
Introduction

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This book provides an advanced analysis of EU criminal law as a distinct policy area and field of research, which has procedural, substantive and institutional dimensions. It aims to reflect critically on the wide range, scope and significance of EU criminal legislation and institutions and their impact upon the course of European integration. This study is highly pertinent now because tackling cross-border crime has incrementally become one of the European Union's top priorities. Indeed, the EU aspires to maintain its reputation as an Area of Freedom, Security and Justice (AFSJ) based, *inter alia*, on accelerated mutual assistance in criminal matters. Almost complementary to the prohibitions imposed upon Member States to create the right conditions for the free movement of persons in the EU, the fast-developing criminal law *acquis* serves to prevent the free movement of offenders and to reduce their capacity to exploit their fundamental freedom to move across the Member States in order to resort to unsanctioned cross-border criminal activity.

So far, while the plethora of national responses about the likelihood of a general EU criminal code have largely focused on the opportunities open to the EU, they also pinpoint the limitations of judicial cooperation in criminal matters and EU criminal law in general as a sovereignty-sensitive area of EU law – an area known for its 'transitional periods', 'emergency breaks' and 'opt-outs'. While this Research Handbook discusses EU action in the field of criminal law by being mindful of the legal constraints of EU competence and the prescribed duty of EU institutions to respect national criminal law systems, it takes a bolder approach. It is arguing, through its various contributions, that a number of variables, such as Lisbon's legal framework for enacting criminal legislation and the subsequent adoption of minimum rules regarding the definition of crimes and sanctions, as well as minimum standards for procedural rights, have standardized the legal profile of EU criminal law as a well-settled policy area of EU law.

Indeed, the protection of fundamental rights has been at the epicentre of the Court of Justice of the European Union (CJEU)'s jurisprudence. More specifically to our field of study, the President of the Court of Justice, Koen Lenaerts, and José A. Gutiérrez-Fons highlight in Chapter 1 that the effectiveness of EU criminal law needs to be balanced against fundamental rights. According to the Judge, this balancing exercise has been influenced by the binding force of the Charter of Fundamental Rights which has been key in streamlining national criminal laws when Member State action falls within the scope of EU law. The practical application of the Charter, and its interaction with EU criminal law norms, constitutes the subject matter of other contributions in this book.

It is worth posing the following question from the outset: who, or rather, which institution guarantees individual or 'procedural' (as some constitutional lawyers like to

call them) rights and guarantees? Soon after its inception, EU criminal law faced severe teething problems linked to the democratic deficit affecting the former third pillar (its former home). For instance, neither the European Parliament nor the CJEU could benefit from their full powers. This development, as Henri Labayle explains in Chapter 2, looking specifically at the institutional framework of EU criminal law, posed ‘major questions’ *vis-à-vis* respect for the principle of legality and fundamental rights. Rosaria Sicurella, the author of Chapter 3, which deals with the controversial competence question, explains that any rights shortage in EU criminal law are due to a historical mistake. We should not forget that for a long time criminal law was considered to fall outside the competence of the EU institutions and was presented as an area which was immune from integration. She argues that this historical mistake can be corrected with a well-implemented conferral of EU competence in criminal law to the European Union.

But does one size fit all Member States, especially if they are to surrender an intimate area of national competence to the EU? Maria Fletcher sheds light on this question by explaining thoroughly in Chapter 4 that deviation from the norm is permissible in EU criminal law. She critiques the differentiation mechanisms, using Protocol No. 36 on Transitional Provisions (the so-called ‘Protocol 36 opt-out’) which applies to the United Kingdom, as a prime example of national reservation from the integrationist approach to EU criminal law campaigned for by the Treaty of Lisbon. Indeed, the Protocol puts at the top of the agenda the capacity of Member States to retain the efficacy of law enforcement at home, therefore rendering it a contentious policy area. For instance, outside express opt-outs Member States have expressed certain scepticism about the interaction between fundamental rights and EU criminal law. Paul De Hert calls for further refinement of this interaction in Chapter 5. Whilst providing a historical account of the EU’s fundamental rights protection through a careful parsing of the CJEU’s jurisprudence, he underlines the level of complexity and uncertainty with regard to the practical application of fundamental rights in the field of criminal law.

The CJEU’s emphasis on the effectiveness of EU criminal law over fundamental rights standards as protected in the national constitutions seems to have become a bone of contention for Member States. This is not least, as Alexandros Kargopoulos argues in Chapter 6, because European citizens are the bearers of constitutional and statutory rights stemming from both national legal orders and international human rights instruments, such as the European Convention on Human Rights (ECHR). Indeed the EU is appreciative of this legal reality and the Charter expressly provides that its provisions need to be interpreted in the light of other legal resources, whether national or international. Nonetheless, it appears that there are competing visions of fundamental rights guarantees in criminal law between national and European judges, something that, especially when it comes to the right to a fair trial, may cause further turbulence in the national reception and overall legitimacy of EU criminal law. A solution to this problem could be, as Valsamis Mitsilegas proposes in Chapter 7, to place fundamental rights at the forefront of the system of mutual recognition rather than relying on a system of automatic recognition. This is something that he contextualizes against the backdrop of the seminal Opinion 2/13 regarding the draft agreement on EU accession to the ECHR.

