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*Published in:*

Maastricht Journal of European and Comparative Law

*DOI:*

[10.1177/1023263X211005967](https://doi.org/10.1177/1023263X211005967)

*Publication date:*

2021

*Citation for published version (APA):*

Harding, C., & Öberg, J. (2021). The journey of EU criminal law on the ship of fools: What are the implications for supranational governance of EU criminal justice agencies? *Maastricht Journal of European and Comparative Law*, 28(2), 192-211. <https://doi.org/10.1177/1023263X211005967>

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# The journey of EU criminal law on the ship of fools – what are the implications for supranational governance of EU criminal justice agencies?

Maastricht Journal of European and  
Comparative Law  
2021, Vol. 28(2) 192–211  
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DOI: 10.1177/1023263X211005967  
maastrichtjournal.sagepub.com



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## Abstract

This article addresses supranational governance of EU criminal justice agencies from the perspective of the various agencies of policy and rulemaking who have contributed to the impressive developments in the field of EU criminal law. Taking as a working hypothesis the happenstance and haphazard character of this field of policy and law, it suggests that there is an absence of design. In the discussion the article proposes the Platonic analogy of the ‘ship of fools’ (Plato, Republic, Book VI) as an explanatory tool. The ship’s captain is the guiding spirit of criminal law, but the crew of the ship, who have the power to take control, have diverse interests and ideas about how the ship should be taken to sea and navigated. The article addresses thematically and chronologically the development of EU criminal policy by means of this framework. Subsequently it discusses the extent to which the ‘ship of fools’ analogy is relevant to the development of EU criminal justice agencies, and to the emergence of a European Public Prosecutor. Underlying all this discussion is the uneasy sense that the true pilot of EU criminal law and policy has been displaced, in particular by ‘instrumental’ pilots of securitisation and effectiveness.

## 1. Introduction

The article here aims to better understand the landscape of policy and rule formation that is packaged conveniently as ‘EU criminal law’, with a particular focus on EU criminal justice

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agencies. The aim is to initiate an exploration of how these policies and rules come about, and precisely who might be involved in this process. The importance of this exercise has been rehearsed by Ian Loader and Richard Sparks, who have argued that the ‘distinct questions for a European penology would . . . include not just the established activities of tracking convergent and divergent tendencies and their general and particular explanatory dynamics, but also which actors in what kinds of networks and institutional settings are now influencing developments at the European level?’<sup>1</sup>

This question appears to be worth asking, because the answers are not evident or quickly found. That is because the landscape is complex, comprising a large geographical and political space, with a number of levels of institutional activity, and containing both intergovernmental and supranational structures. Moreover, it is a landscape which has changed over time,<sup>2</sup> and which may continue to evolve. At the same time, this landscape is being described in a very oblique fashion in formal constitutional terms.<sup>3</sup>

Whilst the topic is difficult to penetrate, it may, however, be useful to note a few characteristics of the area of activity under discussion, since this will provide the parameters for the exercise. ‘EU criminal law’ is a convenient shorthand term rather than a formal descriptor. Thus, in his pioneering work of 2009, Valsamis Mitsilegas used it as the title for a book,<sup>4</sup> but then described the scope of the subject therein as ‘EU action in criminal matters’. EU criminal law would then cover all instances where the EU has normative influence on either substantive criminal law/criminal procedure or on judicial cooperation between the Member States.<sup>5</sup> Then, we might say for more formal purposes that the TFEU provides for legal competences under the headings of ‘the Area of Freedom, Security and Justice’ (AFSJ), ‘judicial co-operation in criminal matters’ and ‘police co-operation’. In substantive terms, it contains the legislative competences in Articles 82–88 TFEU and those legal bases providing for criminal law competence outside Title V.<sup>6</sup> EU criminal policy<sup>7</sup> covers all EU legislative actions, policies/strategic directions (e.g. Commission Communications, Justice and Home Affairs (JHA) Council documents and strategic decisions by the European Council), as well as central legislative actors (i.e. the European Council, the JHA Council and the Commission) relating to criminal procedure and substantive criminal law on a domestic level, as well as at the EU level.<sup>8</sup>

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1. I. Loader and R. Sparks, ‘Knowledge Politics and Penal Politics in Europe’, in T. Daens, D. van Zyl Smit and S. Snacken (eds.), *European Penology?* (Hart Publishing, 2013), p. 58. Loader and Sparks build on the previous work of Stanley Cohen, *Against Criminology* (Transaction Publishers, 1988), p. 67, which originally reinforced the importance of this exercise.
  2. M. Chaves, *The Evolution of European Union Criminal Law (1957–2012)*, (DPhil, London School of Economics, 2012), chapter 1.
  3. As a matter of fact, there is no clear reference in the EU Treaties or legislation to EU criminal law. The closest summarizing labels would appear to be ‘judicial cooperation in criminal matters’, ‘police cooperation’, and ‘freedom, security and justice’: see title V of the TFEU.
  4. V. Mitsilegas, *EU Criminal Law* (Hart Publishing, 2009).
  5. J. Öberg, *Limits to EU Powers: A Case Study of EU Regulatory Criminal Law* (Hart Publishing, 2017), p. 10; A. Klip, *European Criminal Law* (Intersentia, 2012), p. 1.
  6. See C. Harding and J. Banach-Gutierrez, ‘The Emergent EU Criminal Policy: Identifying the Species’ 37 *European Law Review* (2012), p. 761.
  7. See A. Weyembergh and I. Wiczorek, ‘Is There an EU Criminal Policy?’, in R. Colson and S. Field (eds.), *EU Criminal Justice and the Challenges of Legal Diversity* (Cambridge University Press, 2016).
  8. See E. Baker, ‘Governing Through Crime – the Case of the European Union’, 17 *European Journal of Criminology* (2010), p. 190; J. Monar, ‘Decision-Making in the Area of Freedom, Security and Justice’, in A. Arnall and D. Wincott (eds.), *Accountability and Legitimacy in the European Union* (Oxford University Press, 2002), p. 67.

This is an area of intense legislative activity both at the EU level and the national level, and criminal law has been called in aid to support the application of a range of EU policies. Much has happened over the years, involving national criminal law and criminal justice agencies, from the early days of TREVI, into the period of the Third Pillar of the EU, and then the post-Lisbon supranational phase under the TFEU. Treaty amendments in Maastricht and a strong political commitment by the European Council in Tampere, The Hague and Stockholm have contributed to making EU criminal law a central field of EU policy. This evolution culminated in the Lisbon Treaty, when EU criminal policy was (partly) integrated into the supranational Community decision-making framework.<sup>9</sup> But surveying this history of ‘EU action in criminal matters’, to what extent may this be described as criminal law in the traditional sense, rather than piggybacking on existing national criminal law and procedures? The main thrust of the EU action in this field has been to enhance enforcement, typified for example by the core principle of ensuring effective, proportionate and dissuasive enforcement,<sup>10</sup> or by the explosion of activity in relation to the European Arrest Warrant (EAW).<sup>11</sup> It might well be suggested that what is at issue here is ‘EU enforcement law’ rather than ‘EU criminal law’.

This brings us nicely to theme of this special issue, which is to explore EU criminal justice agencies on the intergovernmental-supranational axis. This article commences with a general analysis of the making of policy and regulation in EU criminal law. It endeavours to define the study topic and introduce the general narrative of this field. Thereafter it introduces Plato’s narrative of the ‘ship of fools’ to describe developments in this area. The second part of the article applies the ‘ship of fools’ framework to the present situation. It particularly considers the supranational argument (*‘effet utile’*) and ‘intergovernmental’ justification (*‘security’*) as tools for different actors to drive law and policy forward in this area. It employs a larger case study of the EU’s financial interests and the creation of the Office of the European Public Prosecutor (EPPO) to demonstrate the broader policies, rationales and actors which have contributed to the shaping of EU actions in this area. The conclusions summarize and reflect on the findings of the article.

