as we show in the next Section, the discussion is still at an early stage.

EU Criminal Policy Documents: A Discussion of Their Content

So far, three documents can be categorised as 'European criminal policy documents'.[63] They are, in chronological order, the Council's 'Conclusions on model provisions, guiding the Council's criminal law deliberations' adopted by the Justice and Home Affairs Council on 30 November 2009,[64] the 2011 Commission's Communication mentioned earlier entitled 'Towards an EU Criminal Policy?: Ensuring the effective implementation of EU policies through criminal law'[65] and, finally, the European Parliament's resolution of 22 May 2012 'on an EU approach to criminal law'.[66] All of them have faced severe criticism regarding their limited content and their lack of vision.[67] The Commission's Communication in particular was subject to severe criticism.[68] Of course, the task undertaken by

[62] Enrico Cottu argues that this very synthetizing approach can be explained in light of the inclusion of EU criminal law within the First Pillar. The European Council, a fundamentally intergovernmental institution, would be trying to respect the newly acquired stronger 'community' nature of EU criminal law. E. Cottu, 'Il Consiglio europeo adotta i nuovi orientamenti strategici per lo spazio di libertà, sicurezza e giustizia per il quinquennio 2015–2020', *Diritto Penale Contemporaneo*, (2014) available at: www.penalecontemporaneo.it/area/3-/18-/-/3227-il_consiglio_europeo_adotta_i_nuovi_orientamenti_strategici_per_lo_spazio_di_libert____sicurezza_e_giustizia_per_il_quinquennio_2015_2020/ (Last accessed: 22 Sept. 2014). This approach would be in line with the Commission growing inclination to autonomously define its own policy goals in the Area of Freedom Security and Justice. On this point, see L. Salazar, 'EU's Criminal Policy and the Possible Contents of a New Multi-annual Programme', *EuCrim*, 1 (2014), 25.

[63] De Hert and Wieczorek, 'Testing the Principle of Subsidiarity in Criminal Matters', 394.

[64] 'Draft Council conclusions on model provisions, guiding the Council's criminal law deliberations', 16542/2/09, 27 November 2009.

[65] COM(2011) 573 final.

[66] European Parliament, 'Report on an EU approach on criminal law', 2010/2310(INI), 24 April 2012.

[67] See De Hert and Wieczorek, 'Testing the Principle of Subsidiarity in Criminal Matters', about the absence of a reflection on the subsidiarity principle in each system. See also Veravaele ('Harmonised Union Policies', p. 61), who argues that the document is mainly a codification of past practices rather than a programme for the future, and Miettinen (*Criminal Law and Policy in the European Union*, p. 143) who speaks of the 'platitude of restating those principles'.

[68] A. Klip, 'EU criminal policy', *European Journal of Crime, Criminal Law and Criminal Policy*, 20–1 (2012), 1.

the Commission was a tricky one and its title 'Towards an EU Criminal Policy?' created high expectations. However, its true added value is difficult to identify.

All these documents have a very limited scope. Referring back to the distinction presented in Section 2 between criminal policy and criminal law policy, it seems fair to say that these documents only address aspects related to criminal law policy, and then only some of them. They merely deal with the framework of principles and the justification for approximation of substantive criminal law. The Commission's communication has an even narrower scope, as it only deals with approximation of substantive criminal law with the aim of enforcing EU policies (approximation on the basis of Article 83(2) TFEU), but does not touch upon the approximation of substantive criminal law in the field of the so-called Euro-crimes (approximation on the basis of Article 83(1) TFEU).[69] There is no discussion on the approximation of procedural criminal law. Moreover, none of the important challenges we discussed in the previous Section received particular attention. There is nothing on how to accommodate diversity, especially with regard to the sensitive issue of prison conditions. Nor is there anything on the general theme of the balance between security and justice, let alone on the issue of gathering empirical information. The application of subsidiarity and proportionality and the relation between the two strategies of integration (harmonisation and cooperation), is merely addressed to the extent that it relates to the justification of approximating substantive criminal law.[70] Moreover, in all the texts there is a reference to traditional criminal law principles like the principle of *ultima ratio*, the principle of legality or the principle of guilt, which should guide the EU legislator when drafting EU approximating instruments.[71] This arguably shows that the institutions uphold a liberal and modern vision of criminal law.[72] Yet, there is no reflection on the combination of traditional EU constitutional principles such as subsidiarity and proportionality and traditional criminal law principles.[73]

[69] European Commission, 'Towards an EU Criminal Policy', p. 6.

[70] *Ibid.*, p. 3; European Parliament, 'Report on an EU approach on criminal law', pt 7.

