Harmonisation of criminal law is a tricky subject. National criminal law is often the product of centuries of development. Compared across different countries, the results may seem broadly similar, but the ways in which these results are reached differ. Harmonisation of one or a few elements of these systems strips these elements of their mutual context.

EUROPEAN INTEGRATION AND HARMONISATION AND CRIMINAL LAW

1. Introduction

Framing the question, the structure and the limits of the report

Today, in 2006, problems of contemporary European society are usually met with a call for a common European approach. Terrorism and other societal problems must be rooted out and the first instrument that Europe reaches for to do so is criminal law. Alongside this function of problem control, criminal law is used as a means of promoting European integration. Although not everyone is happy with the European influence on criminal law, the inextricable connection between Europe and criminal law has become a fact that is now no longer subject to discussion as such. It is considerably more difficult to define exactly what criminal law and

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∗ This study could be realised due to a replacement subsidy given by the Netherlands Science Organisation.


2 See, for example, the Belgian Minister of Justice, M. Verwilghen, in Interpellation sur les travaux de la Convention dans le secteur pénal: la nécessité d’entrer au cœur du débat: ‘La construction de l’espace judiciaire pénal est en effet indispensable pour consolider l’Union européenne’ (The construction of the judicial criminal area is in essence indispensable for consolidating the European Union), in: G. de Kerchove and A. Weyembergh, Quelles réformes pour l’espace pénal européen?, Collection ‘Études européennes’, Bruxelles, Editions de l’Université de Bruxelles, 2003, p. 9.
Europe mean for each other. I endeavour to do this using the following questions: What role does European integration and harmonisation play in criminal law? What role does criminal law play in European integration and harmonisation? What are the objectives, methods and effects of European harmonisation of criminal law?

These reports have, wherever possible, been written in accordance with a common structure and under a common denominator: European integration. Members of the legal profession who may have more experience with European criminal law will note that the term ‘harmonisation’ sounds more familiar. Before going further, it is therefore important to define these terms as they will be used in this paper. This paper defines European integration as the political pursuit of European unification. This pursuit takes shape in a common foreign and defence policy and a common currency, but also in an array of exchange programmes for students, European research programmes, and a variety of other initiatives intended to bring Europeans closer together. Integration need not necessarily take place in legal form. The definition of harmonisation used in this paper is: the movement of the legal practice of various legal systems closer together based on a common standard. Harmonisation can be considered a legal means for achieving the political objective of integration. Harmonisation implies differences, otherwise there would be nothing to harmonise. Harmonisation is an attempt to diminish these differences, but its ultimate goal is not to eliminate them. Elimination of all differences is the goal of unification. At present, unification is not an issue in a criminal law context. Harmonisation distinguishes itself from mutual recognition in that mutual recognition of the differences observed is in fact an acknowledgement of the parties’ desire not to change. A form is found to make those differences irrelevant. In the legal development of the European Union, there is a clear relationship between ideas about harmonisation and mutual recognition. In some cases, the two concepts are considered to be alternatives to each other, while in others they are deemed to be instruments that can be used simultaneously.

The focus of this paper is limited to criminal law aspects of integration and harmonisation. These aspects are treated from opposing perspectives. The theme of European integration and harmonisation and criminal law is approached from both a European perspective and a criminal law perspective. This paper establishes that the current policy and available instruments do not lead to the intended goal. It also notes that the principles rooted in the traditions of the economic community are, to put it mildly, somewhat at odds with the traditions of criminal law. There is,

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3 This is not to say that these are the only true definitions of these terms; the important thing is to adhere to explicit definitions. This is to facilitate the discussion; moreover, without consistent definitions it would be impossible to review integration and harmonisation at all.


5 For the purposes of this paper, I leave aside the punitive character of the Commission’s direct enforcement of the anti-cartel legislation.
however, also potential for the future of European criminal law, and this paper concludes with a few proposals.

2. European Integration and Harmonisation and Criminal Law

2.1. European Integration and Harmonisation

The most important role as instigator of European integration and harmonisation is reserved for the European Communities/European Union. Although this report will be primarily focused on the EC/EU, there are several other organisations that are equally relevant to the development of the European concept of criminal law or which have exerted a harmonising influence on the area of criminal law: the Council of Europe, the Benelux and the United Nations.