## 2. Making policy and law: Agenda-setting and making rules and policy

Turning, then, to the general business of formulating policy and making rules, the first issue pertains to agenda-setting and the underlying justifications for action in this area. This includes questions concerning what field of action should be covered, and why, where and when: setting a timetable for legislative action in the form of programmes of action. Thinking about these issues prompts questions about the philosophy which underpins this area and its institutional expression.

Recalling that what we are dealing with here is perhaps correctly defined as EU enforcement law, one of the original justifications for EU action in criminal matters was to reinforce and enhance the implementation of EU rules. The dogmatic EU principle of effective, proportionate and dissuasive sanctions for the purpose of enforcement of EU obligations encapsulates this

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9. Articles 82, 83, 85 and 88 TFEU provides for the ‘Community’ decision-making procedure (and qualified majority voting in the Council) on matters of criminal law, criminal procedure and in respect of legislation on Eurojust and Europol.

10. Case C-68/88 *Commission v. Greece*, EU:C:1989:339.

11. V. Mitsilegas, ‘The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU’, 43 *Common Market Law Review* (2006), p. 1277.

‘instrumental’ rationale.<sup>12</sup> This now classic statement on the use of criminal law first appeared in the judgment of the Court of Justice in the so-called *Greek Maize* case in 1989. There, the Court ruled on the use of criminal law based on Member State obligations under Article 4(3) TEU, giving rise to the need for it to be assimilated with national criminal law enforcement, and the use of effective, proportionate and dissuasive sanctions.<sup>13</sup> This part of the judgment was based on the Commission’s fourth submission. There was no mention of these principles in the Opinion of Advocate General Tesauro,<sup>14</sup> and the inspiration for them seems to have come from the legal argument of the Commission. The whole frame for this litigation was *effet utile* and the driving force here was the Commission’s – and then the Court’s – concern with the effective enforcement of EU policies and rules.<sup>15</sup>

*Effet utile* has, in due course, appeared as a formal justification for EU competence in criminal law matters under Article 83(2) of the TFEU. Rather differently, the second main area of competence, under Article 83(1), justifies EU action on a different basis, namely to address serious crime that has a cross-border dimension. This is often now seen as part of the ‘security’ agenda, a supranational successor to the established intergovernmental crime control tradition, embodied in the EU Third Pillar. The driving force underlying the agenda for legal action here is more complex, involving EU encroachment into a subject that was originally more an intergovernmental concern of national governments. The agency of policy development should be sought in that quarter, where leading roles have been played by the European Council and the JHA Council,<sup>16</sup> and agenda-setting events such as the Tampere,<sup>17</sup> Hague<sup>18</sup> and Stockholm<sup>19</sup> programmes. As Mitsilegas has neatly noted, this ultimately reveals a complex set of motivations on the part of different institutions.<sup>20</sup> In the Stockholm Programme,<sup>21</sup> the European Council and the JHA Council placed emphasis on the continuation of the adoption by the EU of ‘securitized’ criminal law, whilst the European Parliament, on the other hand, underscored the need for EU criminal law to comply with fundamental rights.<sup>22</sup> The Commission, in its turn, attempted to demonstrate the added value of criminalization at EU level and focused primarily on functional criminalization. To a large extent, this has entailed the Commission being given a central role in policy formulation

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12. See M. Dougan, ‘From the Velvet Glove to the Iron Fist: Criminal Sanctions for the Enforcement of Union Law’, in M. Cremona (ed.), *Compliance and the Enforcement of EU Law* (Oxford University Press, 2012), p. 75 for a comprehensive analysis of criminal law as a tool in the enforcement of EU law.

13. Case 68/88 *Commission v. Greece*, para. 23.

14. Case 68/88 *Commission v. Greece*, EU:C:1989:281.

15. See E. Herlin Karnell, *Constitutional Dimension of European Criminal Law* (Hart Publishing, 2012), chapters 2–4 for an extensive analysis of the *effet utile* justification.

16. P. Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform* (Oxford University Press, 2011), p. 370 convincingly explains this justification and the Council and Member States’ role in driving forward policy.

17. Council, Presidency Conclusions, Tampere European Council, 15–16 October 1999 (1999).

18. Council, From General Secretariat to Delegations: The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, 16054/04 (2004).

19. Council, The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens, [2010] OJ C 115/1.

20. V. Mitsilegas, *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe* (Hart Publishing, 2016), p. 71.

21. Stockholm Programme, [2010] OJ C 115/1, p. 11.

22. European Parliament, An EU approach to criminal law: European Parliament resolution of 22 May 2012 on an EU approach to criminal law (2010/2310(INI)), [2013] OJ C 264 E/7.

and development. At first sight, the Commission's Communication on Criminal Policy<sup>23</sup> stands as an important reference point in this regard.

The contributions of several courts across a number of jurisdictions have also proved to be a rich source of material, reflecting more precisely different legal traditions and national perspectives. The recent decision of the European Court of Justice in the *Taricco* case<sup>24</sup> serves to illustrate this point. In those proceedings there was a careful consideration of the role of time bars to prosecution, in the context of a case that involved fraud in relation to VAT. The competing arguments can be gathered from Advocate General Kokott's Opinion – for example the Commission's arguments on effective penalties, and the objection by the Council and also the German Government that VAT fraud<sup>25</sup> should not be assimilated to customs and agricultural fraud, were not accepted by either the Advocate General or the Court. Both the Court and the Advocate General were clear that the time limits applicable under Italian law should not obstruct the prosecution of the EU fraud in the immediate case, since the principle of effective and dissuasive enforcement should prevail.<sup>26</sup> This case again shows the imperative of *effet utile* in EU law, reflecting the functional value being accorded to the system of criminal law at the national level.

This preliminary survey seems to confirm the character of the EU incursion into the criminal law domain as essentially concerned with the process of law enforcement. Even a cursory look at the history makes it clear that the Commission (and the Court of Justice) have played major roles in driving forward these developments. The underlying motivation is to enhance enforcement at the EU level, either in aid of EU policies (*effet utile*) or in aid of the security element within the AFSJ, to combat organized crimes that have transnational elements. All of this suggests that national criminal law has been commandeered in the interests of supranational policy and law enforcement.

The Platonic metaphor of the 'ship of fools' may be able to help provide a critical assessment of the current state of EU criminal law:

Imagine then a fleet or a ship . . . where the sailors are quarrelling with one another about the steering – every one is of opinion that he has a right to steer, though he has never learned the art of navigation and cannot tell who taught him or when he learned, and will further assert that it cannot be taught, and they are ready to cut in pieces anyone who says the contrary. They throng about the captain, begging and praying him to commit the helm to them; . . . and having first chained up the noble captain's senses with drink or some narcotic drug, they mutiny and take possession of the ship and make free with the stores . . . Him who is their partisan and cleverly aids them in their plot for getting the ship out of the captain's hands into their own whether by force or persuasion, they compliment with the name of sailor, pilot, able seaman, and abuse the other sort of man, whom they call a good-for-nothing; but that the true pilot must pay attention to the year and seasons and sky and stars and winds, and whatever else belongs to his art, if he intends to be really qualified for the command of a ship, and that he must and will be the steerer, whether other people like or not-the possibility of this union of authority with the steerer's art has never seriously entered into their thoughts or been made part of their calling. . . . How will the true pilot be regarded? Will he not be called by them a prater, a star-gazer, a good-for-nothing?<sup>27</sup>

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23. Commission, Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, COM(2011) 573 final.

