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The emerging role of the EU as a primary normative actor in the EU Area of Criminal Justice

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Abstract

This article explores the role and justifications for EU action in the EU Area of Criminal Justice, also relying on a comparison with the justifications for EU action in the internal market. It distinguishes between a role for the EU as a subsidiary policy actor and as a primary policy actor. By substantiating both models, the article illustrates how the model of the EU as a subsidiary policy actor has been challenged by legislative and judicial developments in the internal market and how these trends were particularly accentuated in the EU Area of Criminal Justice. The EU increasingly regulates areas of non-cross-border crime, as can be appreciated by the shape and the implementation of the competence to harmonise definitions of crimes. And the Court of Justice has unequivocally extended the application of EU criminal law, both substantive and procedural, to internal cases. The article argues that such developments, which build on pre-existing trends in the internal market field, are inevitable in the EU Area of Criminal Justice due to the inherent fundamental rights' sensitive nature of criminal law. A subsidiary, piecemeal approach in criminal justice might safeguard national regulatory autonomy but is hardly affordable as it would challenge general principles of criminal law. Relying only on "legal cross-borderness" as a criterion to justify EU definition of crimes would neglect the harm principle and the legal interest principle. Legal creativity that would stem from limiting EU intervention and safeguarding regulatory competition can be fostered by enlarging EU regulatory tools in this area codifying also decriminalisation competences. Moreover, limiting the application of EU criminal law to only cross-border cases is at odds with the principle of legality in criminal matters and of equal treatment.

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1 | INTRODUCTION

As a supranational organisation born after its constituent entities, the EU has always needed to justify its legitimacy to act as a policy actor in the eyes of its Member States and EU citizens. When designing and implementing supranational policies, the EU necessarily restricts Member States' corresponding autonomy. Moreover, EU action can both enhance and also restrict individuals' liberties.

A vast literature exists on the various dimensions on which legitimacy of EU action is in fact grounded or should be grounded.[1] Sticking to the rationales the EU has set for itself, a traditional one, which is enshrined in the Treaties and EU Institutions' policy documents, is that of acting as 'subsidiary policy actor' only. This means that the EU is justified in stepping in to regulate specific phenomena in the pursuit of a policy goal only when Member States fail to reach it autonomously. As later illustrated, a good indicator of when Member States are likely to fail, and EU action is thus needed, is when the relevant phenomenon has a cross-border dimension.

Evidence of the EU as a subsidiary policy actor can be directly or indirectly found in key provisions of EU constitutional law already in the first and core field of EU action, namely the internal market.[2] Through the years, the EU range of action has expanded beyond its economic core. But it arguably reproduced variations of the 'EU as a subsidiary policy actor' model for its justifications, including in the EU Area of Criminal Justice,[3] the main focus of this contribution.

This article, however, argues that such a model of the EU as a 'subsidiary policy actor' has progressively been challenged. There are more and more instances in which the EU acts instead as a 'primary policy actor' pursuing a normative agenda in areas in which Member States are capable of acting on their own.

This contribution thus illustrates the limits of the model of the EU as a secondary policy actor when applied to the field of criminal law. This model neither accounts for nor explains some of the legal developments in this area. This points to the complementarity of the alternative model of the EU acting as a primary policy actor in order to assess the normative foundations of EU criminal law.

The following section clarifies the theoretical framework for the analysis. It provides definitions of the key concepts. It illustrates how the 'EU as a subsidiary actor' model is enshrined in the Treaties, including in the field of criminal justice and police cooperation. And it clarifies the tools through which it has been challenged. The following two sections develop the first argument of this contribution, namely that the EU is progressively acting as a primary policy actor in criminal justice. The third section focuses on the challenges that the criterion of legal cross-borderness is facing, while the fourth deals with the challenges to material cross-borderness. The fifth section develops the second argument, namely that the trend towards the EU acting as a primary policy actor in criminal justice is an inevitable one for normative reasons.

In terms of scope of the analysis, it is worth clarifying from the outset that the expression the 'EU as a policy actor' is used in this discussion to capture EU action in a broad sense. This includes both EU law-making action setting substantive standards and defining the scope of application of EU law, as well as EU action aimed at implementing EU policies by means of operational agencies.[4]

Furthermore, this contribution develops its core arguments with respect to the field of criminal justice and police cooperation. To further illustrate its points, it nonetheless compares trends in this area with those in the field of the

[1]See, among many others: F.W. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press, 1999); G. Majone, *Regulating Europe* (Routledge 1996); J.H.H. Weiler, 'In the Face of Crisis: Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration', (2012) 34(7) *Journal of European Integration*, 825; V.A. Schmidt, *Europe's Crisis of Legitimacy: Governing by Rules and Ruling by Numbers in the Eurozone* (Oxford University Press, 2020).

[2]See the next section for further elaboration on each of these points.

[3]This expression refers to all the instruments adopted by the EU in the field of criminal justice including measures on police cooperation. The expression is admittedly not to be found in the Treaties but is commonly used in literature. V. Mitsilegas, 'The Symbiotic Relationship between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice', (2015) 6(4) *New Journal of European Criminal Law*, 457.

[4]See Marianne Wade, who speaks with respect to EU actions in criminal justice matters as going largely beyond just the adoption of repression conventions, but as being constitutive of a complete governance level with considerable expertise which includes a wide range of institutional frameworks and agencies, as well as flanking measures ensuring that Member States would implement their obligations in the field of criminal justice. M. Wade, 'Cross-Border Crime', in K. Ambos and P. Rachow, *The Cambridge Companion to European Criminal Law* (Cambridge University Press, 2023), forthcoming.

internal market. This has a threefold aim. Firstly, it allows one to show that the trend towards EU 'primary policy action' is not confined to criminal justice but actually reproduces and amplifies what happened in other, older core areas of EU action. Considering that the internal market is a more established policy area and EU criminal justice a relatively more recent one, it is interesting to investigate the presence of transversal trends across both areas, which repeat themselves throughout history.[5] The comparison is pertinent in that both areas are among the few in the Treaty that envisage harmonisation as a strategy of integration.[6] Investigating the rationales for pursuing harmonisation can thus give some indication on 'how far the EU is ready to go' in its integration goals. This is naturally interesting for broader discussions on the EU role as a policy actor in general, beyond the internal market and the EU Area of Criminal Justice. Although developing such a general theory is beyond the ambitions of this article, it may nevertheless contribute to such a broader research agenda.[7] Secondly, jointly looking at EU action in the fields of the internal market and EU criminal justice equally allows one to illustrate the specificities of this latter area by comparison. Finally, given that the internal market is an older and core EU policy area, there has been a wide proliferation of scholarship on the subject, interestingly conceptualising different approaches for integration in this area, and the balance struck between centralisation and Member States' autonomy.[8] It is thus useful to draw on this literature, where compatible, in addition to EU criminal law literature, in order to draw inspiration but also to critically appraise the specificities of the EU Area of Criminal Justice.

2 | THE TRADITIONAL MODEL FOR THE EU AS A "SUBSIDIARY POLICY ACTOR"

This contribution relies on the above-mentioned theoretical distinction between the EU acting as a subsidiary policy actor,[9] that is, stepping in when national regulators fail, and the EU acting as a primary policy actor, that is, pursuing an autonomous normative agenda also in policy areas where Member States are capable of acting autonomously. Authoritative scholarship commonly views national regulators as failing when the phenomenon to be regulated has a transnational dimension. This can be the case, for instance, when local phenomena have transnational effects which spill over beyond national borders. Foreign citizens and companies, whose interests are jeopardised by such spillover effects, are affected by policy decisions in a constituency where they do not enjoy having formal representation within domestic democratic regulatory procedures. A classic example is that of local manufacturing activities which

[5]The interest in comparing the internal market and the Area of Freedom, Security and Justice, of which the EU Area of Criminal Justice is a part, emerges clearly from L. Azoulai, 'The Complex Weave of Harmonisation', in D. Chalmers and A. Arnull (eds.), *The Oxford Handbook of European Union Law* (Oxford University Press, 2015), 590.

[6]The Treaty explicitly grants harmonisation (referred to as approximation) competence in a fairly limited number of areas which include, next to the internal market, indirect taxation (Article 113 TFEU), civil matters (Article 81 TFEU), criminal matters (Article 82 and Article 83 TFEU)—the object of the discussion here—and environmental protection (Article 192 TFEU). The legal basis for consumer protection admits harmonisation but envisages this to be made on the internal market legal basis (Article 169 TFEU). There are then a number of legal bases which do not explicitly mention harmonisation but use a different language such as setting common rules or minimum rules and do not explicitly rule out harmonisation. These concern rules designed to prohibit discrimination on grounds of nationality (Art 18 TFEU), citizenship rights (Article 21 TFEU), common agricultural policy (Article 43 TFEU), asylum policy (Article 78 TFEU), immigration policy (Article 79 TFEU), transport policy (Articles 91 and 100 TFEU), public undertaking (Article 106 TFEU), social policy (Article 153 TFEU) and equal treatment of men and women (Article 157 TFEU). For a discussion of the extent of EU harmonisation competences, see Azoulai, n. 5, 590–591.

[7]The debate about the function of harmonisation is therefore part of a wider and grander debate about the function of the EU itself. See S. Weatherill, 'Why Harmonise?', in T. Tridimas and P. Nebbia (eds.), *European Union Law for the Twenty-First Century*, Vol. 2 (Hart, 2004), 11, 12. As a confirmation that harmonisation is an intrusive strategy, it should be noted that the Treaty explicitly excludes it in certain policy areas where it wishes to preserve Member States' regulatory autonomy. According to Art 2(5) TFEU, in all areas where the Union has competence to support, coordinate or supplement the actions of the Member States (health protection, industry, culture, tourism, education, vocational training, youth and sport, civil protection and administrative cooperation), but also combat against discrimination (Article 19(2) TFEU), integration of third country nationals (Article 79(4) TFEU), crime prevention (Article 84 TFEU), employment (Article 149 TFEU), specific actions related to social policy (Article 153), harmonisation is excluded.

[8]See, among others, Weatherill, n. 7, 11, or A. Sayde, 'One Law, Two Competitions: An Enquiry into the Contradictions of Free Movement Law', (2010–2011) 13 *Cambridge Yearbook of European Legal Studies*, 365, or R. Schütze, 'Limits to the Union's 'Internal Market' Competence(s)', in L. Azoulai (ed.), *The Question of Competence in the European Union* (Oxford University Press, 2014), 215. For a conceptualisation of internal market law and its interaction with EU labour law, see P. Syrpis, *EU Intervention in Domestic Labour Law* (Oxford University Press, 2007).

[9]The expression of the EU acting as subsidiary *regulator* can be found in M. Kumm, 'Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union', (2006) *European Law Journal*, 503, 524. The expression "subsidiary policy actor" is here used in a broader sense and in the framework of an original conceptualisation.

have a polluting impact beyond national borders. National regulators are believed to be structurally biased against these interests. Regulation by the EU, which does not have such structural bias, would arguably correct this failure.[10] In this case, EU regulation can also act as a democracy-enhancing tool. It ensures that regulatory action is the outcome of a weighting of all interests at stake, of both national and EU citizens.[11]

But a transnational dimension also exists when phenomena occur on a large scale, affecting the territory of several Member States, which are then unable to tackle them effectively alone. In this case it is not just the interests of selected foreign citizens that are at stake, but also general interests shared by members of several polities.[12] EU action would correct this efficiency failure and tackle what is commonly referred to as a collective action problem.[13] Examples include coordinating responses to climate change, welcoming and supporting the settlement of a large influx of asylum seekers, or creating a level playing field to smooth cross-border economic transactions in a fair competition environment.

An exception, however, to this association of EU subsidiary policy action to a transnational phenomena is when supranational interests are at stake. These are interests belonging to the EU, which national regulators are likely to disregard because of their supranational character. The classic example is that of EU financial interests. National regulators, as well as administrative and prosecutorial apparatuses, have an interest in investing resources to protect their national budget, whereas they would consider protecting the EU budget a secondary priority.[14] In setting up regulatory standards and enforcement systems to protect such interests even in the absence of a transnational dimension—that is, even if the relevant conducts do not affect more than one State—the EU would still act as a subsidiary policy actor. It would step in to safeguard specific interests which won't be protected at the national level, not because of incapability, but due to unwillingness.

When EU Member States are not faced with such regulatory failures but the EU nonetheless steps in, the EU is arguably acting as a primary policy actor. EU Member States might have already regulated a certain phenomenon, possibly in a divergent manner. By intervening, the EU would *re-regulate*[15] the relevant policy area, overriding the various national preferences.[16] To be sure, even when the EU acts as a subsidiary regulator, normative choices are made on the single provisions included in the EU regulatory instruments, and re-regulation happens. For instance, when harmonisation of product manufacturing standards is pursued for the sake of creating a level playing field and ease of transactions, naturally a choice as to what standards should be the common ones is made.[17] And eliminating regulatory failures, and therefore legislative differences, via harmonisation is a normative choice in itself.[18] However, the conceptual difference between the EU as a subsidiary and as a primary policy actor lies in the original rationale

[10]This argument can be found in C. Joerges and J. Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology', (1997) 3(3) *European Law Journal*, 273, 292–293. On this, see also M. Maduro, 'Reforming the Market of the State? Article 30 and the European Constitution: Economic Freedom and Political Rights', (1997) 3(3) *European Law Journal*, 55. Somek also recalls that Habermas too has invoked this justification for EU action, J. Habermas, 'Solidarität jenseits des Nationalstaats. Notizen zu einer Diskussion', in J. Beckert et al. (eds.), *Transnationale Solidarität: Chancen und Grezen* (Campus, 2004), 225, 234, quoted in A. Somek, 'The Argument from Transnational Effects I: Representing Outsiders through Freedom of Movement', (2010) 16(3) *European Law Journal*, 315, 316. See, however, *contra*, Kumm, n. 9, who argues that national legislation would not disregard the interests of foreign citizens, but in fact the national regulatory process would be skewed in favour of those foreign citizens who are economically active and mobile, that is, willing to relocate. In a context of regulatory competition, national legislators would adopt legislation which is favourable to this group of people. This is equally considered a regulatory failure that EU action, issued from a democratic process where all interests are given due weight, would come and correct.

[11]Joerges and Neyer, n. 10. For a slightly more nuanced position, see Somek, n. 10, who claims that also virtual representation, as opposed to actual democratic representation, is sufficient to ensure such transnational interests are given sufficient weight in national democratic processes. He also points out that one can make the argument in favour of EU action being needed to avoid that national regulatory process unduly affecting foreign citizens' interests regardless of whether said interest-holders are keen to see their interests represented or not, that is, regardless of democratic concerns.

[12]Maduro refers to these interests which citizens of each polity have as 'cross-national interests'. These are said not to be tainted by national biases, so it is not a failure of the national democratic process which is at stake here. Maduro, n. 10, 78–79.

[13]This is the key argument developed by Kumm, n. 9.

[14]This argument is the key one for justifying EU criminal law to protect EU financial interests and will be further discussed in the next section.

[15]On the EU as a re-regulator, see Azoulai, n. 5, 599.

[16]On overriding national preferences, see Kumm, n. 9, 520, arguing the EU should not be 'substituting its own substantive judgement of the wisdom or the fairness of Member States policy choices'; or Somek, n. 10, arguing that a supranational authority cannot have as its task to promote substantive policies for the sake of it.

[17]On the inherent normative dimension of harmonisation, see extensively I. Wieczorek, *The Legitimacy of EU Criminal Law* (Hart, 2020), Chapter 3. See also L. Tsoukalis, 'The JCMS Lecture: Managing Diversity and Change in the European Union', (2006) 44(1) *Journal of Common Market Studies*, 5, 8.