2.2. Enforcement of Community Law through Criminal Law

At the foundation of the European Community in 1957, the Community set itself the goal of eliminating the internal borders and bringing about the internal market (Art. 2, EC Treaty). The objectives were economically determined and focused on what is referred to as the ‘four freedoms’: the free movement of employees, goods, capital and services. These freedoms may not be subjected to any restriction within Europe. The EC Treaty establishes the principle of sincere cooperation within the Community, which includes the obligation for the member states to enforce the law of the community. This obligation of compliance/enforcement rests on all bodies of the member state, and in particular, the legislator and the judiciary.

That community law consists of the EC Treaty, directives and regulations. Pursuant to Article 249 of the EC Treaty, a directive is ‘binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods’. Pursuant to Article 249, a regulation has ‘general application. It shall be binding in its entirety and directly applicable in all Member States’. This means that community law does generally require implementation into national law, but does not prescribe how the member states must do this. The member states may elect administrative enforcement, civil law or criminal law enforcement, or any other means. The obligation is one of results. This background explains why, for a long time, criminal law played a subordinate role in the enforcement of community law. The policy areas of the EC were limited, and primarily of an economic bent.

The Commission is the linchpin of community law. The Commission proposes legislation, which must be adopted by the Council and the European Parliament. Additionally, in community law the Commission oversees harmony at three different levels: monitoring of implementing legislation (member states inform the Commission of their proposed implementing legislation); monitoring of enforcement (the Commission is authorised to examine whether member states are enforcing community law) and by instituting infraction procedures against states that are not complying with community law (if the Commission believes that a
member state is not complying with community law, it may bring a case against that state before the Court of Justice).

The Court of Justice is established to ensure the uniform interpretation of the EC Treaty. In practice, cases come to the Court of Justice in one of two ways: Firstly, if the Commission brings a matter against a member state it considers is not enforcing community law (Art. 226, EC Treaty). In this case, the Court may determine whether the member state has or has not met its obligations. This procedure is used frequently. Secondly, national courts may request the Court of Justice to interpret community law if it is involved in a pending dispute in which the interpretation of the law is relevant to the outcome of the matter. In that case, a national court submits a preliminary question. This type of question is also frequently submitted to the Court of Justice. The preliminary questions may relate to any area of law (including criminal law). The Court of Justice’s position is made even stronger because the legislative history of EC/EU law offers strikingly little by way of indications for interpretation.

The most influence on criminal law is exerted by the directive. Insofar as the directive is described unconditionally and in sufficient detail, it leaves the member states no room for interpretation, and the directive must be strictly complied with.\(^6\) In other words: if a member state fails in the implementation of community law into its national law, that community law is nonetheless still effective, so long as the provisions of the community law are beneficial to the citizen. In the case law of the Court of Justice, in criminal proceedings ‘beneficial’ is translated as a right that suspects and other parties can invoke.\(^7\) The national court is obliged to interpret implementing legislation as much in the spirit of the directive as possible (‘directive-conformative interpretation’). A citizen may invoke this at any time in any proceedings. Additionally, the Court of Justice has determined in its case law that criminal responsibility cannot be established directly on the basis of a directive without transposition into national criminal law. This means that the influence of the community law is not of equal weight, because obligations under community law cannot be directly applied against the citizen.\(^8\) By contrast, a suspect can invoke community law if that law prescribes that a certain activity may not be prohibited even though that activity is an offence under the national criminal law.

Community law has a harmonising influence that goes beyond the strict scope of criminal law. The areas in which community law strives for harmonisation are, in themselves, related, but that cannot be said of their influence on criminal law. That is better characterised as coincidental, and is partly dictated by the member state’s choice of the realm of law (civil, administrative, disciplinary, criminal) in which it

