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Normative justifications of EU criminal law: European public goods and transnational interests

Jacob Öberg

Abstract
EU policy-making in criminal law is a matter of significant public concern for EU citizens and the Member States. The exercise of EU public powers in the fields of criminal law and law enforcement have tangible and adverse consequences for the liberties and well-being of individuals. Furthermore, EU cooperation in the area of criminal law touches upon core functions of statehood including ‘core state powers’ such as the safeguarding of internal security and law enforcement. This raises several questions regarding the rationale underpinning EU criminal policy and its legitimacy within the context of a multi-level polity. This article sketches out a normative argument for legitimate justifications for some particular areas of EU criminal law on the basis of the transnational criterion enshrined in the subsidiarity principle. The article claims that there is a compelling justification for EU action in criminal law to protect European public goods and other key transnational interests.
Criminal law has traditionally belonged to the realm of national competence and has thus been subject to ‘intergovernmental’ governance at EU and international level. The main reason is that criminal policies and law enforcement are vehicles of social control which seriously restrict citizens’ right to free movement and other fundamental rights. As such, criminal law reflects a value system which is also the source of its legitimacy in a given society. This also means that EU policy-making in criminal law is a matter of significant public concern for EU citizens and the Member States alike. From a subjective standpoint, the exercise of EU public powers in the fields of criminal law and law enforcement have tangible and adverse consequences for the liberties and well-being of individuals. From an objective standpoint, EU’s cooperation in the area of criminal law touches upon essential functions of statehood including ‘core state powers’ such as the safeguarding of internal security and law enforcement.

 Nonetheless, developments in this area over the last 30 years suggest that criminal law is no longer on the periphery of European integration. Whilst some have claimed that the integration of criminal law as a ‘core state power’ is indicative of the notion of ‘new intergovernmentalism’, ‘intensive transgovernmentalism’ or ‘new institutionalism’, none of these theories seems to explain satisfactorily the significant institutional and policy changes that have taken place in the field of criminal law since the Lisbon Treaty. Paradoxically, in the field of criminal law, comprehensive integration driven by the EU institutions has taken place, embracing new substantive areas and actors, despite the fact that the policy area embodies high sovereignty and national identity costs for the Member States.

 It is conversely proposed that supranational governance is the most apposite characterisation of developments in this field. Drawing on insights from a body of literature in EU law and political science, the key criteria for assessing the depth of supranational integration include the scope, type and nature of EU competences, the mode and formal rules of decision-making, forms of oversight and implementation by supranational bodies, the effectiveness of the decisions taken by EU institutions as well as the intensity of the legal measures adopted at EU level. Two traits of development in this area particularly stand out as prima facie evidence of a gradual supranationalisation of the field of criminal law. First, it appears clear that the supranational EU institutions have gained stronger powers after the Lisbon Treaty and that today, decision-making in the area of criminal law as a whole is governed by the
ordinary decision-making procedure and qualified majority voting. Secondly, the enforcement powers that have been delegated to Europol, Eurojust and the European Public Prosecutor’s Office (EPPO) are conventionally associated with the core areas of State sovereignty: policing powers, law enforcement and prosecution competences. There is also tentative evidence from recent research on integration in the field of criminal law and policing which suggests that decision-making dynamics and general policy developments indicate stronger supranational governance of the area. Thus, the development of EU criminal law indicates a broader shift from a rationale of ‘cooperation’ to one of ‘integration’ of national criminal justice systems along functional lines coherent with the traditional integration theories.

This transformation of EU criminal law into a more integrated policy area, however, calls for higher standards of legitimacy to be applied to EU legislative activities in the field, as compared to an intergovernmental regime. This raises questions regarding the rationale underpinning EU criminal law within the context of a multi-level polity. This article wishes to respond to these questions by offering a tentative vision of what could constitute robust normative justifications for EU criminal law. EU action in criminal law has previously been analysed from the specific non-domination (security and freedom) perspective, communitarian and citizenship-based perspective; and from the perspective of ‘internal’ legitimacy. This article offers, however, a different, subsidiarity-based framework focusing in particular on when and why the EU rather than the Member States are entitled to regulate criminal justice, hereto lacking in the literature. The account offered below, centring on the relationship between the EU and Member States, reflects central criteria for legitimacy as EU action post-Lisbon needs to be in conformity with the principle of subsidiarity. Enshrined in Article 5(3) TEU, this principle is the cornerstone regulating the relationship between the EU and the Member States. Such an approach is congruent with the political sensitivity of the specific field of criminal law, not only in terms of sovereignty but also in terms of fundamental values such as justice, democracy and fundamental rights. This account is furthermore in line with the theories of European public goods and transnational interests, which offers normative frameworks for a subsidiarity-based approach to EU criminal law.

15 See Lisbon judgment, above, n. 3, paras. 252–253, 355–362; Besselin, above, n. 6, 101–116 for an outline of such a sovereignty discourse.
17 L. Lindberg, The Political Dynamics of European Economic Integration (Stanford University Press, 1963); E. Haas, The Uniting of Europe: Political, Social, and Economical Forces, 1950–1957 (University of Notre Dame Press, 1958) for seminal works on functionalism.

Transnational interests’ is used as a term to bridge these accounts to capture the normative basis for EU intervention in these instances.
The ambitions of this article are modest in that it does not aim to offer a complete coverage of the whole field of EU criminal law. The analysis employs carefully selected examples taken from the harmonisation of substantive criminal law and domestic criminal procedure and the establishment of the European Public Prosecutor. On the basis of these examples, a broader framework is developed which could be tested in other specific areas of EU criminal law (such as judicial cooperation in criminal matters and EU criminal justice agencies).

The article first offers an assessment of three different rationales and drivers of EU criminal law since the Maastricht Treaty by reviewing key legal and political developments in this area. They indeed offer distinctive ways of understanding why the European Union wishes to take action in the area of criminal law and is the best placed to undertake those actions (Section 2). Thereafter it proceeds to sketch out a normative argument for legitimate justifications for some particular areas of EU criminal law on the basis of the transnational criterion enshrined in the subsidiarity principle. The article claims that there is a compelling justification for EU action in criminal law to protect European public goods and other key transnational interests (Section 3).