It is worth mentioning that, in its defence, the European Union has put together a raft of measures which are mindful of procedural safeguards. For instance, Jacqueline Hodgson discusses in Chapter 8 the positive contribution of certain Directives on the right to legal assistance and the right to information which are aimed to protect suspects and accused persons alike. She also points to the practical challenges of implementing rights and uniform safeguards across different criminal justice systems. In this respect, the implementation of principles such as *ne bis in idem* or the prohibition of double jeopardy, included, for instance, in the Convention Implementing the Schengen Agreement, has enhanced judicial cooperation in criminal matters. As Anne Weyembergh and Inés Armada argue in Chapter 9, the clarification of boundaries of *ne bis in idem* by the CJEU has in turn allowed the development of the principle of mutual recognition.

The CJEU's work in striking a right balance between the need to establish a homogenous EU criminal law framework and protect fundamental rights is particularly manifest in the area of data protection. The recent annulment of the Data Retention Directive in 2014 and the *Google Spain* judgment demonstrate that the CJEU is prepared to interpret the Charter as including strong data protection and privacy rights. However, as Luisa Marin sets out in Chapter 10, these decisions are in stark contrast with current discussions about a recalibrated Data Retention Directive and the recent proposal for an internal EU Passenger Name Record Directive which will encourage a systematic and indiscriminate storage and analysis of personal data. The CJEU needs to be prepared for future challenges in right to privacy cases, and the *Schrems* judgment is already indicating the relevance of *Digital Rights Ireland*.

Another challenge for the CJEU is related to the constitutional dispute over the competence of the EU to criminalize behaviour which occurs outside the strict margins of EU criminal law. This dispute involves reconciling criminal law with other substantive areas of law, such as the internal market, which have incrementally deployed rules of criminal law. For instance, an argument put forward by Ester Herlin-Karnell in Chapter 11 is related to dual regulation through criminal law sanctions and administrative sanctions, as proposed in various EU legislation. She warns not only that this framework may prompt claims for breaches of the principle of *ne bis in idem*, but that it also brings into sharp relief the exact definition of sanctions in EU law. For instance, in competition law, the application of administrative sanctions against some cartels is promoting a model of quasi-criminal law. More provocatively, in Chapter 12, Christopher Harding argues that 'criminal law has invaded EU competition law through the back door'. Likewise, Valsamis Mitsilegas, Malgosia Fitzmaurice and Elena Fasoli explain in Chapter 13 that environmental protection has become a legitimizing factor for the EU to impose criminal offences and adopt criminal sanctions to punish, *inter alia*, ship-source pollution. Like the previous contributions, they query the effects of pre-emption imposed upon Member States by the relevant EU legislation upon national autonomy to impose criminal or administrative sanctions.

Moving on, the book delves into another substantive area of EU law: EU immigration policy. This area has recently been connected to the current escalating migration crisis in Europe, which has taken the dimension of a humanitarian emergency. In Chapter 14, Niovi Vavoula looks at EU immigration law and its interplay with national criminal law, or to put it differently, the limitations placed on Member States' power to

impose criminal law sanctions to irregular migrants. The diminution of the powers of the Member States to adopt criminal law is further made evident in Chapter 15, where Petter Asp discusses the positive and negative obligations in the field of criminal law that arise out of EU membership and are directed towards national legislatures, whether through the adoption of minimum rules as regards the definition of offences and sanctions or through the general duty to interpret national norms in conformity with EU law.

An interesting substantive component of EU criminal law is related to what is often referred to as ‘Euro-crimes’ for which, according to Article 83 TFEU, the European Union may establish minimum rules concerning their definition as well as appropriate sanctions. Bridging over from the previous Part and the constitutional disputes on competencies, this Part of the book considers money laundering in Chapter 16, in which Maria Bergström provides a historical and contextual analysis of the new but still mainly administrative EU anti-money laundering framework, pointing to some of its specifics and also to some potential problems. In the same vein, Saskia Hufnagel in Chapter 17 discusses the contours of the all-inclusive term ‘organized crime’ in EU criminal law by taking a historical approach to this broad offence and considering the practical problems of its harmonisation through a raft of soft and hard legal instruments. In Chapter 18, Maria Kaiafa-Gbandi elaborates on the need for anti-corruption EU legislation to employ criminal law while at the same time fundamental criminal law principles need to be protected. Francesca Galli in Chapter 19 focuses on terrorism and the increased level of threat, recently manifested in the 2015 jihadist terrorist attacks in Paris and Copenhagen. She makes a plea for authorities to integrate law enforcement efforts into a more comprehensive approach with a raft of preventative measures. Finally in this Part, Tom Obokata in Chapter 20 provides an overview of EU attempts to tackle trafficking in human beings. He reflects on the impetus added through Treaty revisions and the adoption of secondary legislation, which also places emphasis on the protection of vulnerable victims (e.g., children, people with special needs). The latter development is marking a transition in focus from a mere criminal justice response to one that fully incorporates a human rights approach.