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7 Court of Justice (ECJ), 21 March 1972, criminal proceedings against Società Agricola Industria Latte, C-82/71, ECR 1972, 119; ECJ, 5 April 1979, criminal proceedings against Tullio Ratti, C-148/78, ECR 1979, 1629.
8 ECJ, 8 October 1987, criminal proceedings against Kolpinghuis Nijmegen B.V., C-80/86, ECR 1987, 3969; ECJ, 3 May 2005, criminal proceedings against Silvio Berlusconi and others, C-387/02.
wishes to enforce this. The method of enforcement is an individual choice left to the member state (for example, Germany opts for enforcement by civil law, Belgium for administrative law enforcement, and the Netherlands for enforcement under criminal law). If member states select different enforcement instruments, which does happen with some regularity, then enforcement diverges and cooperation in enforcement becomes more difficult. Cases where there is effectively harmonisation in the area of criminal law (because all member states elect to implement community law into criminal law) are individual themes or ‘single-issue harmonisation’.9 The fight against EU fraud in particular has led to an array of legal instruments that are enforced from the perspective of criminal law.10 Within the Commission, a unit (OLAF) has been established and charged with the specific task of combating fraud.11 Many of the investigations initiated by this unit ultimately lead to criminal law investigations.

The significance to criminal law of the other community law instrument, the regulation, is more limited. Under Article 249 of the EC Treaty, the regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. This means that implementing legislation at the national level is not strictly necessary. As a consequence, regulations and criminal law only come into contact in the exceptional case in which a member state utilises criminal law in support of a regulation with direct effect.12

Criminal law principles from the national criminal justice systems have had an influence on community law. This refers primarily to the fundamental principles of community law developed in the case law of the Court of Justice. Examples are the

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12 Article 1 under 2°, Economic Offences Act, sets out various regulations the violation of which is an offence under Dutch law without further transposition.
prohibition on retroactive force,\textsuperscript{13} the nulla poena rule,\textsuperscript{14} the principle that a suspect cannot be forced to incriminate himself,\textsuperscript{15} the lex mitior rule,\textsuperscript{16} the principle of proportionality,\textsuperscript{17} the principle of guilt,\textsuperscript{18} the lex certa principle,\textsuperscript{19} and the ne bis in idem principle.\textsuperscript{20} These are principles either common to criminal law/the law of criminal procedure in all member states or principles derived from human rights conventions.\textsuperscript{21}

\textit{Obligation of enforcement versus free choice of means}

It was long assumed that community law (EC Treaty, directives and regulations) cannot prescribe that member states must practice enforcement under criminal law, but that community law could force the member states to exclude criminal law from certain areas because electing criminal law enforcement in those areas would be a violation of the internal market. The appearance of the EC as a factor in criminal law gave rise to a form of indirect harmonisation. Most notions derived from community law are not specifically geared towards criminal law but apply in all legal areas.\textsuperscript{22} Community law does, of course, create its own legal order,\textsuperscript{23} independently of the various sub-areas within law. The same applies to the normative influence that community law exerts on coercive and investigatory measures in criminal law enforcement. If a member state elects to enforce community law through criminal law, then it must also use that means.\textsuperscript{24} The

\begin{itemize}
\item \textsuperscript{14} ECJ, 8 October 1987, criminal proceedings against Kolpinghuis Nijmegen B.V., C-80/86, ECR 1987, 3969; ECJ, 3 May 2005, criminal proceedings against Silvio Berlusconi and others, C-387/02.
\item \textsuperscript{15} ECJ, 18 October 1989, Orkem, C-374/87, ECR 1989, 3283.
\item \textsuperscript{16} ECJ, 1 June, 1999, criminal proceedings against A. Kortas, C-319/97.
\item \textsuperscript{17} ECJ, 5 March, 1980, Ferwerda, C-265/78, ECR 1980, 623; ECJ, 13 December 1979, Hauer, C-44/79, ECR 1979, 3727.
\item \textsuperscript{18} ECJ, 26 May 1981, Rinkau, C-157/80, ECR 1981, 1395.
\item \textsuperscript{19} ECJ, 12 December 1996, consolidated matters C-74/95 and C-129/95, ECR I-6629; ECJ, 7 January 2004, criminal proceedings against X, C-60/02.
\item \textsuperscript{20} ECJ, 13 February 1969, Wilhelm, C-14/68, ECR 1969, 1.
\item \textsuperscript{21} The fundamental rights from the ECHR by definition fall under the general legal principles of community law. See ECJ, 4 October 1991, SPLUC, C-159/90, ECR 1991, 4685. See also ECJ, 14 May 1974, Nold, C-4/73, ECR 1974, 491; ECJ, 21 September 1989, Hoechst, C-46/87 and 227/88, ECR 1989, 2859.
\item \textsuperscript{22} There are, however, some notions specific to criminal law. The Court of Justice does in some cases consider criminal law as such to be too severe as an enforcement instrument in proportion to the crime. ECJ, 29 February 1996, C-193/94, Skanavi and Chryssanthakopoulos, ECR 1996, I-943.
\item \textsuperscript{23} ECJ, 5 February 1963, Van Gend en Loos, C-26/62, ECR 1963, 1 and ECJ, 15 July 1964, Costa/ENEL, C-6/64, ECR 1964, 585.
\item \textsuperscript{24} ECJ, 21 September 1989, Commission v. Greece, C-68/88, ECR 1989, 2965. Under the assimilation principle formulated in this landmark decision, entailing that the member states must orient the enforcement of community law as much as possible in accordance with the way comparable violations of national law are enforced, a member state that uses the
enforcement obligation (Art. 10, EC Treaty)\textsuperscript{25} and its enforceability (seeing as the Commission can summon a member state before the Court of Justice) has a harmonising effect on community law.