24. Case C-105/14 *Taricco and Others*, EU:C:2015:555.

25. Opinion of Advocate General Kokott in Case C-105/14 *Taricco and Others*, EU:C:2015:293, para. 80.

26. Case C-105/14 *Taricco and Others*, para. 36.

27. G. Ferrari (ed.) and T. Griffith (translator), *Plato: Republic* (Cambridge University Press, 2000), p. 190.

Let us then briefly deconstruct the metaphor and apply it to the present context:

- the captain = the spirit of criminal law in its guiding and expressive role in society;
- the sailors = those who would use criminal law for their own particular purposes;
- steering and navigation = the application of criminal law;
- drink or narcotic drug = the imperative of the Single Market and that of security of EU citizens;
- making free with the stores = commandeering the national resources of criminal law and criminal justice;
- union of authority and the steerer's art = for instance, use of rigorous research to test claims of deterrent effect or risks of impunity, as advocated in principle in the Commission's Communication on Crime Policy;
- true pilot = experts who deliver sound research findings and critical argument.

### 3. Plato applied

#### A. Commandeering and legitimacy

Perhaps, to start with, it would be helpful to reflect on the way in which the ship of criminal law, let us call it *The Spirit of Criminal Law*, has been commandeered in terms of the legitimacy of this adventure. In other words, let us test the justification for the move by the EU into the domain of criminal justice, and examine more precisely who exactly made this move.

This in itself is a challenging task, since it is not entirely clear how the question of legitimacy in the present context should be approached in the area of criminal law, which has historically been developed in a national context and with reference to national concepts and justifications. Irene Wieczorek recently addressed this question, and provided a helpful framework for discussion as well as detailed analysis. As an initial step, Wieczorek identifies a general theory of legitimacy, as evident in national and comparative criminal law, as a frame for discussion in the supranational EU context.<sup>28</sup> In fact, this is a 'Western' approach to criminal law justifications, embodying elements of *ultima ratio* or 'last resort' argument and then justification on the basis of two alternative methodologies, the deontological (values to be protected), and the utilitarian (desirable objectives).<sup>29</sup> Following Simester and von Hirsch,<sup>30</sup> Wieczorek argues that the best justification is to combine these two methodologies, which will offer the highest level of protection of the liberty of individuals. Such criteria of legitimacy are then applied to the post-Maastricht (1993) advent and subsequent implementation of EU criminal law. Wieczorek argues that, from 1993, the new EU competence was based on an awarding of authority from the Member States and is to be found in constitutional principles in the EU Treaties.<sup>31</sup> There is a convincing tightness in this argument,

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28. I. Wieczorek, *The Legitimacy of EU Criminal Law* (Hart Publishing, 2020), chapters 1–2.

29. S. Coutts, 'Supranational Public Wrongs: The Limitations and Possibilities of European Criminal Law and a European Community', 54 *Common Market Law Review* (2017), p. 771 provides for an excellent discussions on justifications for supranational criminal law. Coutts' analysis is based on Anthony Duff's seminal work on 'communitarian' theory: *Punishment, Communication and Community* (Oxford University Press, 2001).

30. A.P. Simester and A. von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart Publishing, 2011).

31. I. Wieczorek, *The Legitimacy of EU Criminal Law*, chapters 3–4.



since it then enables the simple question: what do EU constitutional principles<sup>32</sup> (as enshrined in the EU Treaties and as interpreted by the Court of Justice) advise on the legitimate use of criminal law by the EU?

Pausing at this moment, we might then return to the Platonic metaphor and observe that the ship *The Spirit of Criminal Law* has been commandeered for a particular voyage by its owners, the Member States. Its experienced captain, trained as a guardian of the traditional spirit of the criminal law, may have doubts about the purpose of the voyage, but has no option but to comply, and will be assisted by newly appointed senior crew, his Mates, comprising the EU institutions, the Council, Commission, Parliament and Court of Justice. The ship is now flying supranational colours, certainly since docking at Lisbon.<sup>33</sup> The purpose of the voyage and the regime on board the ship are laid down in supranational Treaty provisions, as a kind of legitimated constitution. The Maastricht and Lisbon Treaty amendments can then be seen as seminal moments of commandeering, when the ship's earlier meandering in international and supranational waters moved from an experimental process of discovery to something more defined and purposeful.

### B. *The provenance of criminal law*

Let us return now to that original provenance of criminal law, at least as it had been developed in national legal orders in a European context. As a matter of history this is a somewhat uncertain science in that criminal law has been something widely acknowledged as distinctive and significant, but not defined in a categorical way. Indeed, the concept of crime, the distinction between criminal and other forms of delinquent conduct, and the justification for using criminal sanctions, has long been a matter of debate in the literature of criminal jurisprudence and the theory of punishment.<sup>34</sup> The debate has led to a certain 'strong' concept of what is criminal, which has a widely supported ethical basis in many legal systems. This is the idea that the label of criminality is appropriately applied to conduct which clearly harms the established core values of a society, and has been commonly referred to as *mala in se* or 'deontological'.<sup>35</sup> From this may be derived the argument that the function of criminal law is to validate and reinforce the protection of society's core values, as an expressive instrument of condemnation of certain conduct. This assertion is concisely articulated by the German Federal Constitutional Court in its 'Lisbon Judgment':

By criminal law, a legal community gives itself a code of conduct that is anchored in its values, and whose violation, according to the shared convictions on law, is regarded as so grievous and unacceptable for social co-existence in the community that it requires punishment.<sup>36</sup>

32. E.g. the principles of conferral, subsidiarity and proportionality in Art 5 TEU. See J. Öberg, *Limits to EU Powers: A Case Study of EU Regulatory Criminal Law*, chapter 1 for further discussion.

33. S. Peers, 'Mission Accomplished? EU Justice and Home Affairs Law after the Treaty of Lisbon', 48 *Common Market Law Review* (2011), p. 661.

34. For a convenient summary of the main lines of arguments, concept and theory, see: A.P. Simester et al., *Simester and Sullivan's Criminal Law: Theory and Doctrine*, (7th revised edition, Hart, 2019), chapter 1.

35. The term 'deontological' is used here broadly to denote an emphasis on the nature of action or conduct rather than the intended consequences of its description and classification. See A. Larry and M. Moore, 'Deontological Ethics', in E.N. Zalta, *The Stanford Encyclopedia of Philosophy* (Winter 2020 Edition), forthcoming, <https://plato.stanford.edu/archives/win2020/entries/ethics-deontological/>.

36. Judgment of German Federal Constitutional Court of 30 June 2009, *Lisbon Judgment*, Case 2 BvE 2/08, 5/08, 2 BvR 1010/08, 1022/08, 1259/08, 182/09 (2009), para. 355.



This expressive function of criminal law<sup>37</sup> as a guiding spirit of true criminal law has a strong pedigree in theoretical writing. So, for instance, some 50 years ago the noted American theorist Herbert Packer observed that there is no coherent theory of which conduct, and its characteristics should be criminalized and enforced by criminal sanctions. But having reminded us of the lack of agreed theory, he went on to argue that: ‘There is a vast range of economic offenses . . . where the forms of criminal sanction can be and should be dispensed with.’<sup>38</sup> This assertion of the ‘core’ of criminal law was similar to what Packer’s contemporary fellow American theorist, John Langbein, referred to as the ‘rehabilitation’ of the criminal sanction.<sup>39</sup> In this intellectual tradition, it is the sense of a serious damage or threat to social coexistence (e.g. bodily and psychological security, material necessities) which justifies the strongest prohibition and sanctions to support the latter (and the consequent *ultima ratio* argument that otherwise less incursive legal intervention will suffice). This view was also taken up by the European Commission in its Communication of 2011.<sup>40</sup> This, then, was the flag and enterprise of the ship *The Spirit of Criminal Law*.