The book then considers the institutional proliferation in EU criminal law from the point of agencies, their historical and legal foundations, composition and structure, as well as their field of activity and operational effectiveness. The focus in Chapter 21 by Michèle Coninx is on Eurojust; in Chapter 22 by Sabine Gless on Europol; and in Chapter 23 by Katalin Ligeti on the more recent addition of the European Public Prosecutor’s Office (EPPO) which as of 2016 will be empowered to prosecute offences against the financial interests of the EU. Whilst the chapters focus on the individual characteristics of these agencies they all touch upon the balance of relations between them, as well as the interplay between them and the national and international actors who may request their assistance (e.g., with reference to data exchange). Using the above agencies as case studies, the authors provide the picture of an integrated AFSJ institutional landscape which is supplemented by the relevant constitutional design, including emphasis on accountability and democratic control by the main EU institutions. For instance, in the post-Lisbon dispensation, the European Parliament may

hold Europol accountable and scrutinize its activities. The above development, however, does not exclude tensions, especially related to resistance by Member States to further integration.

Last but not least, the book explores the foreign affairs dimension of EU criminal law through an analysis of the external profile of the AFSJ which is important for both regional and global stability and security. In Chapter 24, Adam Łazowski looks into enlargement as the 'EU's flagship external policy' and singles out the role of criminal matters in EU accession criteria, taking stock of the previous enlargement rounds and the alleged failure of conditionality. He also provides an account of the current enlargement policy pursued by the EU in relation to the Western Balkans and Turkey as an example of a stricter pre-accession strategy whereby EU criminal law is an indispensable part of the EU *acquis* and a more robust benchmark in EU enlargement negotiations.

Outside the adoption of EU criminal justice standards by past EU acceding states and prospective entrants, EU criminal law also contains clear imprints of transatlantic cooperation. In Chapter 25, Elaine Fahey provides a critique of mutual legal assistance between the European Union and the United States in, *inter alia*, the field of extradition, information exchange and cybercrime. These are not only examples of the extra-territorial effect of EU criminal law but also of 'transatlantic rule-making' and exportation of the principle of mutual recognition as the crown principle in EU criminal law. Counter-terrorism and, in particular, individual sanctions (coming into the limelight after the infamous *Kadi* saga) occupy a large part of EU criminal law and create a host of issues *vis-à-vis* the externalities and the scope of the EU's capacity to punish individuals. In Chapter 26, Iain Cameron discusses the capacity of the EU to issue autonomous sanctions against those (persons or entities) suspected of belonging to, or supporting, a terrorist group and places emphasis on the standards of judicial review, including the possibility to claim damages. In Chapter 27, Theodore Konstadinides discusses the necessity of EU international cooperation with non-Member States in criminal matters by evaluating some individual EU mechanisms that have attracted little commentary. He focuses, in particular, on the viability of the EU strategic partnership with Russia and external aid programmes and institution building, contributing to good governance and the rule of law in the Western Balkans. Finally, in Chapter 28, Pedro Caeiro concludes by offering a *tour-de-horizon* of the relationship between European and international criminal law. At the epicentre of this relationship lies the traditional conception that penal jurisdiction is a monopoly of the sovereign state. Building on a critique of such dogma, he analyses the differences and similarities between the two legal branches and assesses the paradoxical role of the state (and state penal law) in their configuration.

From the above, it can be concluded that EU criminal law is a very exciting area of EU law, not merely because it is 'trendy' or because it only 'lifted off' in recent years but also due to the fact that it is structurally and constitutionally unique. To provide only one example, unlike the internal market, EU criminal law not only concerns individual rights-enhancement but also rights-restraining. Hence, on the one hand, EU criminal law is preoccupied with defining cross-border or 'Euro-crimes', while leaving open the opportunity for Member States to sanction criminal behaviour through mutual cooperation. On the other hand, EU criminal law contains a web of institutions and

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agencies and a number of external liaisons which, while ensuring the protection of EU citizens from serious crime, should also endeavour to protect the fundamental rights of suspects and criminals. This Handbook is testament to the fact that the European Union has achieved a lot in little time in this field, and hence it comprises more of a work in process than a work in progress.