In the 1970s, various attempts were made to give the European Communities competences in the domain of criminal law and to pave the way for the introduction of European criminal penalties.\textsuperscript{26} The member states were in fundamental disagreement on this subject. In 1979, the Netherlands even vetoed a proposal by French president Giscard d'Estaing for the creation of an \textit{espace judiciaire}. The member states still had the express desire to leave criminal law within the authority of the member states themselves. It also appeared that the objections were focused more against the authority of the Commission in the area of substantive criminal law than the cooperation as such.\textsuperscript{27}

\subsection*{2.3. Union Criminal Law}

The European Union was established by the Treaty of Maastricht.\textsuperscript{28} This treaty has a ‘pillar’ structure, by which each pillar is distinguished by a different manner in which the law is derived, its binding effect and the compliance monitoring. In the \textit{first pillar} we find community law, based on the EC Treaty. The \textit{second pillar} is where a common defence and foreign policy takes shape. The \textit{third pillar} relates to the cooperation in the areas of justice and home affairs.\textsuperscript{29} While criminal law can be seen as a side issue in community law (the main objective of the EC treaty is, of course, the creation of the internal market), this is not the case in union law. In third pillar law, criminal law is the essential enforcement instrument.

The first pillar has already been addressed above. I leave aside the second pillar. Independently of sanctions and boycotts, the second pillar is not particularly relevant from a criminal law perspective. This section, therefore, concerns the third pillar. The objective the Union formulates in this area is to ‘maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime’ (Art. 2, EU Treaty). The 1992 Maastricht Treaty sets the basis for the \textit{approximation} of national rules on criminal matters where this is in keeping with the objectives of the Union. How does the Union make use of this? On the one hand, the principle of opportunity in criminal prosecution may use that principle in full in cases of violation of community law.

\textsuperscript{25} The enforcement obligation comprises the obligation to transpose the standards as needed into the national legislation, and further, to comply with these standards. Violation of the standards must be sanctioned and cannot go unanswered.

\textsuperscript{26} For the period up to 1979, see A. Mulder, ‘Europees strafrecht, het verslag van een trieste geschiedenis’, SEW, 1979, p. 466-471.

\textsuperscript{27} See also A.H. Klip, \textit{Criminal Law in the European Union}, inaugural lecture Maastricht University, 2004, p. 6.

\textsuperscript{28} Treaty on European Union, 7 February 1992.

\textsuperscript{29} I use the following terms synonymously: union criminal law, third-pillar law, cooperation in the area of justice and home affairs.
European Integration and Harmonisation and Criminal Law

Union has made progress with common definitions of certain crimes (e.g. criminal organisation,\textsuperscript{30} counterfeiting,\textsuperscript{31} corruption,\textsuperscript{32} terrorism).\textsuperscript{33} On the other, it is oriented towards facilitating cooperation between the member states.\textsuperscript{34}

The Treaty on European Union sets aside an important role for the Council. Pursuant to Article 203, EC Treaty, this institution consists of representatives of the governments of the member states. The Council adopts decisions unanimously (Art. 34, paragraph 2, EU Treaty). Initiatives for legislation can be taken by any member state and by the Commission. In practice, many initiatives are adopted by the member state holding the position of President of the Council. No president can be denied some profiling tendencies in the presentation of themes. The Commission is also ambitious and power-hungry in the third pillar, but officially its position here is considerably more modest than in the first pillar. It can take legislative initiatives, but it has no role in the decision-making. It cannot bring member states before the Court of Justice for non-compliance with Union law. The Court of Justice can only review the legality of framework decisions and decisions (Art. 35, paragraph 6, EU Treaty).