[18]On this, see Syrpis, n. 8, 13.

driving the push towards supranational regulation. In the first case, the EU steps in because national regulators have failed, and in the course of EU regulatory action specific normative choices are made. In the second case, the EU acts to pursue the said normative agenda in the first place regardless of the impact and drawbacks of national regulatory processes. Admittedly, as with any abstract conceptualisation, this too has its limitations, and the two rationales can of course co-exist. Indeed, De Witte speaks in this context of a regulatory mix between different aims which results from different political compromises.[19] However, a difference between the two approaches can be appreciated when looking at where the centre of gravity in terms of rationale for the adoption of the measure sits.

Evidence of understanding the EU as being only "a subsidiary policy actor" can be found in several key provisions of the Treaties, which directly or indirectly limit EU action to cross-border matters. These limitations can operate 'upstream', namely identifying the areas in which the EU can regulate. These would be policy areas where legal and physical persons' behaviours, or behaviours' effects, are more *likely* to be cross-border. In this case we speak of 'legal cross-borderness' as a criterion limiting EU action because there is an assumption of material cross-borderness—explained below—made by the law.[20] But these limitations can also operate further down the line and require EU law to be designed to *apply* when there is a cross-border element in practice, that is, when a person, a human activity, or a sum of money actually crosses a border. In this case, EU law's application is predicated on what can be defined as 'material cross-borderness'.[21] These two criteria can be fluid, and it can be hard to distinguish where a policy area or specific situation fits in. In particular, legal cross-borderness has an inherent element of uncertainty as it requires one to look, a priori, at the *likelihood* of a transnational dimension. One has to assess whether the given area is interested in a statistically significant manner by a high level of 'transnational activity'. What this means is that this criterion is only as stringent in defining whether EU action should regulate a certain policy area as the evidence brought about to substantiate the forecast of actual material cross-borderness.[22] However, these doubts aside, the assumption in this contribution is that when the Treaty requires the EU to act within the boundaries of legal and material cross-borderness, it conceives the EU as a subsidiary policy actor. Whereas when the EU is granted a wider range of action—that is, to regulate and implement its policies in areas which statistically feature little to no transnational dimension and apply in practice to internal situations—the assumption is that it is conceived as a primary policy actor.

The most evident manifestation of EU constitutional law envisaging the subsidiary policy actor model for the EU is the homonym principle of subsidiarity as enshrined in Article 5(3) TEU. The principle establishes that EU action is justified when the proposed action cannot be sufficiently achieved by Member States, but would rather by reason of the *scale* or *effects* be better, that is, more efficiently, achieved at the Union level. The emphasis on scale and effect maps onto the definition of phenomena with a transnational dimension listed above. And indeed, the Amsterdam Protocol on Subsidiarity makes an explicit reference to legal cross-borderness when it lists the transnational nature of the conduct at stake as an indicator of the need for EU regulatory action.[23]

Looking beyond subsidiarity, Treaty provisions on the internal market—the quintessential field of EU action—can also be said to be originally underpinned by an understanding of the EU as a subsidiary policy actor, whose range of

[19]See, for a detailed discussion on the complex dynamics of market and non-market rationales intertwining, B. de Witte, 'A Competence to Protect: The Pursuit of Non-market Aims through Internal Market Legislation', in P. Syrpis (ed.), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press, 2012), 25.

[20]The expression 'legal cross-borderness' is taken from A. Arena, 'The Wall around EU Fundamental Freedoms: The Purely Internal Rule', (2019) 38(1) *Yearbook of European Law*, 153. It is here however used in a slightly different conception. Arena defines 'legal cross-borderness' as indicating the ability of a State measure to produce effects beyond that State's borders. In this context it is intended in a broader sense, namely not only encompassing State measures that regulate cross-border situations but also State measures that are *likely* to regulate cross-border situations, namely whose adoption is predicated on the assumption that the relevant policy area might be cross-border.

[21]The terminology of material cross-borderness is taken from Arena, who defines it as the presence of inter-state elements in a given set of facts; Arena, n. 20, 156.

[22]See also the discussion on the difficulty of narrowing down legal cross-borderness in the next and third section.

[23]Protocol annexed to the Treaty of the European Community (consolidated in Amsterdam)—Protocol on the application of the principles of subsidiarity and proportionality [1997] OJ C340/105. While this specific mention has not been reproduced in the current Lisbon version of the protocol, the Commission has declared that it will still rely on them (Report from the Commission on Subsidiarity and Proportionality, COM(2011) 344 final, 2), and the Court has defined them as an authoritative guidance, Case C-491/01, *The Queen v. Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECR I-11453, para. 178.

action is limited by legal and material cross-borderness. Article 114(1) TFEU grants to the EU the power to adopt harmonised standards to the extent that these pursue as their objective the establishment and functioning of the internal market. The assumption is that a regulatory level playing field—which only the EU can achieve—is necessary to ease *cross-border* economic transactions leading to a market without national barriers. The implication appears to be that EU regulatory action should be limited to those areas where cross-border economic activity is likely to take place. EU action is thus in principle limited by legal cross-borderness. Similarly, the Treaty free movement provisions are conceived as applying to *mobile* economically active citizens,[24] or citizens engaged in *transnational* economic activities,[25] *mobile* goods,[26] and *mobile* capitals.[27] Their application thus is predicated on material cross-borderness. This is corroborated by the CJEU's case law regarding the four free movements, whereby material cross-borderness is, in principle, the main criteria applied by the Court to determine whether the relevant Treaty provisions apply in practice. This has come to constitute one of the main tenets of negative integration through mutual recognition in the absence of harmonisation.[28]

When EU competence in the EU Area of Criminal Justice was later introduced, this was underpinned, at least to an extent, by a similar understanding of the EU as a secondary policy actor. Admittedly, even before Maastricht, EU law could have, and had, an impact on national criminal justice systems. Free movement provisions could have decriminalisation effects on national provisions.[29] Furthermore, the Court of Justice had introduced *sanctioning* obligations for Member States providing some indications on when such obligations could and should amount to criminalisation obligations.[30] However, it seems fitting to focus our analysis of the EU understanding of its role in criminal justice matters on the competences which grant to it *explicit* powers in the area.

Looking at EU competences and the policy discourses that surrounded them, one can appreciate how, since Maastricht, the EU Area of Criminal Justice developed along three streams. In each of these, strong emphasis was put on, among other aspects, the need for EU action to fight cross-border crime. To this aim, instruments and agencies regulating and supporting inter-state judicial and police cooperation have been introduced (first stream). Secondly, EU competence to harmonise the definition of crimes has been introduced (second stream). EU harmonisation has often been justified on the basis of the need to create a level playing field to facilitate such judicial and police cooperation. It followed from this reasoning that harmonisation would therefore have to focus on areas of cross-border crime. It will be seen that such focus has partially been corrected with the Lisbon Treaty. Finally, the competence of the EU to regulate individuals' rights on criminal procedures introduced with Lisbon (third stream) also considers harmonisation in the area to be justified only if it supports judicial cooperation. Moreover, it establishes that EU action in the area needs to focus only on cross-border matters.

However, despite these constitutional premises, the history of EU legislation in the field of the internal market has proved that the link between harmonising measures and the cross-border market-making objective has been broadly interpreted by the legislators and by the Court of Justice. The boundaries of the concept of 'internal situation' have also been significantly blurred in the Court's case law. Briefly, the EU seems to have increasingly relied on Article 114(1) TFEU to venture into policy areas where there is little evidence of cross-border economic activity and to have the EU regulate factual situations with no cross-border elements. As anticipated,

[24]Article 45 TFEU et seq.

[25]Articles 49 TFEU et seq. and 56 TFEU et seq.

[26]Article 34 TFEU et seq.

[27]Article 63 TFEU et seq.

[28]See, famously, Case 120/78, *Cassis de Dijon*, ECLI:EU:C:1979:42. See on this topic, J. Pinder, 'Positive and Negative Integration: Some Problems of Economic Union in the EEC', (1968) 24 *World Today*, 88. G. Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (Oxford University Press, 2005), 143–161.

[29]For a detailed account of the impact on internal market case law on a national criminal case, see S. Miettinen, *Criminal Law and Policy in the European Union* (Routledge, 2nd edn, 2014), 123–132.

[30]Case C-50/76, *Amsterdam Bulb BV v. Produktschap voor Siegewassen* [1977] ECI I-137, and Case C-68/88, *Commission of the European Communities v. Hellenic Republic* [1989] ECR I-2965. On these sanctioning obligations and the early history of EU criminal law, see J. Vervaele, 'Harmonised Union Policies and the Harmonisation of Substantive Criminal Law', in A. Weyembergh and F. Galli (eds.), *Approximation of Substantive Criminal Law in the EU: The Way Forward* (Editions de l'Université Libre de Bruxelles, 2013), 43.

these trends are but accentuated in the EU Area of Criminal Justice, with the EU acquiring a more pronounced role as an EU primary policy actor. Among other things, the link between cooperation and harmonisation has been significantly attenuated; and the reach of procedural rights has unequivocally expanded to purely internal situations. The next two sections develop this argument further, comparing the developments in the two policy areas.

3 | THE CHALLENGES TO LEGAL CROSS-BORDERNESS

The challenges to legal cross-borderness in the field of the internal market can be appreciated in the evolving interpretation of Article 114(1) TFEU. There are early legislative initiatives which regulated areas where transnational economic activity was unlikely and followed an independent normative agenda.[31] Examples are the 'Doorstep Selling' Directive[32] and the 'Bathing Water' Directive.[33] Over the years, a growing body of EU law on, among other things, consumer protection was adopted on the basis of Article 114(1) TFEU. This created intellectual momentum and an inevitable desire to impose intellectual order and pursue an independent and fully-fledged normative agenda.[34] The Court made a first attempt to rein in these developments in the *Tobacco Advertising* case,[35] stressing the need for a link with the market. But it then admitted a wide role for non-market aims in *Swedish Matches*.[36] Several pieces of EU internal market legislation were subsequently adopted and upheld by the Court, despite a doubtful link to the market and the strong pre-eminence of non-market-related aims.[37] These include legislation in the field of, among other things, public health,[38] consumer protection,[39] and also animal welfare[40] and crime prevention.[41] *Tobacco Advertising* has thus been defined as an exception to the rule.[42]

Admittedly, this legislation adopted on the basis of Article 114(1) TFEU still formally acknowledged a link with market-making.[43] However, the progressive attenuation of the relevance of such links questions whether the pendulum has swung. Is the EU acting as a subsidiary policy actor supporting Member States in the cross-border market,

[31]Weatherill, n. 7, but also Somek, n. 10, 335. See for a discussion at the time G. Close, 'Harmonisation of Laws: Use or Abuse of the Powers under the EEC Treaty?' (1978) 3 *European Law Review*, 461.

[32]Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L 372/21.

[33]Council Directive 76/160/ECC of 8 December 1975 concerning the quality of bathing water [1976] OJ L 031/1, whose preambles 'give the political game' away, namely that the actual rationales of the two instruments were respectively consumers' and environmental protection. Weatherill, n. 7, 21.

[34]Weatherill, n. 7, 22.

[35]Case C-376/98, *Germany v. Parliament and Council* (Tobacco Advertising) [2000] ECR I-8419.

[36]Case C-210/03, *Swedish Match* [2004] ECR I-11893.

[37]For a detailed analysis of the relevant cases mentioned here and in general the case law post Tobacco Advertising, see S. Weatherill, 'The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law Has Become a "Drafting Guide"', (2011) 12(3) *German Law Journal*, 827.

[38]Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [2003] OJ L 152/16, on which see Case C-380/03, *Germany v. Parliament and Council*, 2006 ECR I-11573.

[39]Regulation 717/2007/EC of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC [2007] OJ L 171/32, on which see Case C-58/08, *Vodafone, O2 et al. v. Secretary of State*, judgment of 8 June 2010.

[40]Regulation 1007/2009/EC of the European Parliament and of the Council of 16 September 2009 on trade in seal products [2009] OJ L 286/36, on which see *Case* T-18/10R, *Inuit Tapiriit Kanatami et al. v. Parliament and Council*, order of 30 April 2010.

[41]Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L 105/54, on which see Case C-301/06, *Ireland v. Parliament and Council*, 2009 E.C.R. I-593. It is worth noting that the Court however did annul Decision 2004/496/EC based on the parent directive, Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, adopted on the internal market legal basis for being mainly aimed at crime prevention and not sufficiently connected to market-making.

[42]de Witte, n. 19, 28.

[43]de Witte lists Regulation 648/2004 on detergents and Regulation 1829/2003 on genetically modified food and feed as good examples of legislation where the legislators struck a good balance and spelled out both market and non-market rationales in the text; for full references, see also de Witte, n. 19, 38.

making normative choices only when necessary to avoid regulatory gaps?[44] Or is it acting as a primary policy actor surreptitiously relying on the internal market legal basis to pursue autonomous normative goals that are unrelated to market-making?[45]

One can appreciate similar challenges to legal cross-borderness in the EU Area of Criminal Justice. These are nonetheless amplified and part of a more complex evolution as a result of both EU secondary law and Treaty amendments. Admittedly, one should stress that the relevance of legal and material cross-borderness differs across the three streams of the EU Area of Criminal Justice. Legal cross-borderness is of particularly high relevance to the second stream of the EU Area of Criminal Justice, the harmonisation of definitions of crimes. The next two sub-sections focus on this stream only and discuss the weight given to this criterion in EU primary law (3.1) and in EU secondary law (3.2), with the aim of identifying the role envisaged for the EU as a policy actor.

Conversely, legal cross-borderness and material cross-borderness are uncontested as to the EU competence to adopt judicial cooperation instruments, such as the European Arrest Warrant[46] and the European Investigation Order,[47] which concern inter-state cooperation.[48] These thus deserve no further discussion. As far as EU agencies such as Eurojust and Europol are concerned—which are not regulatory bodies, but operational ones—legal cross-borderness is irrelevant. The question rather concerns their scope of application and the role for material cross-borderness, the object of the next section.

Finally, Article 82(2)b TFEU grants the power to the EU to harmonise individual rights in criminal procedures, to the extent that it is necessary to facilitate *mutual recognition* of judgments and judicial decisions, and police as well as *judicial cooperation* in criminal matters having *a cross-border dimension*. The reference to the cross-border dimension can hardly be interpreted as a reference to the type of areas or type of rights the EU should regulate. It would indeed be difficult to distinguish between individual rights which are relevant only to cross-border situations and rights which are not. The choice would be quite restricted.[49] In terms of 'cross-border rights' one could think only of the right not to be tried twice (Ne Bis in Idem) understood in its transnational fashion as applying across States, pursuant to Article 50 EU of the EU Charter; of the right to liberty of persons detained in extradition proceedings, which is defined differently by the ECHR from that of persons in pre-trial detention in national proceedings[50]; and possibly of one aspect of the right to a fair trial,[51] which is the right to translation and interpretation during criminal proceedings as being more relevant to cross-border proceedings. The mention of mutual recognition and the reference to criminal matters having a cross-border

[44]See the discussion in Section II as to the need for making normative choices when picking the desired harmonised standard to be imposed on national legal systems.

[45]See Weatherill, who argues that the EU is in fact doing both, relying on Article 114 TFEU for market-making purposes and borrowing it to pursue non-market aims, for want of a more adequate legal basis, Weatherill, n. 7, 11.

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

[47]Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters [2014] OJ L 130/1.

[48]This reasoning applies to all the EU legal instruments regulating extradition proceedings; mutual legal assistance in criminal matters; conflicts of jurisdiction; creation of joint investigation teams; exchange of information extracted from criminal records; execution in the EU of orders freezing property or evidence; mutual recognition of financial penalties, and of confiscation orders; transfer of the execution of custodial sentences, probation orders, of supervision measures alternative to detention and protection orders. Full references to these instruments can be found in Council of the European Union, General Secretariat of the Council, *European Union instruments in the field of criminal law and related texts*, Publications Office, 2020. https://data.europa.eu/doi/10.2860/154646.

[49]On the theme of 'transnational human rights', see S. Top and P. De Hert, 'Castaño Avoids a Clash between the ECtHR and the CJEU but Erodes Soering: Thinking Human Rights Transnationally', (2021) 12(1) *New Journal of European Criminal Law*, 52.