### C. The days of early exploration and rise of an empire: The European Union

We should perhaps remind ourselves that there have been two principal historical drivers of development in the field of EU criminal law: pan-European security, and ensuring the effectiveness of EU policies (‘securitized’ and ‘functional’ criminalization).<sup>41</sup> Both were evident as far back as the 1970s, and in this way the earlier voyages of the ship were variously populated, and differently purposed or legitimated.<sup>42</sup>

TREVI and Schengen, as precursors of the JHA provisions under the Third Pillar and the AFSJ, were both matters of security and were driven by intergovernmental actors, i.e. national governments.<sup>43</sup> Such origins in TREVI and Schengen, however, serve to warn against over-simplified references to the Member States, since – in the intergovernmental sphere – governments of Member States may be more or less enthusiastic regarding the degree of integration, as may be witnessed from the Member State ‘line-up’ in some cases argued before the Court of Justice,<sup>44</sup> the

37. J. Iontcheva Turner, ‘The Expressive Dimension of EU Criminal Law’, 60 *American Journal of Comparative Law* (2012), p. 555 offers a great exposition of this dimension in EU criminal law.

38. H.L. Packer, *The Limits of the Criminal Sanction* (Stanford University Press, 1969), p. 252.

39. J.H. Langbein, ‘Controlling Prosecutorial Discretion in Germany’, 41 *University of Chicago Law Review* (1973), p. 453, arguing that the German concept of *Ordnungswidrigkeiten* (administrative offence), in decriminalizing the morally neutral, enhances the distinctiveness of what is genuinely criminal.

40. Towards an EU Criminal Policy, COM(2011) 573 final, section 2.2.1. The Communication asserts that because of a significant impact on citizens’ rights and the stigmatizing effect, criminal law must always remain a measure of last resort.

41. V. Mitsilegas, *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe*, chapter 3.

42. This categorization is, however, not very precise. In particular, protection of EU financial interests may be easily categorized as both, and indeed Wade has argued that it should be seen as a separate category or sub-category in itself – see M. Wade, ‘Developing a Criminal Justice Area in the European Union’, European Parliament Study 2014, Study PE 493.043, p. 23.

43. P. Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform*, p. 332.

44. For instance, the ‘Environmental Crimes’ litigation: Case C-176/03 *Commission v. Council*, EU:C:2005:542; Case C-440/05 *Commission v. Council*, EU:C:2007:625.

later participation in the Prüm Convention in 2005<sup>45</sup> and then the emergence of ‘opt-outs’ and the ‘emergency brake’.<sup>46</sup> Although, then, it may be generally true to say that the criminal law as a securitization project has largely been driven by intergovernmental actors, the crewing of the ship for that purpose has been somewhat patchy.

Similarly, the other main project, criminal law as part of *effet utile*, has a long history, but most of the earlier examples lay in the jurisprudence of the Court of Justice. It is notable in such context that the Commission took a leading role as ‘guardian of the Treaty’ and the guarantor of proper implementation and enforcement. So much is clear from some of the earlier seminal rulings of the Court, which also demonstrate the latter’s support for *effet utile* and placing national criminal law at its service. In legal terms, an early pivotal moment occurred in 1981 when the Court of Justice, in its *Casati* ruling, made it clear that national penalties must not go beyond what is strictly necessary if their effect would be to restrict the EU fundamental freedoms.<sup>47</sup> This case was notable for the intervening objections from a number of Member States, in particular those of Ireland and Denmark regarding any limit on the use of criminal law,<sup>48</sup> which the Court vigorously rejected. Such cases provided for a negative restriction on the use of national criminal law, while another line of case law argued for a positive use of national criminal law for purposes of *effet utile*.<sup>49</sup> In the *Amsterdam Bulb* case in 1977,<sup>50</sup> the Commission had argued that Member States are not only empowered but also, with Article 5 of the EEC Treaty, obliged to take all appropriate measures, whether general or particular, to ensure the implementation of Community rules.<sup>51</sup> The Court reiterated this message, adding that appropriate measures could include criminal law sanctions.<sup>52</sup> This line of jurisprudence within the project of *effet utile* was taken further in another seminal case, the so-called *Greek Maize* judgment in 1989. As noted above, the Court there articulated the now well-established principle of effective, proportionate and dissuasive sanctions as an obligation of Member State enforcement, arising under Article 4(3) TEU, and also the principle of assimilation, directly adopting the Commission’s argument in that proceeding.<sup>53</sup> Thus, by the end of the 1980s the EC direction of national criminal law for the purposes of effective enforcement of Community policies, in all areas covered by the Treaties, was well established, and largely through the Commission steering this strategy and principle through the Court of Justice’s jurisprudence.

What may be observed in this earlier period, prior to the Treaty of Maastricht, are a number of actors, jostling for position in colonizing the national criminal justice domain, for various purposes. In that way the ship was already sailing as Plato’s ship of fools, especially as it may be observed that those actors had an uncertain appreciation both of the nature of what was being commandeered and the possible consequences of doing so.

45. On cross-border co-operation, see Council Doc. 10900/05. The parties were Belgium, Germany, Spain, France, Luxembourg, the Netherlands and Austria.

46. On the emergency brake and opt-outs, see S. Peers, ‘EU Criminal Law and the Treaty of Lisbon’, 33 *European Law Review* (2008), p. 507.

47. Case 203/80 *Casati*, EU:C:1981:261.

48. *Ibid.*, p. 2606 in the full ECR report of the Court’s ruling.

49. See M. Dougan, in M. Cremona (ed.), *Compliance and the Enforcement of EU Law*, p. 76 for an extensive analysis of these lines of the case law.

50. Case 50/76 *Amsterdam Bulb v. Produktschap voor Siergerwassen*, EU:C:1977:13.

51. *Ibid.*, p. 144 in the full ECR report of the judgment.

52. *Ibid.*, para. 32.

53. Case 68/88 *Commission v. Greece*, para. 22.

After 1993, the ship, its command and its crew took on a different character, as the legitimization of its activities was transformed by the Treaty on the European Union, and then the Treaties of Amsterdam and Lisbon. The competencies of the Union, through these later Treaty revisions, became more far-reaching than those of the former European Community.<sup>54</sup> With the establishment of the Third Pillar and the AFSJ, securitization appears as a legitimating objective of action alongside effective implementation and enforcement.<sup>55</sup> These justifications were also central in the development and establishment of EU criminal justice agencies. Whilst securitization was a key objective in developing Europol and Eurojust, the *effet utile* of EU policies could be inferred as a justification for formulating the European Public Prosecutor.<sup>56</sup>

Gradually, during this later phase, there was an emerging pattern regarding the policy positions of the leading agents of EU criminalization. Earlier on, this pattern emanated from the agents' own reflection of their roles and powers in this emerging area of enterprise. As time went on, and some of the EU institutions flexed their muscles in relation to policy and law-making on criminal law matters,<sup>57</sup> a degree of concern gained momentum, relating to the promotion of crime control at the expense of the legal protection of individuals caught up in this process.<sup>58</sup> In this way the policy and legal infrastructure of rights protection entered the scene in a significant way, especially after the Treaty of Lisbon, when so much of the latter had a clear formal Treaty basis.<sup>59</sup> Nor is such rights-posturing just part of institutional positioning: it is evident in judicial deliberation, and in critical expert commentary – for instance that of the research collective known as the European Criminal Policy Initiative, which produced in 2009–11 a *Manifesto on European Criminal Policy*.<sup>60</sup> In some respects, therefore, this emergence of a pattern in the policy positions of the various agencies serves to demonstrate the complexity of their positions.

### D. The consolidation of empire: EU criminal law after the treaty of Lisbon

The more recent voyages of the commandeered ship have been characterized by a somewhat different configuration of quarrelsome sailors. It may be argued that competence battles have been overtaken by factional assertions of interest on the part of the EU institutions and other actors who have become prominent in the fray of EU criminal law. But the scuffles on board the ship remain complicated and often muddled.<sup>61</sup>

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54. See M. Chaves, *The Evolution of European Union Criminal Law*, chapters 2–3.