The EU has a different set of legal instruments available in the third pillar from those in the first. Firstly, there is the Treaty on European Union, and in addition there are conventions, framework decisions, decisions and common positions, adopted on the basis of Article 34, EU Treaty. The conventions are conventions in the international law sense. The framework decisions are drafted for the approximation of the laws and regulations of the member states. They are ‘binding, as to the result to be achieved, upon each Member State’, but the choice of form and methods is left to the national institutions. They do not have direct effect. In the words of Article 34, paragraph 2, EU Treaty, decisions concern any other purpose consistent with the objectives of the third pillar. They are binding and do not entail direct effect. Common positions describe the Union’s approach in regard to a particular matter. There are still a few joint actions remaining from the time of the Maastricht Treaty.\textsuperscript{35}

The significance of the EU Treaty itself on criminal law, and in particular the objective of ‘creating an ever closer union among the peoples of Europe’ (preamble) and the creation of an area of freedom, security and justice (Art. 29, EU Treaty), seems limited to referring to a very distant ideal, as well as providing a legal basis for the four legal instruments referred to above.

Just as in the first pillar, in the third pillar the Court of Justice is given the authority to rule on reference for interpretation. The Court of Justice of the European Communities can rule on the validity and interpretation of framework decisions and decisions, and on the interpretation of conventions (Art. 35, paragraph 1, EU Treaty). The first decision of this nature was taken in 2003. Since then, more have followed, and so many have been made pending that it can be assumed that the significance of the case law of the Court of Justice will be just as groundbreaking in community law as in Union criminal law.

Since the Maastricht Treaty of 1992 gave the EU legislative authority in the area of criminal law, a number of organisations have arisen. 1993 saw the establishment of a European police force: Europol. This organisation, based in The Hague, focuses on the exchange and analysis of information between the various EU countries. Europol has no operational authority (that is, it may not trace or use coercive measures itself), so that it is dependent on the police forces of the member states for obtaining its information. Several years ago, Eurojust was established. This is a cooperative relationship of public prosecutors of the member states, who can support each other in obtaining international judicial assistance and can take joint decisions on the most suitable place of prosecution. The European Judicial Network attempts to support the legal profession in obtaining legal aid or information on foreign law. I also point out here the option of the establishment of joint investigation teams.

The EU Treaty, the legal instrument 'Joint Action', which it does not further describe. In the Treaty of Amsterdam in 1997, the EU Convention was amended and Joint Actions as a legal instrument were eliminated with the introduction of the Framework Decision. Existing Joint Actions remained in force undiminished.

‘Ever closer’ does not imply any moment of completion; the story of European integration is a never-ending story.

On the one hand, the term ‘area’ can imply something with no internal boundaries, while at the same time it can be a catch-all term that can be attached to anything with a political will behind it.

ECJ, 11 February 2003, Göztütk and Brügge, C-187/01 and 385/01.


Joint Action 96/602/JHA providing for a common framework for the initiatives of the Member States concerning liaison officers, OJ 1996, L 268/2.


have no permanent structure but can be established by two or more member states for certain offences and may be active transnationally.

Originally, the focus of the European Union was limited to the area of cooperation in criminal matters. The Union has long since abandoned this restriction. Initiatives are also being developed in substantive criminal law and in criminal procedure. In addition, another important development can be observed. While in the 1990s the emphasis was on not only instruments intended to harmonise criminal law legislation but cooperation instruments as well, since the turn of the century most work has been focused on mutual recognition of other countries’ decisions and investigative methods.44

First and third pillars coming together

The fact that community law does have an obligation to enforce, but does not have an obligation to use criminal law as an instrument, and that union criminal law does oblige the use of criminal law but not enforcement, results in the combination of both obligations. There are many examples from the last ten years in which the Council and the Commission acted jointly in order to be able to use criminal law as the enforcement mechanism. In each case this was achieved by setting out identical obligations either in a regulation and in a convention,47 or in a directive and a framework decision.48