[50]For instance, Article 5(1)c ECHR lists a number of specific grounds for detention in remand in domestic proceedings including for the purpose of bringing a person before the competent legal authority on reasonable suspicion of having committed an offence, or when it is reasonably considered necessary to prevent reoffending or flight. Article 5(3) ECHR also establishes time limits to detention in remand in requiring the person to be brought *promptly* before a judge and having a trial within a reasonable time. These substantive requirements, and the annexed time limit requirement, do not exist under Article 5(1)f ECHR, which regulates detention of persons against whom action is being taken towards extradition, and therefore are necessarily pertinent to cross-border crimes. Extradition proceedings need only to be carried out with due diligence, see *Khlaifia and Others v. Italy* App. 16,483/12 (ECHR, 15 December 2016), para. 90.

[51]Article 47(2) EU Charter.

dimension must thus be interpreted as providing indications as to the scope of application of EU procedural rights law, setting material cross-borderness as a limiting criterion. This is not included in this section and will be discussed in the next one.

3.1 | Legal cross-borderness as a limit to EU criminal law: EU primary law

Before digging into the analysis, this section provides a brief theoretical framework of how to interpret the language of Treaty norms and policy documents to assess the role envisaged for the EU. The key factor to look at is whether EU action is formally limited by legal cross-borderness. In some contexts, however, reference to the role of the EU might be rather indirect. It is therefore useful to look at the different rationales which justify EU action in addressing either cross-border or non-cross-border crimes.

As previously mentioned, legal cross-borderness is a prospective judgement of how likely a certain policy area is to be interested in cross-border activity. Assuming that this assessment can be carried out with sufficient precision, it is undoubtable that cross-border crime is difficult for Member States to tackle autonomously. EU action is needed, and that qualifies its role as a subsidiary one. Following the theoretical framework sketched in the second section, one can say that this might be due to the *scale* of the crimes which requires inter-state cooperation, and thus also a harmonised level playing field of definition of crimes.[52] This will be referred to as the 'cooperation rationale' for harmonisation.[53] The rationale can be interpreted in both narrower and broader ways. A narrow way would see it applying to the need for cooperation to disrupt those crimes perpetrated through international networks scattered across Europe. A broader reading would be to consider cooperation, and therefore harmonisation, as necessary to combat any crime perpetrated online, due to the borderless nature of the cyberspace.[54] But it could also be stretched to cover any crime. Indeed, if the suspects flee abroad, there is automatically a cross-border dimension and a need to cooperate to apprehend them and bring them to justice. This broad understanding of the cooperation rationale is also referred to as the '(prevention of) forum shopping rationale'.[55] Such a broad reading, however, risks watering down the selective potential of the cooperation rationale. This blurs the boundaries between genuinely subsidiary EU action and de facto EU primary policy action.

EU action establishing a harmonised criminalisation level across Europe might also be necessary to counteract locally perpetrated crimes which have cross-border *effects*. This is for instance the case with environmental crimes, affecting the interests of foreign citizens which national regulators might be inclined to neglect. This will be referred to as the 'externalities rationale' for harmonisation of definitions of crimes.[56] In this case, the EU would clearly be acting as a subsidiary policy actor.

[52]This argument is normally built up of three sub-arguments. Harmonisation can smooth cooperation to the extent that it reduces the chances cooperation would be refused on the basis of double criminality; it ensures a more uniform understanding of the scope of action of judicial cooperation actors; it can help foster mutual trust. For a more detailed discussion of each of these aspects and full references to the scholarly debates, see I. Wieczorek, n. 17, 87.

[53]A. Weyembergh, *L'harmonisation des législations: condition de l'espace pénal européen et révélateur de ses tensions* (Editions de l'Université de Bruxelles, 2004), 139–176; J.R. Spencer, 'Why Is the Harmonisation of Penal Law Necessary?', in Klip and van der Wilt (eds.), *Harmonisation and Harmonising Measures in Criminal Law* (Koninklijke Nederlandse Akad. van Wetenschappen, 2002), 43, 47; U. Sieber, 'The Forces behind the Harmonisation of Criminal Law', in M. Delmas-Marty, M. Pieth and U. Sieber (eds.), *Les Chemins de l'harmonisation pénale* (Société de Legislation Comparé, 2008), 385, 393 ff.

[54]L. Arroyo Zapatero and M. Munoz de Morales Romero, 'Droit pénal européen et Traité de Lisbonne: le cas de l'harmonisation autonome (Article 83.1 TFEU)', in G. Giudicielli-Delage and L. Christine (eds.), *Le Droit Pénal de l'Union Européenne au Lendemain du Traité de Lisbonne* (Société de Législation Comparée, 2012), 113, 129.

[55]G. Vermeulen, 'Where Do We Currently Stand with Harmonisation in Europe?', in Klip and van der Wilt, n. 53, 73. The expansive potential of the forum shopping argument is well illustrated by a 2015 Greek-Italian case, where 5 European Arrest Warrants were issued by Italy against Greek citizens for the crimes of aggravated resistance and looting. These crimes at first sight do not appear traditional cross-border crimes. However, on the facts of the cases the cross-border element was determined by the fact that the Greek suspects had returned to Greece, which had a different definition of the relevant crimes. They had thus effectively 'forum shopped'. This created an obstacle to cooperation and therefore they were not surrendered to Italy as Greek authorities argued this would violate double criminality. One could say that a harmonised definition of these crimes would have prevented the suspects from effectively 'forum shopping'. For a discussion of the case and detailed references, see A.E. Kouroutakis, 'The Italian European Arrest Warrants for the Five Greeks Taking Part in Riots and Their Rejection by the Greek Authorities', (2016) 7(3) *New Journal of European Criminal Law*, 295.

[56]This terminology is borrowed from internal market literature, as this rationale is not traditionally conceptualised as such in EU criminal law literature.

Conversely, if the EU regulates non-cross-border areas of crime, where its action is in principle not required and Member States can act alone, it can be presumed that it is acting as a primary policy actor. That is, it imposes harmonised definitions of crimes following a normative assessment of what should represent a crime in all Member States. This will be referred to as the 'normative rationale'.[57] A variation, or a heightened form, of this rationale is what can be referred to as an 'identity-building' or 'socialising' rationale. This is when the EU criminalises behaviours that affect important values with the aim of building the identity of the EU as a defender of said values. Or it can be to generally spread a sense of community and of justice among EU citizens stemming from the fact that the same values are protected within the whole EU territory.[58]

There is one exception, though: the already mentioned scenario of the EU acting to protect EU interests, such as EU financial interests. In this case, even if the EU is targeting areas of crimes or behaviours which are not cross-border, it is acting as a subsidiary policy actor. National regulators are inclined to disregard exclusively EU interests, as opposed to shared interests, such as a general interest in security. The EU must therefore step in.[59]

Finally, an EU harmonised definition of crimes can also be justified to the extent that criminal sanctions can help secure the effective enforcement of EU policies.[60] This can be referred to as the 'effectiveness' rationale, and it has varied implications for the role of the EU as a policy actor. If the original substantive EU policy regulates cross-border areas, where EU subsidiary action is needed, the same can be said for EU criminalisation. Equally, if EU original action follows an independent normative agenda, regulating criminal justice responses to non-cross-border crimes, regardless of national regulatory failure, this will a fortiori be the role it plays as a criminal justice actor.

Turning now to the analysis of EU primary law and EU policy documents, it is here argued that, initially, the Treaty put a strong emphasis on the cooperation rationale. However, throughout the years a combination of Treaty amendments and secondary law progressively watered down its importance, and that of legal cross-borderness more generally. More weight has been given to the effectiveness and, importantly, normative rationales. While not fully ruling out a role for legal cross-borderness and the consequent role for the EU as a secondary policy actor in this field, these evolutions have significantly challenged it. In more detail, the Maastricht Treaty did not include any specific competence for the EU to harmonise national criminal law. It simply listed judicial and police cooperation for the purpose of combating serious forms of *international* crime.[61] Harmonisation made its way into the Treaty only with Amsterdam. In listing the tools to fight crime, the TEU included first police cooperation and judicial cooperation, but it added as a last option approximation, where necessary, of rules on criminal matters in the Member States.[62] This wording was interpreted as envisaging a cooperation rationale for EU harmonisation.[63] The Vienna Action Plan,[64] and the Tampere[65] and Hague[66] multi-annual programmes also strongly connected harmonisation to judicial cooperation with the implication that the focus should be on cross-border crimes. The approach was partially

[57]Weyembergh, n. 53, 179–181; I. Wieczorek, n. 17, 85.

[58]Weyembergh, n. 53, 186, and Spencer, n. 53, 51; for further discussion on the socialising and identity-building potential of EU criminal law, see J.I. Turner, 'The Expressive Dimension of EU Criminal Law', (2012) 60 *American Journal of Comparative Law*, 555; C. Sotis, '"Criminaliser sans punir." Reflexions sur le pouvoir d'incrimination (directe et indirecte) de l'Union européenne prévu par le traité de Lisbonne', (2011) 4 *Revue de Science criminelle et de droit pénal comparé*, 773.

[59]A good example is the protection of the EU budget, an interest protected by the Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud in the Union's financial interests by means of criminal law [2012] OJ L 198/29. This is defined as a 'a solidarity interest at Union level, which is different from the sum of the Member States' national financial interests by nature and from the start, placed at Union level', PIF Directive Impact Assessment (Commission Staff Working Paper Impact Assessment (Part I) Accompanying the document Proposal for a Directive of the European Parliament and of the Council on the protection of the financial interests of the European Union by criminal law (SWD (2012) 195 final)), 27–28.

[60]This rationale has been extensively explored after it was constitutionalised by the Lisbon Treaty in Article 83(2) TFEU. See, for an extensive discussion of treaties, ceteris paribus, J. Öberg, *Limits to EU Powers: A Case Study of EU Regulatory Criminal Law* (Hart, 2019).

[61]Articles K.1.7 and K.1.9 of the TEU (consolidated in Maastricht).

[62]Article 29 TEU (consolidated in Amsterdam).

[63]Weyembergh however observes that by acknowledging harmonisation formally in the Treaty, the Amsterdam Treaty opened the door for harmonisation as an autonomous strategy of integration, independent from cooperation. A. Weyembergh, 'Introduction', in Weyembergh and Galli, n. 30, 11.

[64]Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice [1999] OJ C 190/1, parts 17 and 18.

[65]European Council, The Hague Programme—Strengthening Freedom, Security and Justice in the European Union [2005] OJ C 53/1, part 33.

[66]European Council, The Hague Programme—Strengthening Freedom, Security and Justice in the European Union [2005] C 53/1, part 3.3.2.

modified with the Lisbon Treaty. The first paragraph of Article 83 TFEU includes a specific reference to legal cross-borderness when limiting EU harmonisation only to *serious* and *cross-border* crimes as resulting from the nature or impact of such offences or from a special need to combat them on a common basis. The reference to serious crime arguably hints in the direction of a normative rationale, if one measures seriousness on the basis of the harm the relevant crime causes. The reference to cross-border crime is more articulated and hints in the direction of several rationales. The mention of the 'nature of crimes' could refer to the scale of the crimes, for instance, if perpetrated through a transnational criminal network or online. It therefore hints at the cooperation rationale. It should be noted, nonetheless, that the position of Article 83 TFEU in the Lisbon Treaty,[67] and its drafting history,[68] suggest that the link with cooperation has been attenuated. Moreover, the fact that a rationale for harmonisation is enshrined in the EU competence for harmonisation of individuals' rights, but not in that for harmonisation of definitions of crimes, militates in favour of understanding the latter as independent from cooperation needs. Finally, while this has not been explicitly stated by the Court of Justice, AG Pikamäe confirmed this interpretation.[69] The Stockholm Programme,[70] and the EU Criminalisation policy documents adopted by the Council,[71] the Commission[72] and the Parliament,[73] discussing and interpreting the Lisbon competence, similarly reduced their emphasis on the cooperation rationale[74] and introduced an autonomous role for the normative rationale of harmonisation.[75] This opens the door to a role for the EU as a primary policy actor. The second requirement as to the definition of legal cross-borderness—impact—might refer to the effects of criminal conduct, and thus the 'externalities' rationale. This would imply a subsidiary understanding of the role of the EU. The third one, the 'need to combat them on a common basis', is a catch-all expression which is open to various interpretations. Arroyo Zapatero and Munos de Morales Romero interpret it as referring to the cooperation rationale,[76] whereas Turner connects this limb of the provision to the identity-building and socialising rationale. There would be a need to combat crimes on a common basis when this would help build an EU identity.[77] This would acknowledge a role for the EU as a primary policy actor. Arguably, one can also include under this requirement all rationales that are difficult to fit in under the previous two. For instance, if one were to disagree that crimes that are cross-border in light of their nature would also include online crimes, or crimes that are cross-border because suspects forum shop, one could still justify EU action in these two latter cases on the basis of this

[67]Harmonisation of substantive criminal law has a legal basis specifically devoted to it in the Treaty, and it is not just relegated to a paragraph of the provision on judicial cooperation as occurred in Amsterdam.

[68]The Final Report of Working Group X on "Freedom Security and Justice" involved in the debates for the work of the Convention on the Future of Europe had called for further consideration of the explicit inclusion of the 'cooperation rationale' for harmonisation of the definition of crimes in the text of the Treaty. It suggested adding a competence to harmonise substantive criminal law, which includes crimes' definitions, 'when approximation is required to generate sufficient mutual confidence to enable the full application of mutual recognition of judicial decisions or to guarantee the effectiveness of common tools for police and judicial cooperation created by the Union'. CONV 426/02, Brussels, 2 December 2002, WG X 4. The fact that the Treaty drafters decided not to include it in the current version of the provision suggests that the Lisbon framework envisages harmonisation as partially autonomous from cooperation.

[69]AG Opinion, Joined Cases C-845/19 and C-863/19, *Criminal proceedings against DR and TS*, ECR—General, parts 31–34.

[70]European Council, The Stockholm Programme—An open and secure Europe serving and protecting citizens [2010] OJ C 115/1 (hereinafter, Stockholm Programme).

[71]Council of the European Union, Council Conclusions on model provisions, guiding the Council's criminal law deliberations, JHA Council, 30 November 2009, published in Weyembergh and Galli, n. 30, 226 (hereinafter, 2009 Council Conclusions).

[72]European Commission, 'Towards an EU Criminal Policy: Ensuring the Effective Implementation of EU Policies through Criminal Law', COM(2011) 573 final (hereinafter, 2011 Commission Communication).

[73]European Parliament, Resolution of 22 May 2012 on an EU approach to criminal law, P7_TA(2012)0208, A7–0144/2012 (hereinafter, 2012 Parliament Resolution).

[74]The cooperation rationale is mentioned at part 3.3, part 3.1.1 of the Stockholm Programme—although the relation between cooperation and double criminality is problematised (part 3.3.1)—in the Introduction of the 2011 Commission Communication also in the form of the forum shopping argument, at part 7 of the 2012 Parliament Resolution.

[75]The Stockholm Programme recalls that '[c]riminal law provisions should be introduced when they are considered essential in order for the interests to be protected and, as a rule, be used only as a last resort' (part 3.3.1). Then the 2009 Council Conclusions speak of criminalisation, rather than harmonisation, do not mention cooperation and establish that criminal law should be used only to safeguard important interests (Heading 1, part 1). The 2011 Commission Communication put emphasis on the stigmatising character of criminal law and the need to respect general principles of criminal law (part 2.2) and insists EU criminal law should be used only for serious crimes (third section of the document). The 2012 Parliament resolution insists on the need to use criminal law only to sanction conduct causing pecuniary and non-pecuniary damage (part I).

[76]Arroyo Zapatero and Munoz de Morales Romero, n. 54, 127.

[77]J.I. Turner, 'The Expressive Dimension of EU Criminal Law', (2012) 60 *American Journal of Comparative Law*, 555, 575.

catch-all third limb of Article 83(1) TFEU. Briefly, legal cross-borderness is defined in such a broad manner that it is allowed to encompass scenarios in which EU action also spills over into a primary policy actor role.[78]

Finally, legal cross-borderness is not reproduced, not even in such a diluted form, in the second paragraph of Article 83 TFEU.[79] The provision introduces a new competence to adopt EU criminal law justified on an effectiveness rationale which—it was said—can have varied implications in terms of a subsidiary or primary role for the EU.