2 | ASSESSING THE LEGITIMATING POWER OF THE EXISTING RATIONALES FOR EU CRIMINAL LAW

A close analysis of the evolution of EU criminal law over the past 30 years suggests that it is possible to infer three principal drivers for law and policy-making in this area: ensuring the ‘effectiveness’ of EU policies, ‘security’ for EU citizens; and, subsequently, a ‘rights-based approach’ to EU criminal policy. It is appropriate to review the journey of EU criminal law through the lens of these rationales, commencing with criminal law as an instrumental tool for enforcing EU policy, in order to assess their legitimating power, shortcomings and complementarity.

The principle of effective, proportionate and dissuasive sanctions for the purpose of enforcement of EU obligations encapsulates the ‘effectiveness’ rationale for EU action in the field of criminal law. This statement first appeared in the Greek Maize judgment in 1989 where the Court of Justice ruled on the use of criminal law based on Member State obligations under Article 4(3) TEU. The Court held that whilst the choice of penalties remains within the Member States discretion, they must ensure that infringements of EU law are criminalised under conditions that are similar to those applicable to infringements of national law of a similar nature and that the penalties are effective, proportionate and dissuasive. Effectiveness has subsequently (prior to the Lisbon Treaty) appeared as a justification for EU competence in criminal law in the Court of Justice’s seminal rulings in Environmental Crimes and Ship-Source Pollution where it recognised a self-standing Community criminal law competence on the premise that criminalisation of infringements of EU rules (on environmental protection) would be essential for the ‘effective’ implementation of that EU policy.

31Such a more comprehensive examination, however, requires more research going beyond the limited scope of this study.
34This is the principle of loyalty which requires that ‘The Member States shall take any appropriate measures ... to ensure fulfilment of the obligations arising out of the Treaties’ (Art. 4 (3) 2nd paragraph TEU).
36Case C-176/03, Commission v. Council (Environmental Crimes) EU:C:2005:542.
37Case C-440/05, Commission v. Council (Ship-Source Pollution) EU:C:2007:625.
38Case C-176/03, Environmental Crimes, above, n. 36, para. 48; Case C-440/05, Ship-Source Pollution, above, n. 37, paras. 24–25, 28–39.
Post-Lisbon, we can ascertain that ‘effectiveness’ continues to be the primary justification for shaping policy in respect of EU ‘regulatory criminal law’.\(^{39}\) Along these lines, Article 83(2) TFEU express the rationale for EU intervention in criminal law covering all criminal law provisions aimed at achieving the political objectives of the Union; protection of the environment, protection of the financial market and the four freedoms.\(^{40}\) It contains by definition criminal law measures that are ‘essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures’.\(^{41}\) The Commission has been driving policy here, striving to demonstrate the added value of criminalisation at EU level and focused primarily on functional criminalisation.\(^{42}\)

In the literature, the added value of EU criminalisation has been criticised. It has been observed that the EU has decided to take a stand against certain conducts in the field of environmental law and insider dealing, even if the evidence to support these legislative initiatives was insufficient to sustain the claim that criminal law is essential for the enforcement of these policies.\(^{43}\) The EU’s action in such cases could potentially be explained with reference to the Union’s need to communicate a common sense of justice and expressing the Union’s common values. Since, however, the current Treaties provide no clear mandate for harmonising criminal law on ‘expressive’ grounds, it has been argued that the EU will endanger its legitimacy if it criminalises on such a basis.\(^{44}\)

The emergence of a proper supranational prosecutor in the field of criminal law, i.e. the EPPO, also sprang from the emphasis on the enforcement of existing EU policies and concerns over misappropriation of EU funds. It had been perceived that Member States’ past records in protecting EU funds were insufficient and that a European Public Prosecutor could address these shortcomings. Furthermore, it has been seen as crucial for the legitimacy of the Union that its limited financial resources are used in the best interests of EU citizens.\(^{45}\)

The fashioning of such a body was, however, a contested process. The seeds for the EPPO were considered already in the 1990s by the work of the academics in the Corpus Iuris Project. This project had suggested a scheme of measures to counter the inadequate enforcement of offences against the EU’s budget, including suggestions of a single set of offences applicable throughout the Union and the establishment of a European Prosecutor.\(^{46}\) However, the ambitious vision of the EPPO as a centralised prosecutor must be singled out as an extremely sensitive issue in political terms.\(^{47}\) Member States have voiced fierce opposition towards the establishment of such an office, viewing the EPPO as a further encroachment on national sovereignty, and have expressed concerns over the far-reaching implications of such an office on the functioning of national criminal justice systems.\(^{48}\) Despite these objections, the Lisbon Treaty, created by means of Article 86 TFEU—following the recommendations of Working Group X—a clear

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42See COM (2011) 573 final, above, n. 40.

43Öberg Limits to EU Powers, above, n. 30, ch. 8; Wieczorek, above, n. 24.


48See, e.g., the yellow card issued by national parliaments against the EPPO Proposal: Commission, ‘Communication from the Commission to the European Parliament, the Council and the National Parliaments on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office with regard to the principle of subsidiarity, in accordance with Protocol No 2’, COM (2013) 851 final; see also the divided opinions among the members of the Convention, Secretariat of the European Convention, ‘Draft sections of Part Three with comments’ (CONV 727/03, 27 May 2003), 33–34.
remit to establish a European Public Prosecutor’s Office. On the basis of this mandate, the Member States finally established—on the basis of enhanced cooperation—the EPPO in 2017 to effectively enforce crimes against the EU’s financial interests. The EPPO is a milestone in European integration as this is the first European body to be granted powers to independently prosecute crimes (against the Union’s financial interests) in Member State courts.\textsuperscript{[49]}

There is also a normative argument in favour of the EPPO having powers to prosecute crimes against the EU’s financial interests. It is legitimate to argue that the crimes that the EPPO has been empowered to investigate are not of national concern but clearly linked to serious cross-border criminality.\textsuperscript{[50]} In addition, there are ‘effectiveness’ and incentives considerations substantiating the creation of the EPPO. Based on the inadequate efforts of the Member States to date to deal with crimes against the EU’s financial interests, it is unlikely that they can be trusted to effectively protect the Union’s budget. Furthermore, a careful study of the sovereignty arguments presented by the Member States reveals that they are not predominantly related to concerns about loss of national autonomy but pertaining to the Member States’ lack of political will to spend resources on protection of the EU’s financial interests.\textsuperscript{[51]} Protection of those interests should also be of concern to all parties involved, because the resources that are misappropriated are ultimately taken from EU citizens, who are the real victims of such crimes. The EPPO thus needs to be adequately equipped with tools of criminal law which ensure that the Union’s financial resources are used ‘effectively’ in the interests of its citizens.\textsuperscript{[52]}