The Constitution for Europe provided for a unification of the first and third pillars. That treaty, however, never became effective.49 Nor do I feel that such a change by treaty is still necessary for further integration of the first and third pillars in relation to criminal law. On 13 September 2005, the Court of Justice ruled that based on the EC Treaty, the community has the authority to establish criminal penalties in the areas ascribed to it.50 Although this ruling concerned a battle of

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44 An example: Convention of 26 July 1995 on the protection of European Communities’ financial interests, Treaty Series of the Kingdom of the Netherlands 1995, 289.
49 Incidentally, I assume that EU law as it now stands will continue for some time longer. After the rejection of the Constitution for Europe by France and the Netherlands in 2005, I think it can be ruled out that that treaty will ever become effective, certainly not in its present form.
50 ECJ, 13 September 2005, Commission v. the Council, C-176/03. This decision makes a clear break from older precedent in which it was clearly established that criminal law was a matter
competition between the Commission and the Council on the authority for establishing criminal law penalties in the area of environmental law, its repercussions will be felt outside that area alone. This is a principal decision of the Court of Justice. It will have consequences in all policy areas assigned to the Commission under the EC Treaty.\textsuperscript{51} In community law, too, criminal law will be able to be prescribed to the member states as an enforcement instrument.\textsuperscript{52}

In the area of community law, the question has arisen of how far the various terms used (harmonisation/coordination/bringing closer to each other) should be used interchangeably or whether they are terms with fundamentally different content.\textsuperscript{53} Additionally, the question arises of whether the terms from community law should be interpreted in the same way in union law (approximation/harmonisation). And further, there is the question of whether this may be dependent on the way in which the law is applicable in the national legal order. In other words: can harmonisation in the first pillar mean the same thing as in the third pillar, if the way it is applicable in the national legal order is different?\textsuperscript{54} It is striking that essential concepts such as harmonisation and approximation are not defined in the EC Treaty and the EU Treaty.\textsuperscript{55} Given the political relationships, the lack of these definitions must be considered intentional. Each state can interpret any of them as desired; they are non-restrictive and offer great potential for new developments.

\subsection*{2.4. National Criminal Law}

The national criminal law of all member states has been developed in a process of centuries; it symbolises a national identity and culture. It came about in a time in which the only consideration was national law, and its development did not take any account of law of supra-national origin or its influence. The fundamentally different natures of European law and national criminal law call for a brief consideration of the peculiarities of criminal law from a European perspective. For the member states. See ECJ, 11 November 1981, Casati C-203/80, ECR 2595 and ECJ, 25 February 1988, criminal proceedings against Drexel, C-299/86, ECR 1986, 1228.


\textsuperscript{52} Nonetheless, the Dutch government does not think so. See the Minister of Justice’s responses to questions from member of parliament Van Bommel on criminal penalties in directives, 11 January 2006.

\textsuperscript{53} R.H. Lauwaars and J.M. Maarleveld, \textit{supra} note 6, would have it (p. 45-51) that the terms should be considered synonymous.

\textsuperscript{54} The first cases of the Court of Justice show that the ECJ interprets the concepts identically. ECJ, 11 February 2003, Gözütok and Brügge, C-187/01 and 385/01; ECJ, 16 June 2005, criminal proceedings against Pupino, C-105/03; ECJ, 13 September 2005, Commission v. the Council, C-176/03.

\textsuperscript{55} There are, in addition, still other terms with related meanings: approximation/bringing into line/making uniform/unification/growing towards each other/convergence.
Awareness of these peculiarities can contribute to understanding the problems yet to be revealed between European legal principles and those of national criminal law.56

Punishment as such, but also the simple fact of conducting criminal proceedings do, by their nature, take a dispute to the most serious level. Unlike what may be possible in other legal areas, persons cannot escape criminal law. Criminal law is, by definition, mandatory law. It restricts the freedoms of citizens and market participants. The internal market, on the other hand, creates freedom. Perpetrators of offences, may, of course, be able to effectively escape enforcement, but that does not change the fact that the criminal law simply applies to them. Only by making a choice as to the location of the offence can a suspect influence the applicability of the law; for example, a doctor committing euthanasia according to the statutory system in the Netherlands and not in Ireland. If that criminal offence finds a basis in a European legal instrument, then the consequences of locus delicti choices are less meaningful. That is to say, the greater the harmonising effect of a legal instrument, the less chance of escaping that harmonised law. In terms of the normative standard, it matters little for a violation of the legislation on unusual transactions, forbidden under a European directive, whether the transaction takes place in the Netherlands or in Ireland. Enforcement aspects may, however, differ, but that is the consequence of the fact that the harmonisation focuses on legislation and not enforcement.