Briefly, the EU constitutional law picture is quite complex. It is clear, however, that the role of the EU has evolved beyond that of a purely subsidiary actor. The trend can also be appreciated in secondary law, possibly at a faster speed than in EU primary law.

3.2 | Legal cross-borderness as a limit to EU criminal law: EU secondary law

The EU has so far adopted 37 instruments including definitions of crimes. These cover protection of EU financial interests; counterfeiting of the euro; corruption; money laundering and confiscation; market abuse; a large number of offences belonging entirely or partially to the category Cybercrime, such as Attack Against Information Systems offences (CIA Offences), counterfeiting non-cash means of payment and child pornography; trafficking offences including trafficking in human beings, smuggling of persons and drug trafficking; terrorism; organised crime; racism and xenophobia; environmental crime and ship-source pollution.[80] In addition, the Commission has recently tabled a proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence[81] and for a Directive on environmental crime, updating existing legislation.[82]

Keeping aside EU legislation on financial crimes, where the role for the EU as a policy actor is easier to identify, an overview of the preamble of the remaining EU secondary law adopted on the basis of the Amsterdam competence and of Article 83 TFEU shows a very diverse picture of how the EU justifies its actions. While almost all instruments include a reference to the legal interests the relevant criminal law provisions protect,[83] legal cross-borderness does not always take a prominent role as a legitimating factor for EU criminal

[78]One should note it is equally argued that despite such a broad definition of legal cross-borderness in Article 83(1) TFEU, and the wide interpretation the EU legislators have done with it, see below, not all forms of cross-border crime are of EU interest that is legislated on. Marianne Wade gives the example of mass crimes perpetrated using Polish guns in Germany, or fraud to German pensions perpetrated from the Canary Islands, as crimes that have not triggered impetus for EU legislation. Wade, n. 4.

[79]Although even if formally not present in the Treaty, it was argued that if criminal law is used to support harmonisation in an area which is cross-border, then there is an implicit cross-border criterion in Article 83(2) TFEU. J. Öberg, 'Legal Diversity, Subsidiarity and Harmonisation of EU Regulatory Criminal Law', in E. Colson and S. Field (eds.), *EU Criminal Justice and the Challenges of Diversity* (Cambridge University Press, 2016), 106, 113.

[80]Full references to these instruments can be found in Council of the European Union, General Secretariat of the Council, *European Union instruments in the field of criminal law and related texts*, n. 48.

[81]Commission, 'Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence', COM(2022) 105 final.

[82]Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC, COM(2021) 851 final.

[83]See Recitals 6, 7 and 9 of the preamble to Council Framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the Euro [2000] OJ L 140/1, Recitals 1 and 2 of the preamble to Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the Euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA [2014] OJ L 151/1. Recital 10 of the preamble to the Joint Action of 22 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on corruption in the private sector [1998] OJ 358/2, Recital 9 of the preamble to the Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector [2003] OJ L 192/54. Recital 1 of the preamble Directive (EU) 2018/1637 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law [2022] OJ L 284/22, Recital 2 of the Council Framework Decision 2005/222/JHA Attacks against information systems [2005] OJ L 69/67, Recital 4 of the Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA [2013] OJ L 218/08, Recital 1 of the preamble to the Directive 2019/713 of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA [2019] OJ L 123/18, Recitals 8 and 9 of the Joint Action of 24 February 1997 adopted by the Council on the basis of Article K3 of the Treaty on the European Union concerning action to combat trafficking in human beings and sexual exploitation [1997] OJ L 63/2, Recital 20 of the preamble to the Council Decision 2000/375 of 29 May 2000 to combat child pornography on the Internet [2000] OJ 138/1, Recital 4 of the Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography [2004] OJ L 13/44, Recital 1 of the preamble to Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA [2011] OJ 335/1, Recital 3 of the

law. The preambles of the instruments on CIA offences include a detailed description of the cross-border nature of the crimes at stake and why harmonisation would help support cooperation.[84] The recent proposal on environmental crime also includes quite convincing arguments on the cross-border nature of the crimes.[85] It includes examples of cross-border environmental crimes, such as, for instance, trafficking in waste, and the consequent need for judicial cooperation.[86] Conversely, instruments on cybercrime, such as on child pornography, include inconsistent references to the cross-border nature of these crimes and the need for harmonisation to ensure smooth cooperation.[87] Similarly, instruments on trafficking offences and smuggling include scant reference to the cross-border dimension of the offences and the need for cooperation. They devote much more space to the interests these criminalisation instruments are meant to protect as a justification for their adoption.[88] The analysis suggests that the EU does not understand its role as one of exclusively a subsidiary actor supporting Member States in the fight against cross-border crime, but sees itself also as a strong normative actor developing a normative agenda.

This is not to say that the instruments mentioned above do not, in practice, concern areas of crime that are statistically cross-border. This could be the case for the cybercrime offences due to the borderless nature of the internet or for the trafficking offences. However, the lack of strong emphasis in illustrating the legal cross-borderness of the areas object of harmonisation would suggest a limited investment in this rationale for EU action, and in the consequent idea of the EU as merely a subsidiary regulator. At the same time, a number of EU harmonising instruments were indeed criticised for not having any actual harmonisation impact, such as in the case of drug trafficking[89] or racism and

Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings [2002] OJ L 203/1, Recital 1 of the Preamble to Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L 101/1, Recital 2 of the preamble to the Council Framework Decision of 13 June 2002 on combating terrorism [2002] OJ 164/3, Recitals 1 and 2 of the preamble to the Directive 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/67/JHA [2017] OJ L 88/6, Recital 1 of the preamble to the Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law [2008] OJ 328/55, Recital 1 of the Directive 2005/35/EC of the European Parliament and of the Council on ship-source pollution and on the introduction of penalties for infringements [2005] OJ L 255/11, Recital 1 of the preamble to the Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law [2008] OJ L 328/28.

[84]See Recitals 1, 8 and 16 of the preamble to Council Framework Decision 2005/222/JHA Attacks against information systems [2005] OJ L 69/67 and Recitals 1, 4 and 28 of the preamble to Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA [2013] OJ L 218/8.

[85]Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC, COM(2021) 85 final.

[86]COM(2021) 85 final, 3, see also Recitals 10 and 23 of the proposed text.

[87]For instance, the earlier texts on child pornography included some references to the need for judicial cooperation but did not emphasise the cross-border dimension of this type of crime (Recitals 3 and 14 of the Joint Action of 24 February 1997 adopted by the Council on the basis of Article K3 of the Treaty on the European Union concerning action to combat trafficking in human beings and sexual exploitation [1997] OJ L 63/2, Recital 7 of the Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography [2004] OJ L 13/44. The 2011 Directive does not include any particular emphasis on the cross-border nature of the crimes and the needs of cooperation (Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography and replacing Council Framework Decision 2004/68/JHA [2012] OJ L 26/1).

[88]The instruments on trafficking in human beings always put at the forefront that trafficking in human being is a serious human rights violation (Recital 3 of the Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings [2002] OJ L 203/1, and Recital 1 of the Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L 101/1). There is some emphasis on the need to ensure judicial cooperation in the Framework Decision (Recitals 2 and 7) and a limited one in the directive (Recital 5 mentions the need to ensure cooperation but does not link it to cooperation), but no discussion of the cross-border dimension of these crimes.

See Wade, insisting on the holistic character of the legislation on trafficking in human beings that proposes a much more comprehensive action that one might expect from an entity laying down rules and sentences and that goes beyond what negotiations were willing to stipulate in Treaty provisions. Wade, n. 4. The framework decision on smuggling does not mention the cross-border dimension nor the need for cooperation in this area (Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence [2002] OJ L 328/1), and the 2009 Directive mentions the need for cooperation but again no discussion of the cross-border nature of the crimes at stake (Recital 1, Directive/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [2009] OJ L 168/24). The 2004 Framework Decision on drug trafficking mentions the need for a common approach but does not justify it on the basis of the cross-border character of the behaviour and the needs for cooperation (Recital 3 Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking [2004] OJ L 335/8).

[89]R. Kert and A. Lenher, 'Content and Impact of Approximation: The Case of Drug Trafficking', in Weyembergh and Galli, n. 30, 169.

xenophobia.[90] This questions their added value in terms of supporting cooperation. Furthermore, the EU has been said to be pursuing a strong normative agenda to promote values it considers of high importance, especially in the field of racism and child pornography.[91]Finally, the recent discussion on the possibility of amending the Article 83(1) TFEU crimes list to include gender-based violence,[92] and the Commission proposal to criminalise such crimes, raises interesting questions as to whether the EU is, in fact, acting as a primary criminal justice regulator, and whether the EU legal framework allows for it. The Commission proposal defines the cross-border dimension of these areas of crime in very broad terms that refer to structural inequality, and it considers it a transversal phenomenon.[93] This is far from a technical understanding of cross-border crimes as those which are perpetrated across several states, for instance by an international organised crime network, mentioned above as the narrower reading of the cooperation rationale.[94] The approach in these proposals could be compared with that of the 114 TFEU directives which significantly stretched the market-making rationale to pursue in fact autonomous normative goals. In both cases, at first sight, legal cross-borderness seems to have been dispensed with, and with it, the confinement of the EU to the role of a mere subsidiary regulator.

However, again, even if this was not the argument of the Commission, gender-based violence could be considered cross-border if one were to embrace a broader understanding of legal cross-borderness. Rigotti observes that gender-based violence is being increasingly recognised by criminologist and feminist scholarship as part of a continuum between the online and offline world, where a specific culture and abuses occurring online spill over and trigger abuses offline.[95] This would account for an online dimension to these crimes, and thus an inherent transnational dimension. Incidentally, differences between the UK and Swedish definitions of rape—which is one of the crimes the Commission proposal includes—created considerable difficulties in the execution of a Swedish European Arrest Warrant in the highly mediatised Julian Assange case.[96] One could therefore argue, from a Swedish perspective, that a harmonised definition would have prevented Assange from 'forum shopping' and seeking refuge in the UK, where his actions were not considered a criminal offence. This is relevant for our discussion since, based on the interpretation of legal cross-borderness given above, if justified on these grounds, the proposal could have a stronghold on Treaty competence. It thus illustrates how broad the catch-all character of Article 83(1) TFEU can potentially be even in situations in which there is a clear autonomous normative agenda, unrelated to the EU role as only a subsidiary, gap-filling policy actor.

4 | THE CHALLENGES TO MATERIAL CROSS-BORDERNESS

Interestingly, the Court of Justice has taken an ambivalent approach to the relevance of material cross-borderness in the field of the internal market. The question of the scope of application of EU law has been raised both with respect to harmonising directives setting regulatory standards and with respect to free movement provisions which grant, among other things, individual rights. As to the first scenario, the Court was asked specifically about the scope of application of the provisions of the Services Directive defining the conditions for access to a service activity,[97] which

[90]Turner, n. 77, 571.

[91]S. Coutts, *Citizenship, Crime and Community in the European Union* (Hart, 2019), 201 ff.

[92]See C. Navarra, M. Fernades, N. Lomba and M.G. Munoz, Gender-based violence as a new area of crimes listed in Article 83(1) TFEU, European Added Value Assessment, European Parliamentary Research Service (2021) PE 662.640.

[93]European Added Value Assessment, n. 92, 35–36.

[94]See, for a more convincing reasoning on the cross-border nature of gender-based violence, which links it to the presence of a continuum between the online, cross-border world and the offline perpetration of these crimes, C. Rigotti, 'A Long Way to End Rape in the European Union: Assessing the Commission's Proposal to Harmonise Rape Law, through a Feminist Lens', (2022) 13(2) *New Journal of European Criminal Law*, 153, 169.

[95]Ibid. And see, there cited, L. Kelly, 'The Continuum of Sexual Violence', in J. Hanmer and M. Maynard (eds.), *Women, Violence, and Social Control* (London, Palgrave MacMillan, 1987), 58; O. Jurasz and K. Barker, 'Sexual Violence in the Digital Age: A Criminal Law Conundrum?', (2021) 22 *German Law Journal*, 784, 786.

[96]*Julian Assange v. the Swedish Prosecution Authority* [2011] EWHC 2849.

[97]Chapter III of the Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L 376/36.

it expanded to both cross-border and internal situations.[98] As to the second scenario, regarding the scope of application of free movement provisions, the Court has taken a rather ambivalent approach.[99] As mentioned, the wording of the free movement provisions suggests their scope of application should be limited to cross-border situations and not extended to purely internal situations. The Court nonetheless oscillated between a 'strict' version of this purely internal rule and a more 'flexible' version. According to the former, if a situation presents no inter-state elements in practice, that is, if there is no material cross-borderness, then free movement norms do not apply.[100] According to the latter, the presence of legal cross-borderness—namely, a presumed link with future material cross-borderness—is sufficient to justify the application of free movement provisions. Examples of seemingly purely internal cases to which free movement norms would apply include national rules that could have a *potential* cross-border dimension,[101] national rules that are indistinctly applicable[102] or citizenship case law that does not require a cross-border element on the facts in order for the individuals to be entitled to the right to 'genuine enjoyment of Union Citizenship'.[103] Such oscillations are arguably the result of a tension between conflicting interests that the Court is trying to reconcile. These are, on the one hand, to limit EU intervention to that of a subsidiary regulator only stepping into cross-border situations; and, on the other hand, to avoid normatively undesirable consequences deriving from an overly strict approach to the application of EU law. Undesirable situations could be reverse discrimination—domestic situations being treated less favourably than cross-border ones—or 'false negatives'—that is cases in which the facts at stake might not be cross-border, but the relevant domestic rule in fact does affect inter-state trade.[104]

The case law on the scope of application of EU criminal law is much more recent. Yet, it takes a significantly less ambiguous stance, confirming the argument that the trends emerging in the area of the internal market are enhanced in the EU Area of Criminal Justice. The Court held that material cross-borderness is uncontrovertibly dispensed with, in the context of both the second stream—harmonisation of the definition of crimes—and the third stream—harmonisation of procedural rights.

A separate discussion is devoted later to material cross-borderness and the first stream. It was already mentioned that material cross-borderness is uncontested when it comes to judicial cooperation instruments, but that there are pushes towards extending the range of action of EU judicial and police cooperation agencies to national cases.

Starting with the scope of application of EU harmonised definitions of crimes, the case of reference is *Criminal Proceedings against DR and TS*,[105] mentioned above. The case not only confirmed the interpretation of legal cross-borderness with reference to Article 83(1) TFEU but also established that material cross-borderness should be dispensed with in the application of Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime.[106] The facts of the case concerned an activity of drug trafficking which did not involve any cross-border element.[107] The national court asked if the confiscation measures envisaged by the Directive could be applied

[98] Joined Cases C-360/15 and C-31/16, *College van Burgemeester en Wethouders van de gemeente Amersfoort v. X BV and Visser Vastgoed Beleggingen BV v. Raad van de gemeente Appingedam*, ECLI:EU:C:2018:44, and joined C-340/14 and C-341/14, *Trijber and Harmsen* ECLI:EU:C:2015:641.

[99] Arena, n. 20. It should be specified that the article looks at all sorts of preliminary rulings, the major parts of which concern free movement rules but not exclusively. The focus here is specifically on free movement cases.

[100] Arena identifies three phases in the case law of the Court, a traditional approach, where the interpretation has been a strict one, and expansive where we speak of a broad one, and a reflective approach where the Court finds a sort of middle ground position providing some corrections to the broad understanding. Arena, n. 20.

[101] Case C-293/02, *Jersey Produce Marketing Organisation Ltd v. States of Jersey and Jersey Potato Export Marketing Board*, EU:C:2005:664, Case C-161/09, *Kakavetsos-Fragkopoulos AE Epexergasias kai Emporias Stafidas v. Nomarchiaki Aftodioikisi Korinthias*, ECLI:EU:C:2011:110, paras. 28–29.