[71] 'Draft Council conclusions on model provisions', pp. 4-6; European Commission, 'Towards an EU Criminal Policy', p. 7; European Parliament, 'Report on an EU approach on criminal law', pt 4.

[72] By 'modern criminal law' it is meant that kind of criminal law that developed in the beginning of the 19th century, and whose ideological base is the Enlightenment philosophy and its view on human nature. See further Jareborg, 'What Kind of Criminal Law Do We Want?', p. 20.

[73] See for instance, among Italian scholars, Massimo Donini who largely before the enactment of the Commission Communication had pointed out the possible friction which could

Finally, the Commission lists a number of priority areas that should be addressed by EU criminal law. However, it remains unclear on what basis and following what criteria those policy areas have been or could be selected in the future for criminal law protection.[74]

EU Criminal Policy Documents: A Discussion of the 'Authors'

Besides the issues related to the content of an EU criminal policy, there is also the sensitive question of its 'author'. Which EU institution, what EU actor should guide the EU's criminal policy? Although the three documents mentioned earlier contain important common features, it is confusing to be confronted with three different texts emanating from three different EU institutions. The European Parliament is the only institution that addresses the issue of how to coordinate these approaches.[75] It is argued that the purpose of these documents was not to genuinely reflect on a global or 'inter-institutional' EU criminal policy, but rather to give themselves general guiding principles and to unilaterally express their position towards the EU approach on criminal law in a sort of 'institutional competition'. This has been specifically argued in relation to the Council, which prior to Lisbon was the only EU institution acting in the field of criminal policy, whereas after Lisbon it has to share this role with the Parliament. The Council's conclusions have been interpreted as a way to reaffirm Council's leadership, and the Commission's and Parliament's documents as a response to that.[76]

Given the text of the Treaty, and especially Article 68 TFEU,[77] one of the most evident solutions would consist of conferring on the European Council the task of at least drafting a global approach in relation to an EU criminal policy. The European Council should make the required political choices after a multidisciplinary consultation of all concerned actors, including practitioners. However, we have seen that in its strategic

derive from a concurrent application of the principles of subsidiarity and *ultima ratio*, M. Donini, 'Sussidiarietà penale e sussidiarietà comunitaria', *Rivista Italiana di Diritto e Procedura Penale*, 1–2 (2003), 141–183, esp. 171.

74 Vervaele, 'Harmonised Union Policies', p. 64.

75 European Parliament, 'Report on an EU approach on criminal law', pts 15 and 16.

76 See A. Weyembergh and S. de Biolley, 'Approximation of Substantive Criminal Law: The New Institutional and Decision-making Framework and New Types of Interaction Between EU Actors', in A. Weyembergh and F. Galli (eds.), *Approximation of Substantive Criminal Law*, esp. pp. 24–25.

77 According to Article 68 TFEU, 'The European Council shall define the strategic guidelines for legislative and operational planning within the AFSJ'.

guidelines of June 2014 the European Council has radically changed its approach compared to previous programmes and has opted for a very limited approach. This is not a promising start towards a more active European Council, especially in the field of EU criminal policy.

Concluding Remarks about the Implementation and Assessment of an EU Criminal Policy

Throughout this chapter we have discussed the concept of criminal policy and the difficult challenges the development of an EU criminal policy will face. We have underlined how the discussion among the institutions is at a very early stage, given that none of the important challenges raised in Section 2 have been tackled with just the listing of a few criteria and then only in relation to the approximation of substantive criminal law. Finally, we touched upon the problem of who should be in charge of drafting the EU criminal policy, and this leads to our last point, that is the implementation and assessment of an EU criminal policy. Assuming that the European Council takes up the challenging task of drafting one single EU criminal policy, once shaped, such policy will of course have to be implemented. This involves the European legislator, therefore the Commission as agenda setter, the Council and the Parliament, which will have to legislate in accordance with the policy direction established, as well as national legislators, that will have to transpose the EU Directives. It also involves EU operational bodies such as Eurojust, Europol, and in the future the EPPO, EU criminal networks such as the European Crime Prevention Network, and more importantly, national police and judicial authorities. Given the multiplicity of actors involved, the challenge of uniform implementation, while ensuring respect for diversity, is particularly pressing. This is why we advocate the close assessment and monitoring of the actions of each actor in the field, possibly also on a peer evaluation basis.[78] Evaluation and assessment should thus be an essential and integral part of a sound EU criminal policy.

[78] See Article 70 TFEU, which allows the Council and the Commission to set the arrangements for impartial and objective evaluation by Member States of AFSJ policies. The Stockholm Programme also contained a call for the Commission to come up with a proposal in the area (para. 1.2.5), however no action was taken in this respect, and the Union is still evaluating criminal policies on the basis of an instrument from 1997 (Joint Action 97/827/JHA).