The post-Lisbon decisions of the Court of Justice in \textit{Taricco}\textsuperscript{[53]} and \textit{Melloni}\textsuperscript{[54]} also illustrate the Court’s concern with effective enforcement of EU rules. In \textit{Taricco}, the Court considered the role of time bars to prosecution in the context of a case that involved fraud in relation to VAT. The Court was clear that the time limits applicable under Italian law should not obstruct the prosecution of the EU fraud giving preference to the principle of effective enforcement.\textsuperscript{[55]} In \textit{Melloni}, the Spanish court in charge of executing the arrest warrant considered refusing the surrender of a person on the basis that Spanish constitutional law offered stronger protection against judgments \textit{in absentia} than that available in the executing state (Italy).\textsuperscript{[56]} The Court of Justice rejected the possibility of conferring additional powers on the executing judicial authority holding that Article 53 of the Charter could not be construed as giving priority to the national (constitutional) standard of protection over the application of provisions of EU law as this would compromise the primacy and effectiveness of EU law.\textsuperscript{[57]}

Notwithstanding the Court of Justice’s conclusions in \textit{Melloni}, it is arguable that the contested Spanish rules on \textit{in absentia} trials constituted a ‘fundamental aspect’ of the Spanish criminal justice system.\textsuperscript{[58]} The fact that the provision at issue was derived from the Spanish constitution and the fact that no exceptions from the right to challenge \textit{in absentia} trials was allowed suggested that the provision was of significant importance in the Spanish legal system. Furthermore, the fact that the Spanish Constitutional Court had gone to great lengths to protect this principle was evidence of its prominence. Whilst the right of defence in EU law does not require that a defendant is always guaranteed a right to retrial in case of convictions \textit{in absentia}, this may nonetheless be a ‘fundamental aspect’ of the Spanish criminal justice system.\textsuperscript{[59]} Such disregard is questionable by failing to respect the Member States’ far-reaching fundamental rights guarantees going beyond the protection in the Charter of Fundamental Rights.


\textsuperscript{[50]} Art. 22 in EPPO Regulation, above n. 49.


\textsuperscript{[52]} Art. 325 TFEU; Wade, above, n. 45.

\textsuperscript{[53]} Case C-105/14, Taricco and Others, EU:C:2015:555.

\textsuperscript{[54]} Case C-399/11, Melloni, EU:C:2013:107.

\textsuperscript{[55]} Cases C-105/14, Taricco and Others, above, n. 53, paras. 36–58.


\textsuperscript{[57]} Case C-399/11, Melloni, above, n. 54, paras. 55–63.


In sum, to the extent that the effectiveness rationale for EU action in the field of criminal law holds legitimating power, it cannot justify encroachments upon the constitutional principles (conferral and subsidiarity) regulating the relationship between the EU and the Member States. On the contrary, in such circumstances, it opens the floor to a questioning of the legitimacy of European integration in this very sensitive field.

Moving on to pan-European security as a rationale for EU criminal law, it is appropriate to commence with the TREVI cooperation as a precursor to the provisions on police and judicial cooperation in the Maastricht Treaty. TREVI was set up in 1976 by the then 12 EU Member States to counter terrorism and to coordinate policing in the EU. The group’s work was based on intergovernmental cooperation on security between the participating states excluding the supranational EU institutions—the Commission, the EP and the Court of Justice. ‘Security’-oriented rationales were also behind the formal inclusion of criminal justice cooperation as a ‘compensatory’ measure in the EU integration project. The provisions on judicial cooperation in the Maastricht Treaty were a consequential effect of the construction of a European Police organisation through a convention, as a direct response to the threats of organised transnational crime. Member States considered that this ‘collective action’ problem could not be addressed by them alone but had to be addressed by common action leading them to establish a general EU judicial cooperation mechanism. Securitised EU criminal law has been driven by intergovernmental actors where leading roles have been played by the European Council and the JHA Council and agenda-setting events such as the Tampere, Hague and Stockholm programmes.

Securitised criminalisation has been prevalent with respect to the area of the ‘eurocrimes’ in pre-Lisbon legislative activities expressly addressing the ‘collective action’ problem arising from serious cross-border criminality. Security-oriented rationales are equally relevant in accounting for the incremental rise of EU criminal justice agencies as a direct response to the threats of organised transnational crime. External shocks such as 9/11, and the terrorist attacks in Madrid in 2004 and in London 2005, contributed to make the EU’s security agenda more viable and triggered the creation of two central agencies in EU criminal justice: Europol and Eurojust.

However, what this rationale does not account for is the Member States’ leading role in shaping law in this area. The Tampere European Council in 1999 laid the foundations for the creation of the European Judicial Cooperation Unit (Eurojust) as an EU agency. Eurojust was set up formally in 2002 by a JHA Council decision, with the mission of strengthening the fight against serious and organised crime by coordinating cooperation in criminal matters between the competent authorities. Europol was an even more Member State-driven entity, created as an intergovernmental organisation through a convention, placing it outside of the Community legal framework. The Member States

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60 See Art. 5 TEU.
62 The name ‘Trevi’ has been open to many interpretations but is most likely an acronym for ‘terrorism, radicalism, extremism and international violence’.
66 Art. 29 of the pre-Lisbon version the Treaty on European Union, above, n. 61.
71 See CONV 426/02, above, n. 64, 9–10.
72 Arts. 29 and 30 of the pre-Lisbon version of the Treaty on European Union, above, n. 61.
74 See Tampere European Council, above, n. 67, para. 46.
were also responsible for amending the Europol Convention and subsequently pushing through the Decision on Europol, which transformed Europol from an intergovernmental organisation into a Union agency. 76 The Member States’ leading influence in shaping the activities of Europol and Eurojust is substantiated by a detailed analysis of the powers of those two agencies. Eurojust and Europol have not been envisaged to have any executive powers to take decisions that required national prosecution or police authorities to commence, conduct, coordinate or end criminal investigations. 77