Only criminal law can take people out of society for a prolonged period due to culpable behaviour. Criminal law has a powerful moral message behind it. Its application is society’s way of saying that the behaviour in question is extremely reprehensible. Criminal law, at least in all national criminal justice systems, developed in a conflict between instrumentality and legal protection and found a balance between the two. The enforcement of the law and the protection of the rule of law are the twin foundations of every penal system. A salient feature of the European Union is that it does support this instrumentality, but has little or no regard for the protection of rights.57 The Commission, the European Parliament and the Council appear to be less interested in criminal law and more interested in punishment. When viewed from the perspective of a free market with equally strong market participants, each of which themselves may contribute to creating the law, legal certainties may not even be particularly necessary. The relationship between the parties in the criminal law process is, however, not an equal one. The state determines the procedure. The suspect is the subject of an investigation. Where

56 Just before completing this manuscript (but without enough time to incorporate it) I received E.A.M. Verheijen’s PhD dissertation, Nederlandse strafrechtelijke waarden in de context van de Europese Unie, which she defended at the University of Tilburg on 17 February 2006.

57 I have only been able to find three instruments of a non-repressive nature: Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, OJ 2001, L82/1, the Council Framework Decision (still in protracted negotiations at the time of completion of this manuscript) on certain procedural rights in criminal proceedings throughout the European Union, and the Green Paper on conflicts of jurisdiction and the principle of ne bis in idem in criminal proceedings, 23 December 2005, COM(2005) 696 final.
in community law the behavioural influence is focused on a fixed, traceable member state, with offences that focus is on an anonymous citizen, one who as a rule does not identify himself voluntarily. This last aspect also makes the link between criminal law and enforcement stronger, in the sense that criminal law demands enforcement in order to embed the standards. A sanction provided for in the Penal Code but not followed by investigation and prosecution will project little in the way of behavioural influence. The legal character of criminal law is typified by the tension between government action and legal protection.

In criminal law, there is a natural tendency to limit the looking glass to legislation in the formal sense, or ‘hard law’. This can be explained simply by the dual effect of the principle of legality. Firstly, the standard must be that an act can only be an offence based on a prior criminal provision. This standard is recognised not only in the Dutch Penal Code (Art. 1), but in the Constitution (Art. 16) and in human rights conventions as well (such as Art. 7, ECHR). Secondly, the government may only base its action against violators of such standards on legally admissible investigation and prosecution methods. This legality principle of investigatory and prosecutorial methods has a firm basis, and may explain why the EC/EU as stakeholder and influencer of the world of criminal law has long been ignored or deemed an unwelcome meddler (at times even against one’s better judgement).

While at the time of the introduction of the Penal Code, Dutch criminal law was the ultimum remedium, it has, over time, mutated into the first means that is often taken to hand: in other words, the primum remedium. Determining what the causes of this fundamental change in the perception of criminal law in the Netherlands are is beyond the scope of this paper. Since 1990, the country has changed from one that used criminal law very sparingly, and that expected few positive effects from criminal law as an enforcement instrument, to one that cherishes the supposed power of criminal law in the fight against all manner of evils, such as wearing burkas, inciting hatred, urinating outdoors and sucking another person’s toes in a public park. The political expectations of criminal law are so far removed from reality that it would be laughable were the issues not so serious. This paper argues that the main point is that from a criminal law perspective, the Netherlands has become a ‘normal’ European country, one that in terms of the symbolism of criminal law no longer has any less expectations than other countries. The Netherlands can no longer be qualified as a country with a mild penal climate, but one with a fairly repressive one.