[102] Joined Cases C-197/11 and C-203/11, *Eric Libert and Others v. Gouvernement flamand and All Projects & Developments NV and Others v. Vlaamse Regering*, ECLI:EU:C:2013:288, Case C-125/16, *Malta Dental Technologists Association and John Salomone Reynaud v. Superintendent tas-Saa Pubblika and Kunsill tal-Professjonijiet Kumplimentari g all-Mediina*, ECLI:EU:C:2017:707.

[103] Case C-148/02, *Carlos Garcia Avello v. Belgian State*, ECLI:EU:C:2003:539, Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, ECLI:EU:C:2010:560.

[104] Arena, n. 20, 170, 172 ff.

[105] Joined Cases C-845/19 and C-863/19, *Criminal Proceedings against DR and TS*, 21 October 2021, ECLI:EU:C:2021:864.

[106] Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union [2014] OJ L 127/50.

[107] Criminal Proceedings against DR and TS, n. 105, paras. 16–23.

in this purely domestic case. The Court answered in the positive. The general limit for the EU to regulate exclusively areas of crime that are cross-border, mentioned in Article 83(1) TFEU on which the Directive was based, did not rule out the application of the relevant law to scenarios which were not themselves cross-border. Legal cross-borderness is enough to justify EU action, even if the assumption of material cross-borderness which underpins it does not materialise in practice.

The Court does not provide detailed reasoning for this choice, if not that such a material cross-borderness limitation is not included in the text of the Directive.[108] Advocate General Pikamae provides a slightly more elaborate reasoning relying on the conviction that harmonisation of substantive criminal law is not intended to support judicial cooperation.[109] From this, he derives that harmonisation must not extend beyond areas of cross-border crime as established in Article 83(1) TFEU. Yet, according to AG Pikamae, this does not imply that the harmonised definition of crimes must apply only to cross-border situations. Article 83(1) TFEU speaks of a cross-border *dimension* which pertains to the area of crime in general and is intended as a descriptive adjective for the areas listed in it. The provision conversely does not speak of a cross-border *element* needed in specific situations.[110]

It should be noted that the case *Criminal Proceedings against DR and TS* concerned specifically the application of confiscation measures. It did not address the general question of the application of the EU harmonised definition of crimes as such in criminal justice trials. However, it will be argued in the next section that the same conclusions should be generalised to all instances of application of Article 83 TFEU directives. Indeed, acting otherwise would be not only impractical but also normatively problematic.

The Court took a similar stance on the irrelevance of material cross-borderness as far as the application of EU procedural rights. The previous section argued that the references to mutual recognition and cross-border matters in Article 82(2)b TFEU, the competence to harmonise procedural rights, gives an indication as to the envisaged scope of application of procedural rights. The provision reproduces the traditional understanding of the legitimacy of EU action only as a subsidiary regulator sketched at the beginning of the section. Member States need to cooperate to tackle cross-border criminal matters. EU action is needed to design the legal framework to enable such cooperation. Harmonisation of individual rights in the field of criminal procedure is therefore only justified to the extent that it is necessary to ensure such inter-state cooperation. The question is when it can be said that harmonisation supports mutual recognition, and how far this rationale can be stretched to regulate both cross-border and domestic proceedings. One can think of a narrower interpretation which requires empirical evidence that legislative differences on a specific point hinder mutual recognition.[111] Or one can think of a broader interpretation where harmonisation is justified to the extent that it helps create a climate of mutual trust between cooperating authorities.[112] The assumption is that national judges and prosecutors are arguably more inclined to surrender individuals or provide evidence to jurisdictions where they know fundamental rights will be upheld.[113] Either way, at first sight, it seems that harmonisation should intuitively be designed to apply only to cross-border cases. These are the ones where mutual recognition applies and mutual trust is needed. This is, however, not the direction the EU legislators and the Court have taken.

The EU has adopted so far seven directives on this legal basis, which all formulate their scope of application in broad terms leaving room to interpret them as applying also to domestic, non-cross-border proceedings. These are

[108]Criminal Proceedings against DR and TS, n. 105, para. 33.

[109]Criminal Proceedings against DR and TS, n. 105, AG Opinion, 29–37.

[110]Criminal Proceedings against DR and TS, n. 105, AG Opinion, 40.

[111]For a detailed study on this subject, see E. Sellier and A. Weyembergh, (2018 August) Criminal procedural laws across the European Union: A comparative analysis of selected main differences and the impact they have over the development of EU legislation, Study Commissioned by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs: https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604977/IPOL_STU%282018%29604977_EN.pdf. Last accessed 16 July 2022.

[112]It was argued that this interpretation of the scope of Article 82(2)b TFEU does not comply with the Court of Justice established case law that the choice of legal basis must be grounded on objective factors which are amenable to judicial review, notably Case C-338/01, *Commission v. Council of the European Union*, ECR I-4852. See V. Mitsilegas, *EU Criminal Law after Lisbon Rights, Trust and Transformation of Justice in Europe* (Hart, 2016), 156.

[113]For a more detailed explanation of both models, see I. Wieczorek, 'EU Harmonisation of Rules on Detention: Is EU Competence (Article 82(2)b TFEU) Fit for Purpose?', (2022) *European Journal of Criminal Policy and Research* (available online).

the Directive on the right to interpretation and translation,[114] the Directive on the right to information,[115] the Directive on the right to access to a lawyer,[116] the Directive on the presumption of innocence,[117] the Directive on the right of children in criminal procedures,[118] the Directive on the right to legal aid[119] and the Directive on victims' rights.[120] The broad wording of the directives led to a doctrinal debate on their scope of application in practice.[121] The matter was nonetheless settled by the Court in *Criminal Proceedings against Gianluca Moro*,[122] where the Court held that Directive 2012/13/EU on the right to information in criminal proceedings would apply to both cross-border and domestic proceedings. In its reasoning, the Court linked its solution to the original, collective action rationale for the EU to step in in criminal justice matters. Harmonisation of application of procedural rights, also in domestic cases, is said to be necessary to foster mutual trust, which is instrumental in mutual recognition and cooperation in fighting cross-border crime.[123] The Court considered that, in order to build trust between judicial authorities, it is important that harmonised standards apply to all types of criminal proceedings. Whether this reasoning is convincing is debatable since the Court does not substantiate its statement with empirical evidence or more detailed discussion. There are arguably more detailed normative reasons for this decision, as will be discussed in the next section. At this stage, it is important to underline that material cross-borderness is dispensed with in the case of Directive 2012/13 on the right to information. Considering that the wording of the other procedural rights directives is very similar to that on the right of information, it seems fair to assume that the same conclusions apply to the other procedural rights directives. Moreover, the reasoning of the Court revolves around the relation between harmonisation and mutual recognition in general, and it is not specifically focused on the right to information.

It is submitted that in regulating purely internal situations, the EU is acting as a primary policy actor. A connection between rights applying in cross-border situations and smoothing mutual recognition with the aim of fighting cross-border crime can be intuitively appreciated. Yet the links the Court identifies between regulation of internal situations and judicial cooperation are unconvincing. They seem to rest on an unsubstantiated assumption of what mutual trust is based on. There also appears to be some contradiction between the reasoning in *Criminal Proceedings against DS and DT* and *Moro*. Harmonisation of the definition of crimes and harmonisation of individual rights are respectively considered independent and dependent from judicial cooperation in the fight against cross-border crime. Yet, the same conclusions are drawn in terms of the scope of application of the norms. In light of this, it appears that the rationales for the EU to regulate also internal situations are of a different sort than supporting Member States in the fight against cross-border crime. With regard to the internal market, the Court's oscillations on the interpretation of the purely internal situation have been read as reflecting different understandings of the internal market, either as a 'national space' where the same laws apply indiscriminately, or as a 'federal space' where different, but compatible, laws apply in different Member States.[124] Using a similar metaphor, one could say that the situation in the EU Area of Criminal Justice is more clear-cut. Through secondary law, the EU has created a 'national'

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

[115]Article 2 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L 142/1.

[116]Article 1 Directive 2013/48/EU of the European Parliament and of the Council 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 [2013] OJ L 294/1.

[117]Article 1 Directive 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L 66/1.

[118]Article 1 Directive 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L 132/1.

[119]Article 1, Directive 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.

[120]Article 2(1)a(i) 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 [2012] OJ L 315/5.

[121]J. Öberg, 'Subsidiarity and EU Procedural Criminal Law', (2015) 5 *European Criminal Law Review*, 19, and S. Peers, *EU Justice and Home Affairs Law* (Oxford University Press, 2011), 670–671.

[122]Case C-646/17, *Criminal proceedings against Gianluca Moro*, ECLI:EU:C:2019:489.

[123]Moro, n. 122, para. 34.

[124]Arena, n. 20, 165.

area of justice as far as the enjoyment of individuals' rights in criminal proceedings are concerned. That is a common space where every individual enjoys the same rights regardless of their involvement in domestic or cross-border proceedings. This is not a necessitated choice deriving from the incapability of Member States to generally regulate domestic proceedings by themselves. Nonetheless, the next section will explain that there are sound normative reasons for extending the scope of application of EU law to purely internal cases.

A separate discussion is necessary on the scope of action of EU criminal justice agencies. Eurojust and Europol are operational bodies respectively tasked with supporting and strengthening coordination and cooperation between national investigating and prosecuting authorities, and between police authorities and other law enforcement services, in the implementation of criminal justice and law enforcement policies. They can both request an investigation,[125] and Europol can also ask Member States to set up a Joint Investigation Team.[126] Member States are not bound to comply with these requests, but if they do not, they must give reasons.[127]

In terms of their scope of action, as per Article 85 TFEU, the mission of Eurojust extends to '*serious crime affecting two or more Member States* or requiring *a prosecution on common bases*, on the basis of operations conducted and information supplied by the Member States' authorities and by Europol'. The Eurojust Regulation nonetheless opens the door to action unbound by material cross-borderness as it introduces the possibility for Eurojust to assist in investigations and prosecutions that affect only one Member State but which have *repercussions at the Union level*.[128] Similarly, as per Article 88 TFEU, Europol's mandate extends to 'preventing and combating serious crime affecting *two or more* Member States, terrorism and forms of crime which affect a common interest covered by a Union policy'. It seems that material cross-borderness, that is, that the crime involves in practice two Member States for Europol to intervene, could again be dispensed with in the case of terrorism and if a common interest covered by a Union policy is at stake. Admittedly, the current version of the Europol Regulation speaks of requiring the 'competent authorities of the Member *States* concerned'.[129] However, in December 2021, the Commission tabled a proposal to amend the Regulation[130] modifying, among other things, the text of this provision to read as the 'competent authorities of the Member *State* or Member States concerned'.[131]

Briefly, the scope of action of both agencies is—or could be if the proposed Europol regulation is adopted[132]—designed to envisage a role for both agencies which is independent from material cross-borderness. This arguably reflects an understanding of Eurojust and Europol as more powerful agencies; bodies that are not just supporting and subsidiarily helping Member States when they struggle to deal with cross-border crime. These agencies would rather be pools of expertise that can support and actually trigger investigations also in challenging domestic cases.[133] One should note, however, that the (potential) abandon of material cross-borderness is a qualified one. In the case of Eurojust, even if the case involves only one Member State, there must be a need to prosecute on a common basis. This is admittedly a vague criterion, similar to the one incorporated in the Article 83(1) TFEU definition of legal cross-borderness. But it can still be considered a (tenuous) indication of a subsidiary role for Eurojust. In the case of Europol, the qualification is that the interest of a Union policy must be at stake. If, in the pursuit of said Union policy,

[125]Article 4(2)a, Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA PE/37/2018/REV/1 [2018] OJ L 295/138 (hereinafter, Eurojust Regulation). Article 6(1), Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA [2016] OJ L 135/53 (hereinafter, Europol Regulation).

[126]Article 5, Europol Regulation.

[127]Article 4(6), Eurojust Regulation, and Article 6(3), Europol Regulation.

[128]Article 3(6), Eurojust Regulation.

[129]Article 6(1), Europol Regulation.

[130]Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/794, as regards Europol's cooperation with private parties, the processing of personal data by Europol in support of criminal investigations and Europol's role on research and innovation, COM(2020) 796 final.

[131]Article 1(3) COM(2020) 796 final.

[132]For a comment on the proposal as well as its legal feasibility, see N. Vavoula and V. Mitsilegas, Strengthening Europol Mandate. A legal assessment of the Commission's proposal to amend the Europol Regulation, Study commissioned by the European Parliament, PE 694.200—May 2021, 60.

[133]The example was made of the added value of Europol action in investigations when national authorities risk not being impartial, as in the Maltese investigation of the journalist Daphne Caruana Galizia's murder. See Vavoula and Mitsilegas, n. 132, 60.

the EU is acting as a subsidiary policy actor—for example, helping Member States tackling international organised crime—then Europol's role would equally amount to a subsidiary one. If this is not the case, however, and the EU is acting as a primary policy actor—that is, criminalising gender-based violence—then Europol would be enabling such a role.

A final remark should be made about the European Public Prosecutor Office (EPPO).[134] This agency is tasked with directly enforcing EU criminal law protecting the financial interests of the EU as per Article 86 TFEU. Its scope of action is designed by the PIF Directive[135] which, in the case of VAT Fraud, limits it to cross-border cases.[136] This arguably leaves the door open for EPPO's action to also extend to internal cases for all other crimes. However, it was already argued that when supranational interests are at stake, such as EU financial interests, the justification for EU action is a more straightforward one, and the role for the EU is clearly a subsidiary one. This point therefore does not warrant further investigation.

5 | THE EU AS A PRIMARY POLICY ACTOR: A POSSIBLE AND DESIRABLE TREND?

The picture sketched in the previous sections as to the challenges to legal and material cross-borderness as limits to EU criminal law is a complex and varied one. However, it can be said that all three dimensions of the EU Area of Criminal Justice have been moving, although to different degrees, towards regulation and policy implementation in areas that are not cross-border, and that EU criminal law is increasingly applying to internal situations. Rather than acting solely to correct national regulatory failures, the EU appears to be increasingly pursuing a normative agenda, overriding Member States' normative choices and expanding the EU law scope of application.

As was illustrated, the "subsidiary policy actor" model was already an imperfect one to explain EU action in the field of the internal market. The idea of the EU as a functionalist project pursuing integration through law only to build a common market, a goal that Member States were not able to address themselves, might have been a very early understanding of the role of the EU, if it ever was.[137] It rapidly emerged that this was not and could not be the sole rationale for EU action.

The comparison with the EU Area of Criminal Justice shows how the trends are heightened in this area, with the EU clearly stepping out from the role of a subsidiary platform to help Member States disrupt transnational criminal networks. Firstly, the Court of Justice's stance on disposing of material cross-borderness has been less oscillating and firmer in this context. Secondly, the trend in the EU Area of Criminal Justice has thus a stronger constitutional dimension. It is the result of both secondary law developments, most of which were, however, validated by the Court's judgments, and of primary law amendments.

The core problem with the EU further expanding its range of action, whether it is in the area of the internal market or the EU Area of Criminal Justice, is naturally the compression of national regulatory autonomy it entails.[138] And this begs the question as to the normative justification and desirability of these developments.

[134]Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') [2017] OJ L 283/1 (hereinafter, the EPPO Regulation).

[135]N. 59.

[136]Article 22 PIF Directive, n. 59.

[137]That is, if the EU ever was a purely economic undertaking, considering that the founding fathers had much more ambitious goals for the EU as an organisation to establish and maintain peace on the European continent. And in fact Article 114(3) TFEU includes a clause, which was present from the early versions of the article, which seems to admit that internal market legislation can address aspects of consumer protection or public health. It does not set these as its principal aims, though, and an obvious interpretation seems to be for these to be incidental ones. See, however, for a more elaborate discussion, de Witte, n. 19, 31.