55. This bifurcated justification for substantive criminal law was subsequently enshrined in Article 83 TFEU.

56. J. Monar, 'Eurojust and the European Public Prosecutor Perspective: From Cooperation to Integration in EU Criminal Justice?', 14 *Perspectives on European Politics and Society* (2013), p. 342; V. Mitsilegas, *EU Criminal Law After Lisbon: Rights, Trust and the Transformation of Justice in Europe*, chapter 4.

57. The environmental crimes litigation is the most prominent example: see M. Wasmeier and N.L.C. Thwaites, 'The "Battle of the Pillars": Does the European Community Have the Power to Approximate National Criminal Laws?', 29 *European Law Review* (2004), p. 583.

58. V. Mitsilegas, 43 *Common Market Law Review* (2006), p. 1277.

59. See in particular Article 82 TFEU, which gives the EU powers to harmonize individual rights.

60. See European Criminal Policy Initiative, 'Manifesto on European Criminal Policy', 1 *European Criminal Law Review* (2011), p. 86.

61. For a useful overview, see: V. Mitsilegas, *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe*, chapter 2.

Various factions within the crew have waved different flags. The European Council has waved the flag of the Stockholm Programme;<sup>62</sup> the Council has waved the flag of its Draft Conclusions on model provisions;<sup>63</sup> the Commission its flag of Communication of European Criminal Policy;<sup>64</sup> the Parliament its flag of EU approach on criminal law;<sup>65</sup> the European Criminal Policy Initiative its Manifesto flag,<sup>66</sup> and the Court of Justice has picked up a banner of many colours, representing effectiveness, last resort and rights protection.<sup>67</sup>

As a matter of policy there was a slight redirection in respect of a larger focus on ‘rights’ in comparison to pre-Lisbon ‘security’-minded repression. The European Council took the ‘leading role’ in agenda setting. It underlined in the Stockholm Programme the importance of finding a balance between ‘rights’ and ‘security’, and that law enforcement measures<sup>68</sup> and measures to safeguard individual rights should go hand-in-hand in the same direction and mutually reinforce each other.<sup>69</sup> On the basis of the reinforced Treaty mandate,<sup>70</sup> the Stockholm Programme triggered significant policy developments, particularly in the area of individual rights, leading – post-Lisbon – to the adoption of seven substantive directives setting out comprehensive rights for defendants and victims.<sup>71</sup>

However, the overall impression of a *mêlée* remains. Various positions on the subject have been staked out, with varying degrees of clarity. The Commission’s Communication, for example, contains a continuing reference to the needs of effectiveness, while at the same time apparently committing itself to the principle of last resort and urging an evidence-based approach to the need for criminalization.<sup>72</sup> Inevitably the skirmishes have increasingly been played out in the judicial as

62. Stockholm Programme, [2010] OJ C 115/1.

63. Council, Draft Council conclusions on model provisions, guiding the Council’s criminal law deliberations, Council Doc. 16542/1/09.

64. Towards an EU Criminal Policy, COM(2011) 573 final.

65. European Parliament Resolution, An EU approach on criminal law, A7-0144/2012, [CE 2012] OJ CE 264/7.

66. See European Criminal Policy Initiative, 1 *European Criminal Law Review* (2011).

67. Perhaps most prominently evidenced by the *Melloni* (Case C-399/11, *Melloni*, EU:C: 2013:107) and *Taricco* (Case C-105/14 *Taricco and Others*) judgments

68. The Stockholm Programme did, for example, suggest a novel internal security strategy: Commission, ‘The EU Internal Security Strategy in Action: Five steps towards a more secure Europe’ COM (2010) 673 final.

69. See Stockholm Programme, [2010] OJ C 115/1, para. 2.1.

70. Article 82 TFEU.

71. 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; 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; 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 315/57; Directive (EU) 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 65/1; 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; Directive (EU) 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, [2016] OJ L 297/1; Directive (EU) 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.

72. Towards an EU Criminal Policy, COM(2011) 573 final.

much as the legislative arena. In the judicial context there have been repeated arguments regarding the need to protect individual rights, now championed by the European Parliament<sup>73</sup> and many academic critics.

Apart from the discussed *Taricco* saga, *Melloni* is a particularly enlightening example of how judicial controversies may play out between leading European players in respect of the balance between protecting fundamental rights and ensuring the effectiveness of EU law.<sup>74</sup> In this case 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 *in absentia* than that available in the executing state (Italy). Article 24(2) of the Spanish Constitution as interpreted by the Spanish Constitutional Court provided for an unconditional opportunity for a convicted party to challenge a decision of surrender followed by a conviction *in absentia* to safeguard his rights of defence. Surrender to a country where a person had been tried *in absentia* was thus only possible if that person was entitled to apply for a retrial. It was undisputed that the proceedings in the Italian national courts were in conformity with the conditions for delivering *in absentia* judgments in the Framework Decision on the European Arrest Warrant (EAW).<sup>75</sup> The Court of Justice firmly rejected the possibility of conferring additional powers on the executing judicial authority to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard was higher than that deriving from the Charter. The Court held that Article 53 of the Charter could not be interpreted 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.<sup>76</sup> The key point from *Melloni* is that Member States (and their courts) disagree markedly about the proper level of protection of individual rights. It is significant in *Melloni* that the Spanish courts had concerns about surrendering the suspect even where there were harmonized EU rules on the conditions for accepting judgments *in absentia*. The Court and Advocate General Bot,<sup>77</sup> on the other hand, considered that law enforcement and the effectiveness of the EAW scheme trumps national diversity and ‘excessive’ protection of fundamental rights.

This is not the place to report fully on the continuing debates concerning the development of criminal law rules in a number of judicial sites, and the evolving configurations of the relevant agencies in relation to those legal encounters. But it should be noted that such debates also continue in the policy-making context regarding proposals for new criminalizing legislation. An instructive example is provided by the emergence of new measures aimed at the control of market abuse. In 2014 the Market Abuse Crimes Directive was adopted on the basis of a proposal from the Commission. The Directive provides that Member States should ensure that insider trading and market manipulation should be considered criminal offences, at least in the most serious cases and when committed intentionally.<sup>78</sup> The recitals to the Directive state that: ‘It is essential that compliance

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73. An EU approach on criminal law, A7-0144/2012, [CE 2012] OJ CE 264/7.

74. L.F.M. Besselink, ‘The Parameters of Constitutional Conflict after Melloni’, 39 *European Law Review* (2014), p. 531 for comprehensive analysis and criticism of the judgment and the Court’s stance on the protection of fundamental rights.

75. Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States, [2002] OJ L 190/1, Article 5(1).

76. Case C-399/11 Melloni, para. 55.

77. Opinion of Advocate General Bot in Case C-399/11 *Melloni*, EU:C:2012:600.

78. 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 173/79, Articles 3–5.

with the rules on market abuse be strengthened by the availability of criminal sanctions which demonstrate a stronger form of social disapproval compared to administrative penalties.<sup>79</sup>

The passage of this legislation was preceded by an impact assessment<sup>80</sup> carried out by the Commission, according to its own recommended evidence-based approach laid down in its 2011 Communication.<sup>81</sup> The result of the assessment, however, provided no convincing empirical support in favour of criminalization in this context. Conversely, it indicated preference for the use of administrative sanctions.<sup>82</sup> However, the Commission, Parliament and Council forged ahead with the proposal, apparently on the assumption that a higher level of social disapproval would ensure a higher level of enforcement. Not only did the Commission disregard its own recommended good practice, but the three EU institutions were cavalier in using argument in support of a dogmatic policy of exemplary deterrence.<sup>83</sup> This episode provoked a chorus of critical commentary,<sup>84</sup> and it may be argued that the real objective of this criminalization was not legal enforcement but to reassure the public that ‘something’ was being done to address the malaise underlying the financial crisis.<sup>85</sup> But in this case the agencies supporting the criminalization, and those opposing it, were unmistakable.