Security is still also a truly relevant consideration after Lisbon in framing EU criminal policy. The EU’s institutional framework for addressing the ‘eurocimes’ through common action is now enshrined in Article 83(1) TFEU, listing ten offences 78 for which the EU is entitled to establish minimum rules concerning the definition of criminal offences and sanctions. In this instance, criminal law has been used in an expressive way to provide a sense of safety to citizens. 79 Security rationales have also been decisive in the development towards an amended Eurojust Decision, 80 the revised Eurojust Regulation of 2018 81 and the new Europol Regulation adopted in 2016. 82 The outcome to date has been a process of commandeering of the national infrastructures of criminal law to serve a repressive agenda of criminal enforcement. 83

The emphasis on security has been furthermore pertinent in the development of EU judicial cooperation and the principle of mutual recognition. Instead of endeavouring to harmonise national domestic criminal law as a first option, Member States agreed at the 1999 Tampere European Council to introduce the principle of mutual recognition as the main driver for EU criminal policy. 84 The novel EU mutual recognition instruments departed distinctively from traditional international judicial cooperation by being envisaged to function on the basis of quasi-automaticity and mutual trust. 85 However, the implementation of the principle of mutual recognition, most notably through the high-profile European Arrest Warrant, 86 led to controversy and placed great strain on the confidence of Member States in each other’s criminal justice systems. 87

In order to address these concerns of distrust—and here we turn to the third driver of EU criminal policy—the EU has developed a wider criminal policy embodying protection for individual rights. 88 As argued in the following section, this ‘rights-based’ justification stands on firm normative grounds to the extent that it is employed in cross-border situations. The Hague Programme in 2004 had already recognised that common minimum procedural standards on defence and victim rights could strengthen mutual trust between the authorities in Member States responsible for executing mutual recognition requests and thus the operation of mutual recognition. 89 In 2004, the

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78 ‘Terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.’
79 Turner, above, n. 44, 555.
82 Europol Regulation (EU) 2016/794, above, n. 77.
83 Elholm, above, n. 44; Turner, above, n. 44.
84 Tampere European Council, above, n. 67, point 33.
88 See Baker, above, n. 64, 188–196; Mitsilegas, above, n. 14, ch. 7.
89 See ‘Hague Programme’, above, n. 68, point 3.3.1–3.3.2.
European Commission proposed an ambitious Framework Decision covering a broad range of procedural rights in criminal proceedings. Under the pre-Lisbon provisions of Article 31(1)(C) of the Treaty of European Union, there was no explicit competence to harmonise procedural standards. The Commission, nonetheless, proposed a broad reading of the competence, claiming that such standards would be necessary to promote mutual confidence across the EU.\(^90\)

Several Member States, however, rejected implicit EU competence in the field of criminal procedure and, in conjunction with the unanimity requirement in the Council, this made agreement on the Framework Decision impossible among the Member States.\(^91\) This shows that no matter how powerful the rights-based rationale is for legitimating the evolution of EU criminal law, it cannot be employed to override the fundamental limits of EU competence in the Treaties.

The entering into force of the Lisbon Treaty in 2007, however, signals a remarkable evolution of EU criminal law from the European Community viewed primarily as an economic organisation to the EU conceived as a serious penal actor.\(^92\) It also contributes significantly to reinforce the rights-based rationale. After Lisbon, there is now an explicit competence in Article 82 TFEU and Article 83 TFEU to harmonise national criminal procedure and substantive criminal law. The Lisbon Treaty thereto provides for important institutional reforms. The introduction of qualified majority voting in the Council, co-decision-making powers for the Parliament and full jurisdiction for the Court of Justice in relation to criminal law, currently entrenches EU criminal law (formerly embedded in a formal intergovernmental structure) in a supranational decision-making framework.\(^93\) The stronger mandate of the European Parliament in conjunction with more ‘active’ policy-making has contributed to a change of policy direction post-Lisbon towards a larger focus on fundamental rights. The European Council laid the foundations for the development of a different rights-based EU policy in the 2009 Stockholm Programme.\(^94\) In contrast to the situation pre-Lisbon, the new Treaty provision in Article 82 TFEU conferred on the EU legislator a clear mandate to embark on legislating on such rights.\(^95\)

Furthermore, the Stockholm European Council underlined that law enforcement measures and measures to safeguard individual rights should go hand in hand and mutually reinforce each other.\(^96\) The Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings\(^97\) was adopted by the Council the same year. On the basis of the reinforced Treaty mandate, we have also witnessed, post-Lisbon, notable legislative activity in this area, entailing the adopting of seven substantive directives setting out comprehensive rights for defendants and victims.\(^98\)

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\(^{94}\)‘The Stockholm Programme’, above, n. 69.

\(^{95}\)See Öberg, ‘Trust in the Law?’ above, n. 30, 33.

\(^{96}\)See ‘Stockholm Programme’, above, n. 69, paras. 2.1–2.4.


This brief survey shows the complementarity, yet shortcomings of the traditional rationales used as justifications for European integration of criminal law. ‘Security’ and ‘effectiveness’ have been the dominant justifications for EU action in criminal law. This is not surprising as these are conventionally the key justifications also for a national legislator when considering the use of criminal law. The state has a responsibility and therefore also powers to take actions to protect the central public good of security.99 However, the arguably excessive use of security and effectiveness-based rationales has led to a repressive EU criminal policy to date which have trumped other important considerations such as justice and freedom.100 A more compelling justification for a future, more humane, EU criminal policy is to adopt a stronger rights-based approach when considering legislation.101 Such an approach would be helpful in restoring the integrity and legitimacy of criminal law at the EU level. Nonetheless, whilst the evolution of EU criminal law partly could be legitimated by a rights-based rationale, a more comprehensive deepening of the integration of the EU criminal justice system requires a more robust justification for accepting such major encroachments into the Member States’ criminal justice systems.102

3 | A NORMATIVE ACCOUNT OF JUSTIFICATIONS FOR EU ACTION IN CRIMINAL LAW: TRANSNATIONAL INTERESTS AND EUROPEAN PUBLIC GOODS