[138]Arguments against increased EU powers in the field of criminal law, or in general with reference to the sensitivity of EU action in this area, are often made based on the need to preserve Member States' sovereignty. See, among others, the Introduction in M. Fletcher, R. Loof and B. Gilmore, *EU Criminal Law and Justice* (Cheltenham, Edward Elgar, 2008), 1–20.

Given the presence of a strong constitutional dimension in the criminal justice developments, it would be inaccurate to brush these off as a manifestation of the common phenomenon of competence creep.[139] A broader conceptual discussion looking at the drawbacks and added values of centralisation is necessary.

"Values-based" drifts of Article 114 TFEU legislation are traditionally interpreted as unavoidable evolutions necessary to address normative questions which further economic integration has triggered. The expansion of the internal market required setting down not only the rules that regulate economic transactions but also those that regulate the social and moral infrastructure of the market. For instance, increased digital economic transactions require stronger data protection regulation.[140] Moreover, it was argued that the EU constitutional law framework already included some support for the inclusion of non-market aims in internal market legislation.[141] The adoption of the EU Charter of Fundamental rights, and the Treaty provisions on EU values, also arguably provide a constitutional mandate for the EU to push forward its non-market aims agenda.[142]

It is submitted here that the drift towards the EU as a primary regulator in criminal justice matters is similarly an inevitable pattern. But this does not derive from values-based questions raised by the increasing EU integration in the field. It is linked to the *ab initio*, inherent and stronger value-based nature of criminal law and criminal justice and its embedment in a system of general principles which cannot be ignored by supranational interventions. A piecemeal, gap-filling approach to EU criminal law is—so to say—not affordable from the start, if key general principles of criminal justice must be respected. The importance of safeguarding national regulatory autonomy must therefore be looked at critically. One must balance the added value that diversity in national regulations can bring with the added value of EU action, as requested by the principle of subsidiarity. But the normative "sacrifices" in terms of general principles of criminal justice that this can imply must also be considered.

This general argument is developed with different nuances with respect to the relevance of legal cross-borderness and of material cross-borderness. A more stringent enforcement of the legal cross-borderness criterion in the EU Area of Criminal Justice is normatively possible. There are no strong normative counter-indications against it. Yet, it is not normatively desirable, in the sense that there are better solutions to safeguard national regulatory autonomy, individuals' liberties and the achievement of EU objectives of crime repression (5.1). Conversely, a stringent application of material cross-borderness is not even normatively possible in the EU Area of Criminal Justice, as it would affect core criminal law principles such as equal treatment, legality and legal certainty (5.2).

5.1 | More stringent legal cross-borderness: A normatively possible yet undesirable option

As was discussed, the Lisbon Treaty has maintained the criterion of legal cross-borderness but only for part of the EU competence to harmonise definitions of crimes, notably Article 83(1) TFEU. The traditional argument regarding the added value of EU harmonisation as a tool to support cooperation has faded in importance through time. Moreover, both policy documents and EU secondary law seem to be giving more importance to the normative rationale, namely justifying EU criminalisation on the basis of the values criminal law protects.

The diminishing importance of the cooperation rationale weakens the justification of the EU as a subsidiary actor. It also takes away one helpful argument which can be relied upon to claim compliance with subsidiarity in this

[139]See, however Öberg, who stresses the respect of the cross-border dimension as enshrined in Article 82 TFEU as a constitutional question linked to subsidiarity and conferral, Öberg, n. 121, 23–24.

[140]This is argued by Azoulai, n. 5, 594, with respect to data protection legislation (Directive 95/46 on the protection of individuals with regards to the processing of personal data and on the free movement of such data [1995] OJ L 281/31, now repealed by the GDPR). He engages in a similar discussion on biotechnology law (Directive 98/44 on the legal protection of biotechnological inventions [1998] OJ L 213/13).

[141]De Witte argues that Article 114(3) TFEU provides such support, de Witte, n. 19, 31.

[142]Ibid.

area.[143] However, heavy and sole reliance on the cooperation rationale has been strongly criticised from a criminal legal theory perspective. Justifying supranational criminalisation on the grounds that it would support cooperation means justifying it on (transnational) enforcement needs. This approach works well with subsidiarity, which justifies EU action based on its effectiveness, or more specifically efficiency.[144] But it is problematic from a liberal criminal law theory perspective, which would require criminal law to be justified only if it aims to protect highly ranked interests, and not merely on its enforcement potential.[145] This normative approach is at the core of the traditional criminalisation principles, such as the Anglo-Saxon harm principle,[146] or its continental counterpart the *rechtguts* principle.[147] Efficiency-based approaches to criminal law are found within law and economics literature,[148] which, however, has mainly an analytical value. It develops economic models for when criminal law is an efficient enforcement tool. It does not normatively suggest that this should be the only factor to be taken into account. Against this background, the growing importance of the normative rationale to justify supranational criminalisation should be welcome.[149]

However, the argument here is not that the normative rationale is irreconcilable with other rationales such as the cooperation one, the externalities rationale, or the effectiveness one. In fact, a minimalistic approach to criminalisation, as that mandated by the traditional criminal legal theory principle of *ultima ratio*, requires one to use criminal law as a last resort.[150] It flows from this that the EU should resort to criminal law only when there is the strongest case for it. This is arguably when as many rationales for harmonisation of definitions of crimes as possible are present.[151] Therefore, next to welcoming the emphasis on normative rationales, one could also advocate for renewed emphasis on the cooperation rationale, a more stringent interpretation of legal cross-borderness and its inclusion also with reference to Article 83(2) TFEU competence. One could stick to a need for a strict, technical interpretation of the cooperation rationale whereby only areas of crimes traditionally associated with the activity of transnational criminal networks would qualify for harmonisation. This would rule out the other, broader

[143]On the interpretation of subsidiarity in EU criminal law, see I. Wieczorek, 'The Principle of Subsidiarity in EU Criminal Law', in C. Brière and A. Weyembergh, *The needed balances in EU Criminal Law: Past Present and Future* (Hart, 2016), 71; P. Asp, 'The Importance of the Principle of Coherence and Subsidiarity in the Development of EU Criminal Law', (2011) 1(1) *European Criminal Law*, 44; and Öberg, n. 121.

[144]See the discussion on subsidiarity above, second section. It is also worth mentioning that choosing an efficiency-based criterion for regulating the allocation of powers between the EU Member States and the EU was a deliberate choice, as opposed to other available options. For instance, De Burca speaks of focusing on issues of process for the adoption of the decisions which would require choosing the most democratic level; or on the outcome of such process—choosing the most efficient level; or on the willingness of each government level to take specific policy decisions, G. De Burca, 'Reapprasing Subsidiarity's Significance after Amsterdam', (1999) 7/99 *Harvard Jean Monnet Working Paper*, 4.

[145]De Hert speaks of 'moral philosophy' or a principled objection to use harmonisation to support cooperation. If Member States made different criminal policy choices in certain specific fields, they should not be forced to reconsider them for the sake of enabling mutual recognition; they should simply be entitled to deny procedural cooperation in light of these substantive reasons. P. de Hert, 'Cybercrime and Jurisdiction in Belgium and the Netherlands: Lotus in Cyberspace—Whose Sovereignty Is at Stake?', in B. Koops and S.W. Brenner (eds.), *Cybercrime and Jurisdiction: A Global Survey* (TCM Asser Press, 2006), 88; Fletcher et al., n. 138, 192; T. vander Beken, 'Freedom, Security and Justice in the European Union: A Plea for Alternative Views on Harmonisation', in Klip and van der Wilt, n. 53, 95, 97.

[146]See, as a key text, J. Feinberg, *Harm to Others: The Moral Limits of the Criminal Law* (Oxford University Press, 1984).

[147]The German term *rechtguts* does not have a specific correspondent in English. Lauterwein translates *Rechtgut* as 'legal goods/interest', C. Lauterwein, *The Limits of Criminal Law: A Comparative Analysis of Approaches to Legal Theorizing* (Ashgate, 2010), 5. Other authors prefer 'legal good' rather than legal interest, see C.-F. Stuckenberg, 'The Constitutional Deficiencies of the German Rechtsgutslehre', (2013) 3(1) *Oñati Socio-legal Series [online]*, 31, 35. Available from http://ssrn.com/abstract=2200870. Last accessed 1 June 2016. A modern exhaustive and systematic discussion of the theory can then be found in Claus Roxin, *Allgemeiner Teil: Grundlagen, Aufbau der Verbrechensehre*, Vol. 1 (C.H. Beck, 4th edn, 2006). For an account of both the Anglo-Saxon and German theories, see N. Peršak, *The Harm Principle and Its Continental Counterpart* (New York, Springer, 2012), and I. Wieczorek, n. 17, 21–43.

[148]G.S. Becker, 'Crime and Punishment: An Economic Approach', in G.S. Becker and W.M. Landes (eds.), *Essays in the Economics of Crime and Punishment* (National Bureau of Economic Research, Distributed by Columbia University Press, 1974), 1; I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992); R. Bowels, M. Faure and N. Garoupa, 'The Scope of Criminal Law and Criminal Sanctions: An Economic View and Policy Implications', (2008) 35(3) *Journal of Law and Society*, 389; D. Teichmann, 'The Economics of Crime Control', in P.H. Robinson, S. Garvey and K.K. Ferzan (eds.), *Criminal Law Conversations* (Oxford University Press, 2015).

[149]The relevance of criminal legal theory principles to EU criminal law, and of the *rechtguts* principle in particular, to EU criminalisation has been authoritatively argued in European Criminal Policy Initiative, 'The Manifesto on European Criminal Policy', (2011) 1(1) *European Criminal Law Review*, 86; see also 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', (2011) 1(1) *European Criminal Law Review*, 11.

[150]See, among others, N. Jareborg, 'Criminalisation as a Last Resort (Ultima Ratio)', (2004) 2 *Ohio State Journal of Criminal Law*, 526, and on the importance of the principle for EU criminalisation, S. Melander, 'Ultima Ratio in European Criminal Law' (15 January 2013). *Oñati Socio-Legal Series*, Vol. 3, No. 1, 2013, Available at SSRN: https://ssrn.com/abstract=2200871.

[151]This argument is developed in more detail in I. Wieczorek, n. 17, Chapter 3.

interpretations linked to the online nature of the crimes and the forum shopping argument, making proposals such as the ones on gender-based violence harder to justify. In practical terms, one could advocate for this interpretation to be applied to harmonisation of cross-border areas of crimes as deriving from their nature; and for a redesign of the definition of legal cross-borderness in Article 83(1) TFEU, eliminating the 'need to combat the relevant offences on a common basis' indent. Or one could advocate for this to be the interpretation of the principle of subsidiarity which is to be understood as requiring the EU to focus on phenomena with a transnational dimension.[152] Such a solution would be normatively possible. It would contain excessive centralisation, safeguard national regulatory autonomy and limit the EU to the role of a subsidiary policy actor.

However, having said all this, one should nonetheless reflect on whether national regulatory autonomy deserves to be protected only for the sake of it. Indeed, there might also be some added value in granting a broader role to the EU as a primary policy actor if this safeguards other important EU values.

Arguments raised in favour of safeguarding legal diversity, and opposing centralisation, include textual arguments[153] as well as democratic arguments, the local decision-making process being presumed more democratic.[154] Furthermore, part of the literature focuses on the substantive added value that can be derived from maintaining legal diversity in terms of increased regulatory competition among jurisdictions, which would lead to more legal creativity. In such a diversified legal framework, mobile citizens and companies would choose the best model.[155] These arguments have been referred to as the 'cultural objections' and the 'economic objections' to the expansion of harmonisation.[156] These have been raised, for instance, in the field of private law,[157] but also criminal justice, where legal diversity is bound to have significant weight considering the crucial link between law, culture and identity.[158] Hildebrandt connects the imperative and authoritative aspects of legal norms to the strong impact they can have on the identity of those who are ruled by them. Considering that criminal law is an expression of the legitimate violence a State can exercise, its authoritative aspect is unfolded publicly. This in turn means that criminal law is a strong component of a community.[159] Similar observations can be made with respect to criminal procedure rules which constrain the way a government can decide to punish.[160] The closeness of criminal law to national sovereignty was also underlined by the German Constitutional Court in the now famous Lisbon Judgment.[161] And actually, because of these special features of criminal law, the European legal order already includes a number of tools to pursue integration while accommodating diversity. These include limiting harmonisation to minimum rules,[162] or variable geometry tools.[163] Importantly, a specific form of enhanced cooperation is envisaged precisely for what concerns EU action in criminal justice. Both Article 82(3) TFEU on harmonisation of procedural individual rights and Article 83(3) TFEU on harmonisation of the definition of crimes include the so-called Emergency Brake procedures. These allow the halting of the legislative procedure if a Member State finds that it would affect fundamental aspects of its criminal justice system.

Nonetheless, sceptical views exist on the presumed virtues of localism,[164] including in criminal justice matters.[165] Legal diversity intended that diversity among different domestic legal systems, or one could say

[152]See the discussion in the second section.
[153]See Article 4(2) TEU on the respect of national identities, and Article 67(1) TFEU on legal diversity. The argument is raised in Öberg, n. 79, 108.
[154]Öberg, n. 79, 109.
[155]Weatherill, n. 7, 14.
[156]Weatherill, n. 7, 13.
[157]Weatherill, n. 7, 13.
[158]On the relation between criminal law and culture, see M. Damaska, *The Faces of Justice and State Authority* (Yale University Press, 1986).
[159]M. Hildebrandt, 'European Criminal Law and European Identity', (2007) 1(1) *Criminal Law and Philosophy*, 57, 64.
[160]Hildebrandt, n. 159, 65.
[161]Lisbon Case, BVerfG, 2 BvE/08 from 30 June 2009, available at http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html.
[162]This is a requirement included in Article 82 TFEU and Article 83 TFEU.
[163]These include the possibility to opt out of various legal arrangements which at the moment benefit Ireland, Poland and Denmark; for instance, Protocol (No. 21) to the TFEU on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice [2016] OJ C 202/295, and the Consolidated version of the Treaty on the Functioning of the European Union, Protocol (No. 22) on the position of Denmark OJ C 326/299, but also the possibility of enhanced cooperation (Article 20 TFEU).
[164]Weatherill, n. 7, 14.
[165]R. Colson and S. Field, 'Legal Cultures in Europe: Brakes, Motors and the Rise of EU Criminal Justice', in Colson and Field, n. 79, 1, 13 ff.

parochialism, should not be considered a value in itself, it is argued, and safeguarded as such, as 'some terrible things have been defended in the name of national identity and pride'.[166] Preserving national differences should be pursued if localism can guarantee 'quality law'. In the case of criminal law, such 'quality law' has been defined as 'the capacity of each legal culture to reflect a proper balance between collective interests in security, the efficient management of resources, liberal notions of the rule of law, and individual human rights'.[167] The added value of regulatory competition in criminal justice matters, which maintaining legal diversity would enable, should thus be carefully considered. Allowing domestic experimentation can indeed lead to creative solutions on how to prevent harmful behaviour. Criminal repression is not always the most effective solution, and various jurisdictions could come out with valid non-criminal law options. Formally, the EU has only criminalisation competences, that is, the competence to introduce new definitions of crimes. It does not have an explicit decriminalisation competence.[168] Moreover, the rules adopted at the EU level are minimum rules. The discretion left to Member States only allows them to adopt more repressive criminal law.[169] Therefore, EU harmonisation by definition rules out legal creativity on alternative, non-criminal solutions. At the same time, the argument of letting the relevant actors choose the best model and wait for this to lead to Member States spontaneously adhering to the "winning" one is probably not the wisest choice. In the internal market context, regulatory action can imply a positive concentration of economic actors in one jurisdiction. The downside is probably temporary economic losses in those jurisdictions that do not have the winning model. In criminal justice matters, the situation is reversed. Regulatory competition might lead to a concentration of criminal actors in the weakest jurisdictions, with increased crime rates locally, and potential cross-border effects if the networks operate transnationally.[170] This is naturally an undesirable outcome. It was mentioned that one of the rationales for harmonisation is indeed to prevent criminals' forum shopping.[171] In light of this, the wisest approach in this context is probably not to oppose harmonisation as such. Rather, it is to require a more careful study of existing legal models to identify a suitable one for harmonisation, going beyond a "criminalisation only" paradigm. The EU could be granted an explicit decriminalisation competence next to its criminalisation one. And it could play a virtuous role as a primary policy actor. It could set the most adequate model for addressing and repressing harmful conduct, be this through criminal justice means or others, after careful consideration of the models existing at the national level.[172] Admittedly, the EU already resorts to a double track of administrative law and criminal law in some areas, such as Market Abuse.[173] It has been argued that resorting to administrative law implicitly prevents Member States from using criminal law.[174] It is suggested that such competence could be formalised to ensure that legal creativity is safeguarded and exploited, but at the EU level. Harmonisation would thus secure the best solution for both repression of harmful behaviour and also individual liberties, which criminal law necessarily constrains. To

[166]Ibid.