On the whole, in summarizing the journey to Lisbon, the sailors who were commandeering the ship *The Spirit of Criminal Law* were inspired by easy assumptions concerning the nature and effect of criminal law and its sanctions. And the ranks of the quarrelling sailors were given determination by a sense of their own powers and formal competences. But that particular voyage came to an end when the Treaty of Lisbon swept away the pillar structure and integrated the making of EU criminal law into the traditional ‘Community’ decision-making framework. The EU now enjoys, for the first time in history, explicit competencies to harmonize substantive criminal law and national criminal procedures.<sup>86</sup> The expansion of qualified majority voting in the Council, enhanced powers for the supranational EU institutions (Commission, European Parliament and Court of Justice), as well as the extension of direct effect to EU criminal law measures are all further evidence of the increasing ‘communitarization’ of criminal law.<sup>87</sup> But the ship of fools is not guided by a considerate and humane spirit of criminal law. Rather, it is directed and legitimated by the unprincipled considerations of *effet utile* and ‘security’.

79. Ibid, recital 6.

80. Commission, Commission Staff Working Paper, Impact Assessment, Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on insider dealing market manipulation (market abuse) and the Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation, SEC(2011) 1217 final.

81. Towards an EU Criminal Policy, COM(2011) 573 final.

82. See J. Öberg, *Limits to EU Powers: A Case Study of EU Regulatory Criminal Law*, p. 89 for a detailed analysis of the directive and the empirical evidence underlying it.

83. Although there might be a theoretical case for the use of criminal sanctions for enforcing market abuse behaviours: J. Öberg ‘Is it “Essential” to Imprison Insider Dealers to Enforce Insider Dealing Laws?’, 14 *Journal of Corporate Law Studies* (2014), p. 111.

84. See in particular the range of writers referred to in the discussion by I. Wieczorek, *The Legitimacy of Criminal Law*, p. 181.

85. See M. Miglietti, ‘The First Exercise of Article 83(2) TFEU Under Review: An Assessment of the Essential Need of Introducing Criminal sanctions’, 5 *New Journal of European Criminal Law* (2014), p. 5.

86. Articles 82 and 83 TFEU.

87. S. Peers, 48 *Common Market Law Review* (2011), p. 692; S. Wolff, ‘Integrating in Justice and Home Affairs: A Case of New Intergovernmentalism Par Excellence?’, in C.J. Bickerton, D. Hodson, and U. Puetter (eds.), *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era* (Oxford University Press, 2015), p. 140.



#### 4. EU criminal justice agencies on the ship of fools

Where, then, does the rise and development of EU criminal justice agencies fit into this narrative? There is also a story here of a ship of fools which, simultaneously and as a parallel to the voyage of substantive criminal law, embarked on a journey guided by the principles of more 'effective' enforcement of EU policies and 'security'. It is apparent that the ship of EU criminal justice agencies commenced its journey guided by considerations of 'security' (or 'safety') to citizens.<sup>88</sup> EU criminal justice agencies emerged gradually and incrementally as a response to the increasing 'external'<sup>89</sup> threats of organized and transnational crime. External shocks such as 9/11, and the terrorist attacks in the EU, such as in Madrid in 2004 and London in 2005, contributed to make the EU's security agenda more visible and focused on operational cooperation between police authorities and judicial authorities. This also triggered the creation of two central agencies in EU criminal justice: Europol and Eurojust.<sup>90</sup>

In respect of the crew on this ship, it appears that there have been many players involved in creating and giving impetus to these agencies. Nonetheless it appears evident that the Member States have been leading players in shaping law and policy in this area. Without the political will of the Member States in Tampere and The Hague, it would have been impractical to create Europol and Eurojust. The Tampere European Council in 1999 laid the foundations for the creation for 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 organized crime by improving and coordinating cooperation in criminal matters between the competent authorities.<sup>91</sup> The Council and Member States equally drove forward the development towards an amended Eurojust Decision,<sup>92</sup> adopted in 2009, as well as the revised Eurojust Regulation of 2018<sup>93</sup> (aiming for more transparency in the operational activities of Eurojust).<sup>94</sup> The evolution of Eurojust has been strongly affected by its intergovernmental design, which means that Member States have been deciding on the identity of Eurojust's members, the powers of national members, their term of office and also the financing of their members.<sup>95</sup>

Europol was even more a Member State-driven entity, created as an intergovernmental organization through a convention,<sup>96</sup> placing it outside of the Community legal framework. Europol

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88. Article 29 of the pre-Lisbon Consolidated Version of the Treaty on European Union, [2002] OJ C 325/5.

89. See C. Harding and J. Banach-Gutierrez, 37 *European Law Review* (2012), p. 759 for the use of 'external' and 'internal' threats when describing EU criminal policy.

90. J.D. Occhipinti 'Still Moving Toward a European FBI? Re-Examining the Politics of EU Police Cooperation, Intelligence and National Security', 30 *Intelligence and National Security* (2015), p. 234; Monar, 14 *Perspectives on European Politics and Society* (2013), p. 342.

91. See Council, Presidency Conclusions, Tampere European Council, (1999), para. 46.

92. Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, [2009] OJ L 138/14.

93. 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, [2018] L 295/138.

94. See S. Peers, *EU Justice and Home Affairs Law: Volume II: EU Criminal Law, Policing, and Civil Law* (Oxford University Press, 2016), p. 253.

95. See A. Mégie, 'Eurojust in Action: An Institutionalisation of European Legal Culture?', in R. Colson and S. Field (eds.), *EU Criminal Justice and the Challenges of Legal Diversity* (Cambridge University Press 2016), p. 90.

96. Council Act of 26 July 1995 drawing up the Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention), [1995] OJ C 316/1.



and police cooperation were observed by Walker and de Boer to occupy a 'peculiarly hybrid position within the Community legal system, neither merely intergovernmental nor properly supranational'. They recognized that 'in the core law-enforcement areas of judicial co-operation in criminal matters . . . and police co-operation itself, the Commission, as the permanent EC executive, still has no right to initiate policy'.<sup>97</sup> Europol and the work on amending the Europol Convention thus fell into the hands of the Member States.<sup>98</sup> The Member States as a group were also, as noted by observers,<sup>99</sup> responsible for pushing through the Decision on Europol, which transformed Europol from an intergovernmental organization into a Union agency.<sup>100</sup>

The Member States' dominant influence in shaping the activities of Europol and Eurojust is substantiated by a detailed analysis of the powers of those two organizations. The general impression from this review is that Member States have jealously guarded their law enforcement powers in this area. Eurojust and Europol were not envisaged to have any executive powers to take decisions that required national prosecution or police authorities to commence, conduct, coordinate or end criminal investigations.<sup>101</sup> The narrow Treaty remit of both Eurojust and Europol was coherent with the general justification for EU action in criminal justice, which was based on a philosophy of 'cooperation' between national criminal justice systems, focused on enhancing synergy. Whilst Lisbon has opened up certain possibilities for the reinforcement of the operational capacities of these agencies,<sup>102</sup> the general direction for these developments is still very much provided by the Member States.<sup>103</sup>

Leaving Europol and Eurojust aside, the remaining part of this section embarks on a more comprehensive excursion into examining the development of the EPPO from the perspective of law and agency. The gradual emergence of a 'proper' supranational agency in the field of criminal law followed a slightly different path from the route laid out for Eurojust and Europol. The justification for creating the EPPO was based on the 'effective enforcement' of EU rules, and sprang from legitimate concerns over extensive 'internal' mismanagement of EU funds. The imperative objective of protecting the EU's budget is thus central to understanding the motivation behind the development of this office.<sup>104</sup> It has been perceived as crucial for the legitimacy of the Union that its limited financial resources are used in the best interests of EU citizens. There is also an enduring belief that Member States' past efforts to protect the EU's financial interests have been

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97. M. Den Boer and N. Walker, 'European Policing after 1992', 31 *Journal of Common Market Studies* (1993), p. 8.