The existence of transnational interests justifying EU action has been one of the key normative rationales in the field of criminal law embodying the principle of subsidiarity.103 For example, the fact that an issue to be regulated is of a cross-border/transnational nature is one of the core justifications for EU legislative activities.104 EU action in this instance is often defended on the basis of ‘collective action’,105 theories suggesting that the scope of the problem to be regulated (affecting more than one Member State at the same time) and the insufficiency of decentralised decision-making by independent States cannot adequately address the problem because of various kinds of cross-border externalities or spill-overs.106

The cross-border justification has not only been used to justify EU intervention in the field of the internal market.107 It is also, judging by legislative practice, a central justification for EU action in criminal law.108 The Commission’s general argument is that harmonisation is needed since certain forms of crime have a transnational dimension...
and the Member States cannot combat them effectively on their own. The EU legislator has claimed that violations of EU environmental rules, terrorism attacks, attacks against information systems and infringement of market abuse rules are intrinsically cross-border offences since they affect the interests of several Member States.\footnote{B. Zuleeg, ‘The Rationale for EU Action: What are European Public Goods?’, paper prepared for the BEPA Workshop on ‘The Political Economy of EU Public Finances: Designing Governance for Change’, 5 February 2009, 6; S. Collignon (ed.), The Governance of European Public Goods (Palgrave Macmillan, 2017).} Article 82(2) TFEU, which regulates the EU’s competence in criminal procedure, suggests that the EU may harmonise specific elements of domestic criminal procedure only ‘in criminal matters having a cross-border dimension’ and in respect of substantive criminal law the EU may harmonise ‘areas of particularly serious crime with a cross-border dimension’.\footnote{Ibid.}

The importance of the transnational criterion as a rationale for EU action in criminal law points to the need to offer a general account for why EU action should be preferred over Member State action. On this basis, it is suggested that EU legislative intervention is legitimate when it protects certain general European public goods (‘EPGs’) and interests which Member States cannot sufficiently protect.\footnote{J. Ouwerkerk, ‘Old Wine in a New Bottle: Shaping the Foundations of EU Criminal Law through the Concept of Legal Interests (Rechtsgüter)’ (2022) European Law Journal, doi:10.1111/elj.12447.} For this purpose, EPGs are a specific category of transnational interests. The key notion for EPGs is the specifically public and collective nature of the interest at stake (whether it be the internal market, the environment or financial services). We refer to interests which are collective assets belonging to members of a group in which the individual shares common social interests.\footnote{A. Duff, Answering for Crime: Responsibility and Liability in the Criminal Law (Hart Publishing, 2007), 126; Case C-176/03, Environmental Crimes, above, n. 36.} Within the definition of EPGs belong classic public goods that correspond to policy domains that have been assumed by the Union through functionalist spill-over effects in its quest to secure output legitimacy. Under these criteria, a clean environment and public security would be considered public goods par excellence, but we also have public goods associated with the Union’s traditional task of generating prosperity through creating market institutions at EU level: for example, the internal market and the currency.\footnote{See Art. 5(3) TEU. See also, interestingly, the concept of legal interests developed by Jannemieke Ouwerkerk in her contribution in this special issue. J. Ouwerkerk, ‘Old Wine in a New Bottle: Shaping the Foundations of EU Criminal Law through the Concept of Legal Interests (Rechtsgüter)’ (2022) European Law Journal, doi:10.1111/elj.12447.}

With respect to the transnational criterion, it appears that EPGs arguably fall within the broader notion of transnational interests. In the language of economists, EPGs are non-excludable (individuals cannot be excluded from their enjoyment) and non-rivalrous (the use by one individual does not reduce its value by another). These public goods are European in the sense that Member States typically cannot adequately provide them and that they must nevertheless be provided by a public authority; in this case the European Union. Most importantly, such goods are available for all EU residents, and they exclude—in principle—non-EU residents. This is the case, for example, for the four freedoms,\footnote{For the notion of the fundamental freedoms as European Public Goods, see M. Thöne and H. Kreuter, ‘European Public Goods: Their Contribution to a Strong Europe’ (Hart Publishing, 2007), 126; Case C-265/95, Commission v. French Republic (Spanish Strawberries), EU:C:1997:595.} the use of the euro or public services provided by EU institutions.\footnote{Coutts, above, n. 27, 787–789; A.H. Gibbs, Constitutional Life and Europe’s Area of Freedom, Security and Justice (Ashgate, 2011) 48; N. MacCormick, ‘Law as Institutional Fact’ (1974) 90 Law Quarterly Review, 102.}

One of the central European public goods, which safeguards the interests of EU Member States and citizens alike, is the internal market.\footnote{For the notion of the fundamental freedoms as European Public Goods, see M. Thöne and H. Kreuter, ‘European Public Goods: Their Contribution to a Strong Europe’ (Hart Publishing, 2007), 126; Case C-265/95, Commission v. French Republic (Spanish Strawberries), EU:C:1997:595.} The primary justification for EU legislative action to protect the common market through criminal law can be derived from the general legal basis of Article 114 TFEU.\footnote{See Art. 239(1) TFEU.} Related to the internal market is the integrated European financial system which may require criminal law protection from...
market dysfunctions as suggested by the recent Directive on market abuse.\textsuperscript{118} The financial resources of the Union and the common Euro are furthermore intrinsic supranational public goods which may call for the protection by criminal law.\textsuperscript{119} Lastly, the environment is another public good which may require centralised supranational action to address externalities and protect this collective asset.\textsuperscript{120} In those instances, the nature of the interests being central for the functioning and the existence of European Union and/or are better achieved at EU level, makes a particularly compelling case for EU intervention through criminal law.