[167]Colson and Field, n. 79, 16.

[168]This does not mean that decriminalisation cannot occur as a result of EU law, for instance as a result of internal market fundamental freedoms; see S. Miettinen, n. 29, 123–132.

[169]D.B. Hecker, *Europaisches Stratfrecht* (Springer, 3rd edn, 2010), 371, cited in P. Asp, *The Substantive Criminal Law Competence of the EU* (Stiftelsen Skrifter utgivna avJuridiska fakulteten vid Stockholms universitet, 2012), 111.

[170]A lively debate exists on the relevance of lenient definitions of crimes as a pull factor for criminal networks. See arguing against it, S. Melander, n. 150, and D. Teichman, 'The Market for Criminal Justice: Federalism, Crime Control, and Jurisdictional Competition', (2005) 103(7) *Michigan Law Review*, 1831, highlighting the higher importance of rather weak *enforcement* regimes as a pull factor. For a more positive view, see Öberg, n. 79, 119. See also the Assange case mentioned above, at 97, which is a concrete example of forum shopping.

[171]Weyembergh, n. 53, 181–182; G. Vermeulen, 'Where Do We Currently Stand with Harmonisation in Europe?', in Klip and van der Wilt, n. 53. For the Commission officially acknowledging the forum shopping rationale, see the introduction to the European Commission, 'Towards an EU Criminal Policy: Ensuring the Effective Implementation of EU Policies through Criminal Law', COM(2011) 573 final.

[172]The virtues of this approach were highlighted with respect to the field of drug trafficking. See T. Elholm and R. Colson, 'The Symbolic Purpose of EU Criminal Law', in Colson and Field (eds.), n. 79, 48.

[173]See Articles 2, 4, and 5 of Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (Market Abuse Directive) [2014] OJ L 173/17, and Article 30 of Regulation 596/2014/EU of the European Parliament and of the Council of 16 April 2014 on market abuse (Market Abuse Regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC [2014] OJ L 173/1.

[174]V. Mitsilegas, 'From Overcriminalisation to Decriminalisation: The Many Faces of Effectiveness in European Criminal Law', (2014) 5(3) *New Journal of European Criminal Law*, 416, 422.

conclude, rather than restricting the EU range of action through a more restrictive interpretation of legal cross-borderness, the most normatively desirable solution might be that of enlarging the range of tools at its disposal.

5.2 | A strict application of material cross-borderness: A normatively impossible option

The Court of Justice has dispensed with material cross-borderness in the case of the application of harmonised definitions of both crimes and procedural rights. It is submitted that in both cases, the alternative—applying EU criminal law only to internal cases—is not normatively possible due to the fundamental-rights-sensitive nature of criminal law. Briefly, if the EU intervenes in these two streams of the EU Area of Criminal Justice, it must be prepared to act as a primary policy actor, ensuring EU policies implementation across the entire area. A selective application to cross-border cases only might preserve national regulatory autonomy and legal creativity but compromise criminal justice general principles.

Material cross-borderness has also been put, or could be put, under pressure in the third stream of the EU Area of Criminal Justice, namely judicial cooperation. The definition of Eurojust and Europol ranges of action has been extended or could be extended to cases involving only one Member State. In this scenario, the rationale for the expansion of EU operational capacity is clearly an enforcement- inspired one. The aim is to capitalise on the expertise of both agencies in the fight against crime. In light of this, differently from above, advocating for a more restrictive approach to the scope of action of Eurojust and Europol to protect national policy implementation autonomy appears a legitimate choice.

Focusing on the other two more controversial streams, arguments raised in the literature to advocate for the application of harmonised norms only to cross-border cases are textual,[175] historical[176] and subsidiarity-related[177] ones. While these are undoubtedly solid arguments, the point here is that such constitutional choices were unwise, and that the Court was right in rectifying them in *Criminal Proceedings v. DT and TS*, and in *Moro*. In this regard, rather than focusing on formal constitutional arguments, one needs to look at more substantial ones.

Starting with harmonisation of the definition of crimes, it is submitted that having an EU-derived definition of crimes and sanctions applying to cross-border cases, while domestic criminal law continues to apply to non-cross-border crimes, is problematic from an equal treatment and a principle of legality perspective. Equal treatment is a general principle widely recognised by national constitutions,[178] the ECHR[179] and other international treaties.[180] It is also acknowledged within the EU legal order, both as a case law-derived unwritten principle[181] and as a codified provision in Article 20 TFEU and the EU Charter, binding Member States when implementing EU law.[182] The core of the principle is that comparable situations should be treated alike, while non-comparable ones should be treated dissimilarly, unless this is objectively justified.[183]

The Court of Justice's approach to equal treatment has been very diversified, and some say inconsistent,[184] ranging from a simple 'reasonability' test in some areas[185] to a stricter 'comparator test', especially in the fields of

[175]The argument is made for Article 82(2)b TFEU, which speaks of cross-border matters, Öberg, n. 121, 23–24, but it is easily generalisable to Article 83(1) TFEU, which speaks of a cross-border dimension. See, however, *contra*, A.G. Pikamäe's position, discussed in Section III, which distinguishes between the cross-border *dimension* mentioned in Article 83(1) TFEU and a cross-border *element*. This argument is a compelling one in justifying applying Article 83(1) TFEU Directives in practice to internal situations.

[176]This is argued by Öberg, who refers to the text of the provision, but also to the position of the members of Working Group X within the European Convention, who insisted on the inclusion of this wording precisely to limit the scope of application of this provision. Öberg, n. 121, 27.

[177]Öberg, n. 121, 26.

[178]See, for a few examples, Article 3 of the Italian Constitution, Article 1 of the Dutch Constitution, and Article 3 of the German Constitution.

[179]Article 14 European Convention on Human Rights.

[180]See Article 7 of the UN Universal Declaration of Human Rights, or Article 26 and 14(1) of the ICCP.

[181]See, among many others, Case C-292/97, *Kjell Karlsson and Others*, ECR I-02737.

[182]See Article 51 EU Charter on Fundamental Rights on the Charter's scope of application.

[183]Case 303/05, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, ECR I-03633, para. 56.

[184]M. Bell, Article 20, in S. Peers, T. Hervey, J. Kenner and A. Ward, *The EU Charter of Fundamental Rights: A Commentary* (Hart, 2014), 563, 571.

[185]Case C 127/07, *Société Arcelor Atlantique et Lorraine and Others v. Premier ministre, Ministre de l'Écologie et du Développement durable and Ministre de l'Économie, des Finances et de l'Industrie*, ECR I-09895.

employment.[186] The application of the principle of equal treatment, and legality incidentally, in the field of definitions of crimes was only dealt with in the case *Advocaten voor de Wereld*.[187] The Court's findings are however not particularly helpful, as the question concerned the arrest of an individual in the *absence* of domestic criminalisation, but following a European Arrest Warrant issued by a country where the relevant behaviour was criminalised. Similarly, there is also ECtHR case law on equal treatment and the definition of crimes focusing on whether the absence of criminalisation could amount to unjustified discrimination.[188] Conversely, more inspiration comes from national constitutional jurisprudence,[189] which has discussed the more pertinent question for our analysis. This is whether the *co-existence* in one domestic legal system of two different definitions of crimes for very similar behaviours is compatible with equal treatment. The case law of the Italian Constitutional Court on this point is particularly extensive.[190] A first key guiding principle has been that different treatment of conduct having the same disvalue[191]—that is, harming the same legal interest to a similar extent—is in breach of equal treatment. Different treatment depending on the position, or personal characteristics of the suspect—for example, gender or socioeconomic conditions—was similarly considered unconstitutional.[192]

Taking the cue from this jurisprudence, it is submitted that having two versions of the same offence whose alternative application depends on a characteristic of the offender, that is, their nationality, or on procedural factors, namely whether evidence or the victim are located abroad, could breach the principle of equal treatment. This scenario would materialise if, for instance, the application of EU definitions of environmental or money laundering offences were limited to cross-border cases whereas their domestic correspondent, covering the same physical element (actus reus) and mental element (mens rea), and protecting the same legal interest, would apply to domestic cases.

Having separate offences would be justified only where the cross-border offence aims to protect a legal interest different from that of the domestic offences, or harms the same legal interest in a higher (or lesser) manner. This is the case of the cross-border offence of 'corruption of officials of the EU and of the Member States'.[193] The co-existence, and separate application, of this offence with the domestic one of corruption of national officials is justified to the extent that the first aims to protect the good functioning of public administration and the economy at the EU level, and in the Member States. The second offence protects the good functioning of the national administration and national economy.

Interestingly, in one case, EU law does introduce material cross-borderness as a constituent element of the offence. As was mentioned, the PIF Directive criminalises VAT offences only when involving two or more Member States.[194] In those legal systems where VAT fraud is already a crime, possibly with different penalty thresholds, the implementation of the PIF Directive could lead to a situation where two different offences for the same facts co-exist. The EU-derived one would apply if more than one State is involved, arguably in any form, even just marginally. The domestic one would apply only to domestic cases. This is a potentially problematic case. Indeed, this could be

[186]Case C 81/05, *Anacleto Cordero Alonso v. Fondo de Garantía Salarial (Fogasa)*, ECR I-07569.

[187]N. 182.

[188]*Talpis v. Italy* App No. 41237/14 (18 September 2017) concerning the need to resort to criminal law to prevent violence against women, and therefore avoid gender discrimination.

[189]It should be remembered that national constitutional traditions also have legal value within the EU legal order as sources of inspiration for fundamental rights as general principles, Article 6 TEU.

[190]See, for an extensive discussion of all the most important decisions, A. De Lia, 'Il principio di uguaglianza ed il diritto penale sostanziale: una sintetica analisi del rapporto', (2017) 23 *Federalismi*, 1, available online at https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=35246.

[191]For instance, different treatment by the criminal law of the conduct of failure to pay social security contributions, and failure to pay other tax contributions, was considered to breach equal treatment, as both behaviours harm the same interest and have the same disvalue, Italian Constitutional Court, decision No. 139, 21 May 2014. In this sense it was argued that the Court interpret equal treatment as inherently linked to the harm principle, or *offensività* in Italian legal scholarship, De Lia, n. 190, 9.

[192]See Italian Constitutional Court, decision No. 131, of 21 November 1979, stating that the norms sanctioning failure to pay pecuniary sanctions were discriminatory towards financially underprivileged citizens; or Italian Constitutional Court, decision No. 121, 18 June 1970, which declared it unconstitutional to introduce the aggravating factor of property damage for workers during strikes.

[193]See Articles 1, 2 and 3 of the Convention drawn up on the basis of Article K.3(2)(c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union [1997] Official Journal C 195/2, which defines the crime of passive and active corruption involving also officials of the Member States.

[194]Article 2(2) of the Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law [2012] OJ L 198/29.

justified only if the cross-border offence could be considered as causing more harm than the domestic one, or cause harm to a different legal interest. This might be if the involvement of two States is evidence of a larger fraud scheme. But this would have to be assessed in the specific case. Considering the special status of the PIF Directive which is meant to define the material scope of action for the EPPO,[195] it is more likely that the incorporation of the cross-border element had more to do with the need to contain the EPPO scope of action than with normative, harm-based assessment of the conduct's disvalue.[196] Aside from this exception, however, EU Directives do not include cross-borderness as a constituent element of the crime.[197] Introducing a blank requirement for all EU-derived offences to apply only in the presence of material cross-borderness, to protect national regulatory autonomy, without any prior case-by-case assessment on the protected interest and harm caused, is therefore normatively problematic.[198]

The depicted scenarios are arguably also challenging from a principle of legality perspective. This is a general principle of criminal law which covers substantive criminal law, that is, definition of crimes and sanctions, and that is acknowledged within the EU legal order.[199] It establishes that there cannot be any incrimination or any punishment for acts that have not been defined as criminal offences before their commission.[200] There are various dimensions to the principle which are normally summarised—at least in continental scholarship—with Latin expressions such as *Lex Scripta*, *Lex Praevia*, *Lex Certa*, *Lex Stricta*.[201] The most relevant one in this context is the *Lex Certa* requirement. This can be shortly explained as requiring the legislation to define the punishable conduct in a sufficiently precise way, ensuring legal certainty and enabling individuals to foresee the consequences of their actions.[202] The legislators must also be aware of how the law might be interpreted and applied in practice and draft it so as to avoid ambiguity.[203] The presence of a double—national and cross-border—offence as the one described above could also endanger the *lex certa* requirement. It would be unclear from the outset what offence would apply to a certain set of facts. And the choice of the relevant offence could depend on procedural aspects, that is, the location of the evidence or the nationality of the victim, as opposed to on an assessment of the harm caused by the relevant conduct.

Finally, this reasoning on equal treatment and legality is equally applicable to the more specific scenario of the rules on confiscation which were at stake in *Criminal Proceedings against DT and TS*.[204] Equal treatment is a wide-ranging principle, naturally applying also to confiscation measures. But in *Varvara v. Italy*,[205] the ECtHR established that the principle of legality (Article 7 ECHR) also applies to confiscations measures, as these should be qualified as criminal sanctions. It follows that also in this case one could not have two versions of the same sanctions respectively applying to domestic and cross-border scenarios.

Limiting the scope of application of harmonised individual rights to cross-border situations only is equally problematic. On the practical side, it is difficult to predict whether, and at what stage, a case would reveal itself to be

[195]Article 22 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') [2017] OJ L 283/1.

[196]On the scope of EPPO action, and the role for cross-border criteria there, see J. Öberg, 'The European Public Prosecutor: Quintessential Supranational Criminal Law?', (2021) 28(2) *Maastricht Journal of European and Comparative Law*, 164–181.

[197]This scenario differs from the one in which the conduct is inherently cross-border—and therefore applies only in the presence of material cross-borderness—and does not have a 'purely internal' correspondent. An example is the offence of 'facilitation of unauthorised entry, transit and residence'.

[198]Some of EU offences are transposed at a national level including a cross-border element as constituent of the offence, as is the case for the crime of trafficking in human beings within Italian legislation. Article 601 of the Italian Criminal Code, as modified by the legislative decree No. 24 of 4 March 2014, introduces, among others, penal sanctions for those who introduce within the territory of the state persons in a state of slavery, next to those who transfer and transport said persons both within and outside the territory of the State. This is not required by the EU legislation, but it is not normatively problematic in that there are two offences, one which is inherently cross-border and others which are not. There are not two versions of the same offence.

[199]Article 49(1) EU Charter of Fundamental Rights, and see for earlier case law, Joined Cases C-387/02, C-391/02 and C-403/02, *Criminal Proceedings v. Silvio Berlusconi and Others* [2005] ECR I-03565.

[200]See, for an introduction to the principle, C. Peristeridou, *The Principle of Legality in EU Criminal Law* (Intersentia, 2015), 3 ff, and the references there quoted.

[201]For a thorough explanation of each of these dimensions and related literature, see Peristeridou, n. 200, 118-126.

[202]Peristeridou, n. 200, 85–90.

[203]Peristeridou, n. 200, 87.

[204]N. 105.