98. M. Busuioac and M. Groenleer, 'Beyond Design: The Evolution of Europol and Eurojust', 14 *Perspectives on European Politics and Society* (2013), p. 289.

99. C. Hillebrand, 'Guarding EU-Wide Counter-Terrorism Policing: The Struggle for Sound Parliamentary Scrutiny of Europol', 7 *Journal of Contemporary European Research* (2011), p. 500.

100. Council Decision of 6 April 2009 establishing the European Police Office (Europol), [2009] OJ L 121/37

101. Articles 30(2)(B) and 31(2) of the pre-Lisbon Version of the Treaty of European Union. See also the recent Europol 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, Article 6; Eurojust Council Decision 2009/426/JHA (2009), Articles 7 and 8.

102. Articles 85 and 88 TFEU.

103. See Monar, 14 *Perspectives on European Politics and Society* (2013), p. 353.

104. The EPPO proposal complements the PIF Directive, which determines the criminal offences and applicable sanctions for irregularities against the EU budget.

insufficient.<sup>105</sup> The protection of the EU's financial interests has for a long time been a key policy issue for the EU institutions, following the allocation of resources to the Community.<sup>106</sup> It evolved further with the signing of the PIF Convention of 26 July 1995,<sup>107</sup> and was underscored by the Amsterdam Treaty, where a specific legal basis was provided for the protection of the Community's financial interests.<sup>108</sup>

Nonetheless, it is important to consider the players that shaped policies and law in this initial period. The early voyage with the *Corpus Iuris* project during the 1980s was crewed by a motley collection of recruited experts and led by the supranational EU institutions. It resulted in a larger study, the product of research carried out by academics, which had been commissioned by the Commission and the European Parliament, reflecting increasing concerns on the part of those institutions about the scale of such frauds against the Community budget. This project had suggested a scheme of measures to counter the non-enforcement of offences against the EU's budget, including suggestions of a single set of offences applicable throughout the Union, a common set of procedural rules for the investigation and prosecution of such offences and the establishment of a European Public Prosecutor.<sup>109</sup> It is readily apparent that the European Parliament<sup>110</sup> and the Commission<sup>111</sup> were indispensable in driving forward policy calling for the visions for the EPPO to be realized in concrete legislative action.

However, the constructive input of Member States in preliminary discussions about the EPPO should not be discarded as insignificant. At this stage, some Member States expressed a clear preference towards developing a European Public Prosecutor, believing that such a body could be essential to address the insufficient prosecution of offences that were against the EU's financial interests.<sup>112</sup> Whilst Member States had reservations about the far-reaching reforms envisaged by the *Corpus Iuris*, there was a positive outlook towards the proposal to dramatically improve the overall EU response to fraud against the EU budget.<sup>113</sup> It is, however, equally true that several Member States raised serious reservations pertaining to the whole feasibility of the EPPO project. They considered a European Public Prosecutor to be a

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105. See Commission, Commission Staff Working Document, Impact Assessment, Accompanying the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, SWD (2013) 274, p. 7.

106. With a Commission proposal for a draft amendment to the Treaty dating from 6 August 1976 permitting the adoption of common rules on the protection under criminal law of the financial interests of the Communities and the prosecution of infringements of the provisions of those treaties, COM(76)418 final, [1976] OJ C 222, 22 September 1976.

107. Convention of 26 July 1995 on the protection of the European Communities' financial interests, [1995] OJ C 316/49.

108. Article 280 of the Consolidated Version of the Treaty Establishing the European Community, [2002] OJ C 325/33.

109. M. Delmas Marty and J.A.E. Vervaele, *The Implementation of the Corpus Iuris in the Member States – Penal Provisions for the Protection of European Finances* (Intersentia, 2001).

110. E.g. European Parliament, Resolution on the creation of a European legal and judicial area to protect the European Union's financial interests against international crime, [1997] OJ C 200/157; European Parliament, Resolution of 19 January 2000 on the establishment of criminal protection for the financial interests of the Union, [2000] OJ C 304/126; European Parliament, Resolution on the Commission's antifraud strategy, [2001] OJ C 232/191.

111. The Commission's policy paper from 2001 is a prominent example of the Commission's strong influence in shaping the early discussions of the EPPO: Green Paper on criminal law protection of the financial interests of the Community and the establishment of a European Public Prosecutor, COM (2001)715 final.

112. Délégation de l'Assemblée nationale pour l'Union européenne, 'Rapport d'information sur la lutte contre la fraude dans l'Union européenne', 22.6.2000, No. 2507.

113. Bundestagsdrucksache 14/4991, 14.12.2000; Address by Mr Lionel Jospin, Prime Minister, on 'The future of an enlarged Europe' (Paris, 28.05.2001), [www.cvce.eu/en/obj/address\\_given\\_by\\_lionel\\_jospin\\_on\\_the\\_future\\_of\\_an\\_enlarged\\_europe\\_paris\\_28\\_may\\_2001-en-642dc4c9-b224-4ea7-a77b-7e4d894b3077.html](http://www.cvce.eu/en/obj/address_given_by_lionel_jospin_on_the_future_of_an_enlarged_europe_paris_28_may_2001-en-642dc4c9-b224-4ea7-a77b-7e4d894b3077.html).

further incursion on national sovereignty in a sensitive field, and expressed concerns about the far-reaching implications of such an office on the functioning of national criminal justice systems.<sup>114</sup>

After Lisbon, it is plain that discussions on a centralized European Public Prosecutor obtained real impetus, as there now existed a clear Treaty mandate<sup>115</sup> to realize the plans for the EPPO. Unsurprisingly, it was again the Commission that relaunched the EPPO project, by adopting its very ambitious proposal in 2013.<sup>116</sup> The proposal – which was adopted on the basis of Article 86 TFEU – suggested the establishment of a European Public Prosecutor with powers to autonomously prosecute crimes perpetrated against the EU's financial interests. The proposal was very contentious and was subject to laborious negotiations between the Member States. To the author's knowledge, the legislative dossier on this proposal has produced the highest numbers of official negotiation documents in the Council on criminal law.<sup>117</sup>

In respect of the EPPO proposal there are a number of legislative actors and other stakeholders which have influenced, shaped and created policy. It is impossible within the scope of this contribution to comprehensively examine the role of all the players involved throughout the negotiations. It is, however, instructive as an example to examine some of the key policymakers and their views on the EPPO at the early stage of negotiations.

The initial debate of the EPPO proposal took place at a major start-up conference organized by the Lithuanian presidency in September 2013, where more than 130 experts participated, including representatives from the Member States, the European Council, the Commission, the European Parliament, the Court of Justice, Eurojust and Europol.<sup>118</sup>

Françoise Le Bail, the former Director General of DG Justice of the Commission, was a prominent speaker at the conference and a strong visionary for the Commission's post-Lisbon design of the EPPO. She reflected upon different models for the future EPPO, arguing strongly against the Member States' proposal for a 'collegiate' intergovernmental structure. She suggested that such a model would seriously encroach upon the EPPO's independence in taking prosecutorial decisions. A collegiate structure (as foreseen for Eurojust) would allow national interests in the field of judicial cooperation to be pursued, and give Member States too strong an influence in decision-making, as prosecutorial decisions would have to be subject to their validation. Further, she questioned whether the independence of the EPPO could be safeguarded within the proposed college election procedure in which the European Parliament would not participate.<sup>119</sup> The Commission's most controversial policy choice for the EPPO was the model of exclusive competence, which would mean that the EPPO would hold a monopoly on prosecuting offences that fall within its substantive scope of competence, i.e. over 'PIF offences'.<sup>120</sup> Le Bail explained the choice of exclusive competence as a matter

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114. See 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), p. 33.