In order to more clearly articulate when the EU should intervene by means of criminal law, we consider the internal market as indisputably the most central European public good.\textsuperscript{121} The internal market justification is a wide one which can be employed to justify Union intervention in nearly all national policy fields, including criminal law. The broad reading of the internal market is supported by the use of Article 114 TFEU by the EU legislative institutions whose legislative practice suggests a wide discretion for executing the internal market objectives. Potentially, any differences between the laws of the different Member States can be construed as a distortion to competition or as a barrier to trade justifying resort to Article 114 TFEU.\textsuperscript{122}

It is argued, however, that, even more so in view of the use of criminal law in the internal market context, the internal market justification must be circumscribed. One way of doing this is to pose a more general proposition, which is that supranational action primarily should be employed to address dysfunctional workings of markets, collective action problems and other externalities arising from the economic and social interdependence between states in the EU.\textsuperscript{123} The idea of transnational externalities conditioned the Court’s reading of the competence contained in Article 114 TFEU in the prominent Tobacco Advertising judgment.\textsuperscript{124} The pronouncements of the Court that the Union does not enjoy a general power to regulate the internal market, and that it has to show ‘appreciable distortions to competition’ suggest that it requires evidence of a transnational market failure to substantiate the need for EU action.\textsuperscript{125} The key lesson from the Tobacco Advertising judgment is that a claim from the EU legislator that a measure removes obstacles to trade or distortions to competition must be demonstrated. This test is not satisfied by merely showing an ‘abstract’ case that the measure serves internal market purposes. The actual and predicted economic consequences of the benchmarks should be the decisive factors to determine whether the EU should adopt harmonisation measures.\textsuperscript{126}

Another key cross-border justification for EU action relates to ‘distortions of competition’. Sevenster has offered a compelling argument in favour of harmonisation of criminal laws on the basis of ‘Delaware effects’, which could occur if economic norms were equal, but the penal legislation in Member States showed great divergence. Loopholes in states’ criminal enforcement systems would create ‘safe havens’ because potential perpetrators are provided with an incentive to relocate and exploit jurisdictions with lower regulatory standards.\textsuperscript{127} Another potential distortion is that Member States, in the absence of harmonisation, could enter into a suboptimal ‘deregulatory race’\textsuperscript{128} to attract business to their own jurisdiction giving rise to the ‘Delaware effect’.\textsuperscript{129} Divergences in criminal

\textsuperscript{120}The Court of Justice has held that the provision in Article 11 TEU stating that ‘the Union and the common currency and criminal law: see Counterfeiting Directive 2014/62/EU, above, n. 39.
\textsuperscript{121}See Art. 3(3) TFEU: Art. 4(2)(a) TFEU Protocol (No) 27 on the internal market and competition. This justification is explicitly enshrined as a basis for Union action under Article 114 TFEU and Article 115 TFEU.
\textsuperscript{122}See Case C-547/14, Philip Morris Brands and Others, EU:C: 2016:325, paras. 107–125, 127–136; Case C-210/03, Swedish Match, EU:C:2004:802, paras. 35–40.
\textsuperscript{128}All the jurisdictional competition literature is originally based on the seminal article by C. Tiebout, ‘A Pure Theory of Local Expenditures’ (1956) 64 Journal of Political Economy, 416.
laws may create such races if the Member State with the most lenient penal system attracts most production. It is envisaged that such states would not, because of a fear of placing one’s own companies at a disadvantage, strictly enforce violations of common EU rules.\textsuperscript{130} This argument can be illustrated by examining the Commission’s proposals to harmonise criminal laws in relation to EU regulatory schemes. The Commission argues that differences in Member States’ sanctioning regimes may create distortions to competition. This argument assumes that firms, in the absence of harmonisation, will be subject to different costs for compliance because of divergent regulatory standards, putting firms in a jurisdiction with stringent regimes under a competitive disadvantage.\textsuperscript{131} Firms under a criminalisation regime may, for example, incur additional costs—for example, costs for adopting internal compliance mechanisms and costs for advisors to ensure compliance with the relevant rules—that would not be incurred by firms in a state with a lenient enforcement regime.\textsuperscript{132}

Whilst the distortion of competition argument is recognised as a legitimate rationale for EU harmonisation, there is an abundance of literature challenging the evidence for the premises of the ‘race to the bottom’ and ‘safe haven’ scenarios.\textsuperscript{133} Literature on ‘competitive federalism’ and economics suggests that EU legislative action should only take place under certain conditions. In the first instance it must be evinced that national disparities give rise, or risk giving rise, to transnational market failures. Furthermore, EU legislative action must be more effective than Member State action in addressing those failures. Delegation to the federal (EU) level is typically justified for policies involving significant economies of scale and externalities across countries as well as low transaction costs.\textsuperscript{134} This could be the case where the spill-over effects from national policies are high, where states do not have the required capacity or expertise (global crime) and where policy-making involves real-time response such as crisis management or decisions on rapidly evolving matters.\textsuperscript{135}

Enriques and Gatti have illustrated—on the basis of the example of harmonisation of national company law—why the distortion of competition argument is rarely substantiated in the case of EU harmonisation. With no European ‘Delaware’ in sight, rules to prevent a ‘race to the bottom’ are unwarranted. They also observe that EU harmonisation, far from lowering transaction costs, has raised them and can hardly be expected to do otherwise in the future.\textsuperscript{136} Whereas the argument of Enriques and Gatti does not reject EU harmonisation per se, their findings suggest that claims of the existence of distortions of competition require empirical support. Evidence from regulatory scholarship also suggests that race to the bottom scenarios have overestimated the role played by regulation in market behaviour. Vogel, discussing environmental standards in the US, notes that while state jurisdictions compete with one another to attract investment, they have generally not chosen to do so by maintaining lower environmental standards. On the contrary, many state standards are stricter than federal ones. Research suggests that industrial location is sensitive to other factors than regulations, such as delays, a well-developed industrial base, labour costs, access to markets and other non-regulatory variables.\textsuperscript{137}


\textsuperscript{132}See Case C-376/98, Tobacco Advertising, above, n. 125, para. 109; Case C-300/89, Commission v. Council (Titanium Dioxide), EU:C:1991:244, paras. 12, 23.


\textsuperscript{134}Ibid.


\textsuperscript{136}See Enriques and Gatti, above, n. 133, 953, 969, 978, 988.