[205]*Varvara v. Italy* App No. 17475/09 (ECHR, 29 October 2013).

cross-border, that is, a piece of evidence might turn out to be abroad when criminal proceedings are already initiated.[206] For legal certainty purposes, it would be advisable that the EU norms would apply from the start of the proceedings. Such a practical argument is of the same nature as the 'false negative' arguments—that is, when a norm appears relevant only domestically but in fact has cross-border implications. This argument has in some cases brought the Court of Justice to reconsider its 'purely internal situation' rule in free movement cases.[207] But even if what was at stake was indeed a purely internal situation, this would similarly be problematic from an equal treatment perspective. The principle of legality is conversely not relevant in this context, as it does not extend to procedural norms.

Limiting enjoyment of EU procedural rights to cross-border situations can only lead to reverse discrimination, namely that mobile foreign citizens are treated better than nationals. This is a well-documented phenomenon in the field of internal market and free movement norms.[208] The Court of Justice has traditionally limited itself to regulating the position of mobile citizens and maintained an "agnostic" approach on the position of non-mobile ones, leaving it for Member States to decide whether it required correction.[209] However, its position is not a granitic one. It has been open to looking at equal treatment between EU citizens and third country nationals,[210] and it has in any case reminded Member States that in implementing EU law they are bound by the ECHR principle of non-discrimination.[211] We are not aware of any cases on procedural rights being dealt with by national courts under the angle of equal treatment. However, it is worth noting that national Constitutional courts have been quite active in sanctioning and correcting reverse discrimination in areas which are similarly fundamental-rights sensitive, such as family reunification.[212] It is submitted that reverse discrimination should be treated with equal suspicion in the EU Area of Criminal Justice, as it is less tolerable than in the field of the internal market. Justification for it should therefore be more carefully considered. This is due to the position of the rights holders—who are particularly vulnerable subjects, either in detention or the object of criminal proceedings with all the stigmatising implications that this implies[213]—and the nature of the rights at stake. While, within the internal market, one could argue that what is at stake are economic freedoms,[214] and possibly 'social rights',[215] in the context of the EU Area of Criminal Justice, there is no doubt that discrimination would concern fundamental rights,[216] notably fair trial rights such as the presumption of innocence or the right to access to a lawyer, as well as victims' rights. Furthermore, although there is not yet

[206]This is particularly accentuated when e-evidence is at stake. The Commission Factsheet (Frequently Asked Questions) on the need for regulation of e-evidence, notably the proposal for both a regulation and a directive on e-evidence, reports that '[m]ore than half of all investigations today involve a cross-border request to access electronic evidence. Electronic evidence is needed in around 85% of criminal investigations, and in two-thirds of these investigations there is a need to request evidence from online service providers based in another jurisdiction. The number of requests to the main online service providers grew by 70% in the period between 2013 and 2016'. Report available online at https://ec.europa.eu/commission/presscorner/detail/en/MEMO_18_3345. Accessed 18 November 2022.

[207]Arena, n. 20, 170, 172 ff.

[208]Arena, n. 20, 172–174.

[209]Arena, n. 20, 173. See also Lenaerts, who discusses the only avenues to address the question of reverse discrimination as lying in the hands of Member States, either by political processes or by judicial review. The first scenario is likely to materialise only if a significant part of the population is affected by reverse discrimination. K. Lenaerts, 'Civis Europaeus Sum': From the Cross-Border Link to the Status of Citizen of the Union', (2011) 3 *FMW Online Journal on Free Movement of Workers within the European Union*, 6.

[210]See the Court Opinion on the EU Canada Trade Agreement, Opinion 1/17, EU-Canada CET Agreement, ECLI:EU:C:2019:341, part 171.

[211]Case C 127/08, *Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform*, ECR I-06241, paras. 78 and 79.

[212]E. Guild and C. Gortazar, The Reconceptualisation of European Union Citizenship (Martinus Nijhoff 2014), 169, 179.

[213]Such stigmatising consequences are accentuated especially in the context of mediatised justice. See S. Moccia, *La Perenne emergenza. Tendenze autoritarie nel sistema penale* (Edizioni Scientifiche Italiane, 2nd edn, 2000), 159.

[214]Namely, free movement of workers (Article 45 TFEU), free movement of establishment (Article 49 TFEU) and free movement of services (Article 56 TFEU).

[215]Such as the right to work and right to access to benefits, Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance) [2004] OJ L 158/77.

[216]Internal market legislation can interact with other non-absolute fundamental rights such as the right to family life (citizenship cases can involve the right to family life for instance; an example, among others, is Case C-200/03, *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department*, ECR I-09925) and only very exceptionally with absolute rights such as the right to dignity (Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, ECR I-09609). But these would be invoked as justification to limit the scope of application of free movement norms and are therefore not relevant here.

legislative harmonisation on detention conditions,[217] the risk of reverse discrimination exists also with respect to absolute rights such as the right not to be subject to inhuman and degrading treatment while in detention. The scenario is that of a European Arrest Warrant issued by a Member State where there are very poor detention conditions. The landmark case *Aranyosi and Căldăraru*[218] introduced the possibility for executing authorities to halt surrender in cases in which the individual would be at risk of torture and ill-treatment if surrendered, and to request particular assurances that the detention conditions in the issuing state would be ECHR compliant. If such assurances are given and respected in practice by the issuing state, the risk is that individuals subject to a European Arrest Warrant would be placed in better detention facilities than the one reserved for national prisoners. This can also have the perverse effects of aggravating overcrowding for national prisoners to accommodate better standards for foreign ones. The following considerations therefore should apply also to future EU harmonised norms on detention conditions.

Admittedly, criminal procedural norms routinely allow for different treatment of suspects. Such unequal treatment can be justified on the basis of the status of the offender, for example, in the case of immunity of public officials where prosecution might be barred or require authorisations; on the basis of seriousness of the crime (e.g., mafia-related crimes or terrorism) or readiness of the evidence (cases of flagrante delicto) which justifies fair trial rights reductions; or on reasons of substantial equality which justifies heightened fair trial rights for more vulnerable suspects such as child suspects, or less affluent suspects who can benefit from legal aid.[219] The argument made to support application of procedural rights directives to cross-border cases can only fall into the third category of substantial equality. Individuals involved in cross-border cases are said to be more vulnerable than, and thus not in a comparable situation with, those in national cases.[220] While the argument can be a valid one, it is not universally applicable.

To begin with, it is only relevant to those scenarios in which a case is cross-border because of the nationality of the suspect or of the victim. This rules out any broader understanding of cross-borderness such as when the evidence is abroad because, for instance, the facts have been committed abroad.[221] It would be hard to justify why two national suspects in a national trial are not in a comparable position because in one of the trials the evidence happens to be outside national borders, possibly for no fault of their own. The only hypothesis worth entertaining is thus whether foreign suspects or foreign victims should enjoy heightened protection. It is documented that foreigners can be subject to discriminatory treatment, for instance when it comes to access to alternatives to detention.[222] And it can be assumed that foreigners have a stronger need for interpretation and translation facilities, which was listed as one of the rights which might have an inherent transnational dimension.[223] In these cases, further protection could be justified. One should note, however, that in our contemporary multicultural societies, also national suspects might be in need of translation facilities. It was also highlighted how reverse discrimination in the field of family reunification would affect especially national citizens with a migrant background, arguably a more vulnerable layer of society, who would have similar needs to foreigners but might not benefit from the same treatment.[224] Reverse discrimination on the right to translation and interpretation could similarly disproportionally affect citizens with a migrant background whose first language might not be the official language of the proceedings.

[217]See, on future harmonisation of detention conditions, among others, E. Baker, T. Harkin, V. Mitsilegas and N. Peršak, 'The Need for and Possible Content of EU Pre-trial Detention Rules', (2020) 16(3) *Eucrim*, 221–229, and A. Soo, 'Common Standards for Detention and Prison Conditions in the EU: Recommendations and the Need for Legislative Measures', (2020) 20(3) *ERA Forum*, 327–341.

[218]Joined cases C-404/15 and C-659/15, *PPU Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen*, ECLI:EU:C:2016:198.

[219]This classification is drawn from R. Orlandi, 'Uguaglianza e processo penale', (2014) 2 *Ragione Pratica*, 419.

[220]Öberg, n. 121, 36.

[221]See the different interpretations of cross-borderness in Öberg, n. 121, 25.

[222]See A. Martufi and C. Peristeridou, 'Pre-trial Detention and EU Law: Collecting Fragments of Harmonisation within the Existing Legal Framework', (2020) 5(3) *European Papers*, 1477, and the references there quoted.

[223]Above, Section III.

[224]Groenendijk, n. 212, 173.

Furthermore, the argument of vulnerability of foreign suspects is even less convincing in other cases such as the presumption of innocence, for instance,[225] or the right to access to a lawyer,[226] which incidentally codifies an ECHR standard which was conceived as a minimum standard for all Council of Europe States.[227] In light of the above, interpreting Article 82(2)b TFEU, or the principle of subsidiarity, as imposing a blanket prohibition on the application of procedural rights legislation—or future legislation on detention—to domestic cases is not normatively possible. It is bound to lead, at least in some cases, to an unjustified breach of the principle of equal treatment. And in fact, national provisions meant to ensure substantive equality and differentiating access to fair trial rights are not always a blanket fit-for-all standard. They can include a case-by-case assessment, such as in the provision of legal aid.[228]

6 | CONCLUSION

This article has explored the role and the justifications for EU action in the EU Area of Criminal Justice, relying to some extent on a comparison with EU action in the internal market. It distinguished between a role for the EU as a subsidiary policy actor and as a primary policy actor. In the first case, the EU is justified to step in as a regulator, and as a policies' implementation actor, only when Member States fail to achieve the desired objective. EU constitutional law scholarship has identified this to be the case when Member States are confronted with phenomena having a transnational dimension. This can be locally rooted phenomena which have cross-border effects, such as environmental pollution, or phenomena which occur on a large scale covering several States, such as significant migratory fluxes. In the second case—the EU acting as a primary policy actor—the supranational regulation and policy implementation occurs independently from Member States' failures and pursues an independent normative agenda. It is submitted that a good indicator of the EU embracing this role is when it regulates also internal, non-cross-border situations.

Relying on this theoretical framework, the article puts forth two interrelated arguments. Firstly, it argues that while the Treaties initially envisaged the EU only as a subsidiary policy actor, this model is an imperfect one to explain subsequent legislative and treaty amendments. The article illustrates this point with reference to both a core and well-established area of EU action, the internal market, and in the newer EU Area of Criminal Justice where the trend is accentuated. In particular, the generally applicable principle of subsidiarity, the EU harmonising competence in the internal market, the free movement provisions, as well as the early Maastricht and Amsterdam EU competence in criminal matters all limit, although to a varied extent, EU regulatory action to those areas concerned with cross-border economic transactions or cross-border crime. The application of EU law in practice is also in principle limited to those situations which involve a cross-border element. This is summarised in the article as EU action being respectively limited by legal and material cross-borderness. However, legislative development in the internal market, which progressively gave more space to non-market aims in Article 114 TFEU-based legislation, and an ambivalent body of case law on the boundaries of the concept of 'purely internal situation', have put legal and material cross-borderness significantly under pressure in the field of the internal market. The EU often drifts towards acting as a primary policy actor setting an independent agenda in fields such as consumer or environmental protection. This trend is even more accentuated in the EU Area of Criminal Justice. Both legislative developments and EU constitutional law amendments go in the direction of the EU also regulating areas which are unlikely to be concerned with cross-border crime, with legal cross-borderness losing some of its bite as a limiting criterion. This is well-evidenced by the progressive disassociation of harmonisation from the needs of inter-state cooperation, as well as by the scope of EU harmonising competence, notably Article 83(2) TFEU. Moreover, the Court of Justice has clearly ruled out material cross-borderness as a criterion limiting the application of EU definitions of crimes and EU norms on procedural suspects' and victim's rights. Finally, there are also pushes towards expanding the range of action of judicial cooperation agencies, such as Europol and Eurojust, also to include internal cases. The comparison between the internal market and the EU

[225]Directive 2016/343, n. 117.

[226]Directive 2013/48, n. 116.

[227]ECtHR, *Salduz v. Turkey*, 27 November 2008, App No. 36391/02.

[228]Examples of different support for legal aid being provided depending on individual incomes, and not on a general threshold, exist in Argentina, or to an extent the United States. See the observations on this included in Orlandi, n. 219, 431.

Area of Criminal Justice is helpful in that it illustrates that the trend from the EU acting as a subsidiary to a primary policy actor is not specific to a single policy area, but arguably an evolution of widespread, pre-existing trends. But it is also helpful in triggering the question of whether this trend is a desirable one, and whether that depends on the relevant policy area.

While the drifts towards normative agenda-shaping in the internal market are often interpreted as the necessary consequence of increased integration, the article submits—and this is the second argument—that *any* EU action in the EU Area of Criminal Justice cannot be subsidiary-only. This would lead to a piecemeal approach to criminal justice which would be incompatible with general principles of criminal law. The moment the EU decides to step into the EU Area of Criminal Justice to design and implement supranational policies, it has to be ready to embrace a role as a primary policy actor also re-regulating areas that Member States are in fact able to regulate themselves. This naturally implies significantly compressing Member States regulatory—and policy implementation—autonomy. However, this is the price to pay for entering a highly fundamental-rights-sensitive area. Relying only on legal cross-borderness as a criterion to justify the EU definition of crimes would neglect the harm principle and the legal interest principle. It was also suggested that the legal creativity that would stem from limiting EU intervention and safeguarding regulatory competition can be fostered by enlarging EU regulatory tools in this area, for instance by codifying also EU decriminalisation competences. Moreover, limiting the application of EU criminal law, both on crimes definition and on procedural rights, only to cross-border cases creates a situation of reverse discrimination. This might be tolerable in the internal market cases. It is not in criminal justice, considering the vulnerability of the discriminated subjects and that fundamental rights, as opposed to economic freedoms, are at stake. Lastly, from a theoretical point of view, it is at odds with the principle of legality in criminal matters and of equal treatment.

Thus, the special characteristics of criminal law require the EU to act as a primary policy actor, also regulating internal situations, if it has to act at all. This uncovers a deeper question, which is raised here as one of the obvious avenues for future research. As widely illustrated by authoritative sociologists and criminal legal theorists, criminal law has a strong symbolic potential. It expresses the values of a community.[229] A particularly strong link thus exists between criminal law and the community it is both an expression of and speaking to. Crimes are indeed considered public wrongs, underlying that there is a public they speak to. The question thus is whether there is such a supranational community, or how to address the various composing communities, allowing and legitimating wide-ranging, primary EU action in criminal justice matters. This question has, to our knowledge, not been extensively dealt with in the literature,[230] though similar questions have been raised, already early on, when discussing the EU democratic deficit and the presence of an EU demos, or actually the lack thereof.[231] More recently, the question of the justification for and the need for consistency between the application of EU citizenship and EU values to internal situations has also been addressed.[232] Future research on the role for the EU in criminal justice could start by taking its cues from these investigations.

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[229]See, on community and criminal law, among many authoritative voices, A. Duff, *Punishment, Communication and Community* (Oxford University Press, 2003); J. Feinberg, 'The Expressive Function of Punishment', (1965) *49 The Monist*, 397.

[230]Theoretical discussion exists on the presence of an EU community, although with no specific reference to criminal law. See, among many others, A. Daniel, 'Identifying the European Union: Legal Integration and European Communities', in D. Augenstein (ed.), *'Integration through Law' Revisited: The Making of the European Polity* (Ashgate, 2011), 99. Whereas the existing work on the symbolic dimension of EU criminal law focuses on legal questions analysing what conclusions can be drawn from the existing law as to its expressive potential, see Coutts, n. 91, Turner, n. 58, and Sotis, n. 58. For a more theoretical—although not specifically sociological—take, see Hildebrandt, n. 159.

[231]See J.H.H. Weiler, 'Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision', (1995) 1(3) *European Law Journal*, 219.

[232]A. Jakab, 'Application of the EU CFR by National Courts in Purely Domestic Cases', in A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press, 2017), 252-263.