115. Prior to Lisbon the Union did not have any constitutional remit to create the EPPO.

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

117. Ninety Council Documents as extracted from the Eurocrim database: <https://db.eurocrim.org/db/en/vorgang/306/>.

118. Council Doc. 13863/13.

119. *Ibid.*, p. 4.

120. Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM(2013) 534 final, Article 14.

of efficiency. Such a competence for the EPPO would ensure a clear separation of tasks, and serve to avoid parallel jurisdictions and investigations, aiming at stronger and more streamlined cooperation.<sup>121</sup>

The issue of ‘exclusivity’ was widely contested when the EPPO Proposal was subsequently brought to the Member States.<sup>122</sup> It proved too sensitive in terms of national sovereignty, and subsequent negotiations in the Council shifted quickly to a more ‘cooperative’ design for the EPPO after a proposal from the Greek presidency received broad conceptual support. This model provided that both the EPPO and national prosecution authorities would be competent to enforce crimes against the EU budget without an explicit priority for the EPPO.<sup>123</sup> It is apparent that the shaping of the final structure of the EPPO was guided by a variety of considerations. It is nonetheless apparent that during the course of negotiations the structure shifted to a collegiate and more ‘intergovernmental’ basis (compared to the Commission’s proposal), which meant that Member States would have a stronger influence over the operation of the EPPO at EU level and at national level.<sup>124</sup> The move towards this more collegiate model was accompanied by increased complexity in the structure of the EPPO, with additional layers of prosecutors being introduced between the central EPPO collegiate structure and the work of European Delegated Prosecutors at national level.<sup>125</sup>

Whilst the Commission’s proposal was substantially revised and the model of a centralized prosecutor with exclusive competence was abandoned, it is nonetheless apparent that the Commission was one of the central players in realizing the vision of a European Public Prosecutor. It is equally true that in redesigning the structure of the EPPO as a collegiate model, the model of concurrent competence, and in designing the appointment procedure of the EPPO,<sup>126</sup> Member States have been key stakeholders in shaping the EPPO Regulation. The contributions of the different presidencies of Greece, Italy and Latvia should be particularly underlined, as they were able to find compromises among the very different Member State views on the functions and duties of a European Prosecutor.<sup>127</sup> The EPPO example also highlights something fundamental pertaining to the origin of the EU criminal law project, in the specific concerns expressed by particular EU institutions. The integration project had given rise to opportunities for the illegal exploitation of the

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121. Council Doc. 13863/13, p. 8.

122. Illustrated by the fact that the national parliaments issued a ‘Yellow Card’ against the proposal on this basis: see 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.

123. Council Doc. 5766/17, Articles 20 and 22. The final version of the EPPO Regulation also opted for this model (of concurrent competence) with the right of evocation for the EPPO: Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office, [2017] OJ L283/1 (EPPO Regulation), Articles 25 and 27.

124. Conclusions of the Justice and Home Affairs Council of 15 and 16 June 2015, Council doc 9951/15, p. 5.; Council Doc. 9372/15.

125. V. Mitsilegas, *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe*, p. 104.

126. Where pressing questions have recently been asked about the role of Member States in the appointment procedure of European Prosecutors after the Council, in a decision in July (Council Implementing Decision appointing the European Prosecutors of the European Public Prosecutor’s Office, 14830/19, 22 July 2020, recital 13), decided to sideline the independent selection committee’s nominated candidates in respect of Belgium, Portugal and Bulgaria: See the Open Letter by M. Maduro and others to the European Parliament, ‘Call out the Council on its hypocrisy’, 4/10/2020, Euronews.

127. Mitsilegas, *EU Criminal Law after Lisbon* (2016) p. 106.

EU's financial interests, and there was a perceived need to marshal the resources of Member State criminal law to deal with this problem. It is instructive that the EPPO has been shaped and created on the basis that it must be commandeered to protect the EU's financial interests and safeguard existing EU policies. From any vision of a new Europe-wide criminal law, it is coherent with the enforcement imperatives of the EU.

## 5. Conclusion: The strange voyages of the spirit of criminal law in the waters of EU criminal law

A ship of fools in the Platonic sense? So it would seem. There are now a number of different mariners on board, all jostling with each other for control of the ship's navigation, and apparently frequently heedless of its original mission: EU institutions, Member State governments, courts in different systems, and critical commentators. There are complex currents in the sea of EU criminal law and a number of these have affected the ship's navigation (i.e. the effectiveness of the European integration project and security needs). This cursory and selective historical excursion has shown how the course of the ship has been variously set, by the Commission and Parliament in some cases, and by the Member States in other instances, reflecting the preoccupations and roles of those actors.

The analysis in this article suggests a tentative correlation between the justifications used for triggering certain developments in law and policy and the players involved in shaping those policies. In instances where the supranational EU institutions have been the primary actors in shaping policy, e.g. in respect of the development of EU regulatory criminal law (market abuse and fraud against the EU's financial interests)<sup>128</sup> and the rise of a European Public Prosecutor, the rationale employed has been 'functional' and 'instrumental'.<sup>129</sup> In this area it is possible to identify a leading role, in policy formation and enforcement, on the part of the Commission (and to a lesser extent the European Parliament and the European Court of Justice).<sup>130</sup> In this regard, it is apparent from this discussion that the Commission is more imbued with the spirit of the European project rather than that of criminal law.<sup>131</sup> Conversely, where the Member States have been the primary policy shapers and makers, such as in the area of the eurocrimes in Article 83(1) TFEU (terrorism, counterfeiting, sexual crimes against children, money laundering) and in respect of the development of Eurojust and Europol, the justification for EU action has been driven by an ill-defined sense of 'security'.<sup>132</sup> In this instance, criminal law and the resources and competences of EU criminal justice agencies are used in a very expressive way<sup>133</sup> and guided by signalling politics to provide a sense of safety to citizens. The outcome to date has been a process of commandeering of the national traditions and infrastructure of criminal law – its rules, procedures, agencies and

128. See J. Öberg, *Limits to EU Powers: A Case Study of EU Regulatory Criminal Law*, chapters 1, 4 and 5; E. Herlin Karnell, *The Constitutional Dimension of European Criminal Law*, chapters 2–5.

129. See above Sections 3.D and 4.

130. See above Sections 3.C, 3.D and 4.


131. Given the Commission's very European mission, outlined in Article 17 TEU, which is to 'promote the general interest of the Union and take appropriate initiatives to that end as well as ensuring the application of the Treaties'.

132. V. Mitsilegas, *EU Criminal Law After Lisbon: Rights, Trust and the Transformation of Justice in Europe*, chapter 3.

133. Turner, 60 *American Journal of Comparative Law* (2012), p. 555.

sanctions – to serve a ‘securitized’ and repressive agenda of criminal enforcement.<sup>134</sup> Based on these preliminary observations (which require more empirical substantiation), it is worthwhile asking whether these instrumental and repressive rationales for employing national criminal law and resources to serve EU interests and policies are legitimate justifications and drivers for the future journey on *The Spirit of Criminal Law*.<sup>135</sup>

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134. T. Elholm, ‘Does EU Criminal Cooperation Necessarily Mean Increased Repression?’, 17 *European Journal of Crime, Criminal Law and Criminal Justice* (2009), p. 191.

135. C. Harding and J. Banach-Gutierrez, 37 *European Law Review* (2012), p. 758 examines this question in some detail.