\textsuperscript{137}See Radaelli, above, n. 133, 2–3, 5–6, 8; Vogel, above, n. 133, 557–559, 561; Revez, above, n. 133.
The argument entails a fortiori that harmonisation of national criminal laws cannot readily be justified with reference to distortions of competition. Taking the example used by Sevenster of ‘Delaware effects’ arising from feeble enforcement regimes in certain states, such potential distortions cannot per se be employed to support EU intervention. There must thus be concrete evidence as to the existence of transnational externalities such as safe havens or clear indications that states compete with each other by lenient sanctioning systems to substantiate the case for EU harmonisation.\(^\text{138}\) Criminal law scholars have also challenged the ‘safe havens’ justification on the basis of limited evidence that sanctioning regimes play a role for potential perpetrators when choosing jurisdiction to commit criminal offences. It has been proposed that the severity of sanctions and definition of offences are negligible competitive parameters compared with other key factors such as wage costs, infrastructure, tax and duty rules, proximity to primary producer.\(^\text{139}\) The Commission’s harmonisation argument envisages a rational actor model whereby offenders calculate their own interests and try to minimise the risk of sanctions. Assuming a context of inter-jurisdictional competition and transnational profit-driven crimes, Teichmann has endorsed this argument and suggested that firms and individuals are likely to rationally locate illegal activities to jurisdictions with feeble enforcement regimes.\(^\text{140}\) Melander has convincingly challenged the key premise of the ‘displacement’ theory, which is that offenders possess extensive knowledge on the criminal justice systems of the Member States. Furthermore, if offenders had such information, the Member States with the mildest criminal justice systems should be the primary haven for criminal organisations. The criminal justice systems in the Nordic countries have in comparison to the rest of European been marked by more lenient sanctions and should consequently be a paradise for criminals.\(^\text{141}\) However, there is limited evidence that organised crime has been a serious concern for the Nordic countries in the past.\(^\text{142}\) Although Melander’s argument is compelling, it cannot be excluded that political economy theories at least to some extent can explain cross-border organised crime.\(^\text{143}\) It is important at this stage to reflect on the argument advanced so far, which is that the most justifiable justification for supranational action is to protect European public goods and transnational interests. The baseline premise for this argument is that nationally situated democratic processes are intrinsically predisposed to disregard ‘transnational’ interests. There is a justifiable suspicion that the legitimacy of governance of Member States may—for ‘protectionist’ reasons—be flawed in certain situations. Because a single state’s democracy represents the collective identities of the citizens of a state, it does not have comprehensive mechanisms to ensure that foreign interests are sufficiently considered properly within its decision-making processes. The European Union is thus better placed (given its resources, expertise and incentives) than Member States to protect collective transnational interests in the meaning of European public goods such as the internal market, the transnational protection of the environment and the provision of security for citizens in a transnational society.\(^\text{144}\) Within the context of individual rights in criminal procedure, the supranational legislator would thus confer ‘virtual’ political rights to foreigners\(^\text{145}\) where they have a legitimate concern.\(^\text{146}\) On this basis the transnational argument defends EU action to correct the dysfunctional workings of national political processes.\(^\text{147}\)

\(^\text{138}\)See Öberg, above, n. 25.


\(^\text{144}\)Somek, above, n. 28, 319–321, 323–324; Kumm, above, n. 28; Joerges and Neyer, above, n. 28, 294.


\(^\text{147}\)The Cowan judgment of the Court of Justice (Case 186/87, Cowan v. Trésor public, EU:C:1989:47) is a very illustrative example of the need to confer additional supranational protection for crime victims in other Member States in order for them to exercise their fundamental freedoms: see J. Öberg, ‘Subsidiarity and EU Procedural Criminal Law’ (2015) 5 European Criminal Law Review, 19 for further analysis.
There is also a compelling case for the EU to intervene in protecting the internal market (as a public good) when there are transnational collective action problems arising from the fact that the regulatory choices of competing jurisdictions give rise to different economic costs or opportunities for firms. These choices with regard to which jurisdictions have an incentive to regulate strategically in order to capture a competitive advantage, thus raising concerns of structural bias. On this basis the EU should also be justified to address transnational market failures such as protectionist trade barriers, regulatory costs and inefficiencies arising from multiple regimes and transboundary externalities arising from negative effects occurring in one state as a result of an activity that is regulated or not regulated in another state (including the discussed examples of ‘regulatory race’ scenarios).

The notion of European public goods also includes a sub-category of intrinsic supranational interests such as the protection of the EU budget. The primary examples in the area of criminal law are the European Public Prosecutor’s Office and the PIF Directive. The financial interest of the EU is a special supranational interest, as the budget is central for the existence of the Union. The EPPO is, for this purpose, entrusted with the objective of protecting the common interests of the EU budget, which go beyond the territories of individual Member States. Furthermore, the nature of this public good, i.e. the protection of the budget, entails that criminal justice authorities of Member States are systematically predisposed to deprioritise the protection of the Union’s financial interests, making them incapable of effectively enforcing crimes against the EU’s financial interests. On the basis of the same line of reasoning the EU’s power to criminalise fraud and other behaviours targeted against the EU’s financial interests could be readily justified on the basis that the EU is better positioned than Member States to protect the public good of the EU budget. EU action in criminal law is thus defensible to protect markedly strong supranational interests which Member States are unwilling to or incapable of defending.

All this brings home the point that to ensure the legitimacy of EU criminal law, its actions must be confined to protect European public goods and other clearly defined transnational interests. For intervention by EU criminal justice agencies, this entails that complex and multifaceted transnational criminal activity circumscribes the proper scope for EU intervention in the area of criminal justice. Crimes that are facilitated by transnational cooperation and open borders are a legitimate subject for EU action to protect the public good of transnational security. It is in such instances that EU criminal law can provide significant added value by protecting those interests, by the pooling of expertise, competencies and investigative resources. If EU intervention (e.g., by means of EU criminal justice agencies) could contribute to addressing serious cases of transnational crime that individual states are incapable of dealing with adequately, there is a legitimate case for supranational action. This explains and legitimates the mandate of Europol and Eurojust to fight transnational organised crime.

A subsidiarity-inspired reading of the normative justifications for EU criminal law thus suggests the need for the EU to demonstrate the existence of European public goods and other important transnational interests deserving of protection by means of criminal law. This is, however, not sufficient. It should also be demonstrated that these interests, by their inherent cross-border dimension or on account of stronger expertise, resources or incentives, are more effectively protected at EU level than Member State level. As an example of a European public good par excellence, we identified the protection of the EU budget or the common currency where there is a genuine supranational interest to protect those goods.

Kumm, above, n. 28.

Case C-376/98, Tobacco Advertising, above, n. 125, paras. 106–107.

See Zuleeg, above, n. 115; Collignon, above, n. 115; and Coeuré & Pisani-Ferry, above, n. 135 for a discussion of market failures and European public goods.

Öberg, above, n. 51; Wade, above, n. 45.


Wade, above, n. 45, 143.

See Arts. 85 and 88 TFEU.

In line with the ‘added value’ subsidiarity test in Art. 5 (3) TEU according to the EU shall act when the ‘objectives of the proposed action cannot be sufficiently achieved by the Member States ... but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.’
4 | CONCLUSIONS

This article has endeavoured to contribute to the debate on the normative justifications for EU criminal law. Initially, it suggested that it is possible to infer three principal drivers for EU criminal law and policy: ‘security’ for EU citizens; ensuring the effectiveness of EU policies and subsequently a ‘rights-based approach’ to EU criminal policy. ‘Effectiveness’ and other ‘functional’ considerations have been the primary justifications for EU action in respect of the development of EU regulatory criminal law and the rise of a European Public Prosecutor. In the area of the eurocrimes in Article 83 TFEU and in respect of the development of EU criminal justice agencies such as Europol and Eurojust, the justification for EU action has instead been driven by ‘security’-orientated rationales. In this instance, criminal law is employed to serve a more ‘repressive’ agenda of criminal enforcement. Finally, we also identified a stronger ‘fundamental rights’-based approach to EU criminal law post-Lisbon facilitated by a stronger Treaty mandate to enact legislation on procedural standards and individual rights.

All these justifications offer distinctive ways of understanding why the European Union wishes to take action in the area of criminal law and wherefore the EU level might be a better venue than Member State level for undertaking those actions. As a way of integrating these different accounts, the article suggests that justifications for EU criminal law must be sought in the general rationales for EU action. The key justification for supranational action lies in demonstrating the existence of European public goods such as the internal market, the transnational protection of the environment and the provision of security for citizens and other important transnational interests deserving of protection by means of criminal law. It should also be shown that the Union is better placed (given its resources, expertise and incentives) than Member States to protect those interests. This offers a compelling case for EU action in criminal law to address or correct transnational market failures, collective action problems and other externalities arising from the economic and social interdependence between states in the EU.

The choices of what to accept as normative justifications for policy-making in criminal law have important ramifications for the legitimacy of the Union legal order. One of the challenges is the notion that the EU political institutions use their powers in illegitimate ways, thereby usurping national powers (‘competence creep’). If we acknowledge ‘autonomous’ justifications for EU harmonisation and especially its role in establishing a European common sense of justice, this implies a comprehensive remit for legislative action. If we conversely only recognise the ‘functional’ rationales for harmonisation, there will be a narrower scope for EU action, potentially impairing the EU’s ability to promote fundamental rights for individuals. Whilst the ‘autonomous’ justification model might have a strong political appeal, the argument here does not fully endorse this approach. It is argued that the rights-based approach needs to be aligned with the tenets of subsidiarity and the idea of European public goods. However, it is not convincing to only accept instrumental EU action in criminal law to the extent necessary to promote
certain EU objectives. In the instances where the EU protects European public goods more effectively than the Member States, the EU should be able to intervene.

Let us consider the example of harmonisation of procedural standards in the EU for illustrating the argument. In cross-border situations, there is a clear interest for the EU to intervene to protect the legitimate interests for individual defendants (who exercised their free movement) who otherwise would not have a voice in the national democratic procedure. However, in purely national situations that do not have any cross-border dimension, it is more ambiguous whether the EU per se is better placed to strike the balance between the necessities of law enforcement and defence rights. Whilst formal justice is often invoked as a justification for common standards, it is difficult to defend harmonisation with reference to substantive justice arguments within the EU context given the absence of a common conception of what this might entail.

The broader ‘autonomous’ approach would, however, accept that EU action in criminal law can be justified with reference to the Union’s need to reaffirm its core ‘common values’, and to strengthen its political identity—the expressive dimension of EU criminal law. The expressive/symbolic dimension includes ideas of communicating a common sense of justice and to express that ‘certain forms of conduct are unacceptable’. This flexible approach to the justification for EU action offers, nonetheless, ample opportunity for ‘competence creep’. Furthermore, as the current Treaties provides no clear authorisation for justifying criminal law interventions on expressive grounds, it seems that the EU will endanger its legitimacy if it keeps adopting criminal law on this basis. However, there is a normative basis in the Treaties for a less ‘functional’ approach to EU criminal law. This is the fact that one of the objectives of the EU is to create a common area of justice. Whilst the Treaties only mention the combat and repression of crimes and by judicial cooperation through mutual recognition, there is clearly a legitimate role for the EU to more actively pursue a rights-based approach on the basis that it protects European public goods and markedly transnational interests.

This refined middle-way approach sits between instrumental harmonisation and more value-based EU action in criminal law. Whilst this approach goes beyond the objective of enhancing mutual recognition and judicial cooperation and the strengthening of the common market, the departure point for this approach is still that the EU needs to establish the existence of European public goods that are better protected at EU level. This approach will accept EU involvement in matters where Member States—because of their perverse incentives or lacking capabilities—cannot address the problems of cross-border criminality and instances where the EU intervenes to protect transnational or supranational (e.g., EU budget and the currency) interests. This approach arguably entails a more legitimate and resilient approach to supranational intervention in this area, which is something to build on when designing a future EU policy in the area of criminal law and criminal justice.

171 See Kumm, above, n. 28, 519–520.
172 J. Rawls, A Theory of Justice (revised edn, Belknap Press of Harvard University Press, 1999), 50–51, 208–209 suggests that formal justice entails that similar cases are treated similarly and that distinctions between persons must be justified by reference to the relevant legal rules and principles.
173 Weyembergh, above, n. 165, 1581.
176 Turner, above, n. 44, 564–574; Elholm, above, n. 44, 224–225.
179 Weatherill, above, n. 123.
180 See Art. 3(2) TEU: Art. 67(1) TFEU.
181 See Art. 67(3) TFEU.
182 See Arts. 82(2) and 83(1) TFEU and the ‘reference’ to cross-border dimension.
183 Arts. 67(1) and 82(2) TFEU.
185 Vogel, above, n. 174, 55–64.
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