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58 Article 1, Dutch Code of Criminal Procedure. Additionally, the codification obligation of Article 107 of the Constitution of the Kingdom of the Netherlands. Human rights conventions always require a statutory basis in law for infringements; see, for example, Article 5 ECHR.
59 The only example I will refer to here is the detention rate. From 49 prisoners per 100,000 residents in 1992, that figure has risen to 127 today (source: <www.prisonstudies.org>). No other member state has exhibited such exponential growth.
2.5. **Characterisation and Valuation of the Acquis: Fragmentary and Minimally Effective**

In sections 2.1 through 2.3, I described the broad outlines of Europe’s influence on criminal law. The focus of this outline was the European perspective. This section provides an analysis of what actually happens now in criminal law under the title of European integration and harmonisation. First, this paper examines the form in which these objectives are pursued and the resources used to pursue them. In section 2.5.2, the results of the efforts for integration and harmonisation are reviewed. Section 2.6 is an attempt to explain the observations.

2.5.1. **Methods of Integration and Harmonisation: Form and Means**

In essence, the European Union practices only two forms, which can be referred to as ‘hard law’ and ‘soft law’. Hard law is legislation, and is the backbone of integration and harmonisation. ‘Soft law’ refers to those control instruments that are not legislation. They may, however, be based on legislation. These terms largely (but not entirely) go together with harmonisation and integration. All harmonisation and integration forms exhibit different accompanying principles. First and foremost, harmonisation and integration are also put in the perspective of a process with varying speeds (integration à la carte).60 This term is and continues to be used in the Schengen context, and the Constitution for Europe also provides for something similar. This means that the Schengen countries harmonise somewhat faster than the other member states of the European Union. It is also interesting that integration and harmonisation are understood as a linear process, or in other words, a one-way process.61

**Hard law: form and means**

European legislation in the area of criminal law must be effected by means of implementation into the national legal system. This has been addressed sufficiently in the sections above. An additional factor in the legislation is the time frame. All legal instruments that have an influence on criminal law contain terms in which the member states must meet the implementation obligations. In directives and framework decisions, such obligations can be found in one of the concluding articles of the instrument.62 These terms are, as a rule, two years. The

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60 This is a characterisation originated by J.P.H. Donner, *supra* note 1, p. 75.
61 J.P.H. Donner, *supra* note 1, p. 24. Schengen is also an example of, and is considered to be, a forerunner of the EU, one that other states may join at some future point.
62 For example, the Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, *OJ* 2004, L 335/8, includes a term of 18 months. Most framework decisions, however, have a term of two years; see, for example, Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems, *OJ* 2005, L 69/67. Directives generally have a conversion term of two years; some have different terms. Regulations become effective a few days after publication.
‘implementation term’ serves to provide states with a reasonable term to meet their obligations. Often, transposition legislation will be necessary. This legislation can be submitted to the Commission for recommendations within this period.

Also specific to the legislation is the question of what the object of the harmonisation is or could be. There are authors who argue strongly for the position that only substantive criminal law should and could be harmonised. Others argue that the object of harmonisation is in fact procedural rules. I am not entirely convinced by the arguments of including and excluding given sub-areas of criminal law/the law of criminal procedure in regard to harmonisation. The division between formal and substantive criminal law is not so strict that the two areas never meet. If, for example, the liability of legal persons is defined, then this has inescapable consequences for the attribution of actions to the legal person and the method in which this can be proven. Many material legal questions are bound up in formal questions, and vice versa. In my opinion, the entire body of criminal law/the law of criminal procedure, including the enforcement and the bodies to which that enforcement is charged, can be the subject of harmonisation.

Only one theme is precluded from integration and harmonisation: the legal language. This is the only real European taboo. Because language is also legal language, the use of different legal languages leads to different interpretations. Using terms in Dutch automatically results in a Dutch-law (or Belgian-law, if you prefer) interpretation. Anyone who has done comparative law knows that working with other languages can lead to completely different concepts being raised that fit in an entirely different context. If the guideline for determining obligations for countries and citizens is a community European standard, there can, in my opinion, be no further tolerance for the differences that arise from different language use. In its drive for integration and harmonisation, the Union itself creates a major obstacle here by adhering to the position that all 21 European languages must qualify as official language. If there is a means for bringing people closer together, then it is

63 I will leave aside the question of what is part of criminal law, but here, too, the various states do not all share the same opinion. Tricky themes in this are administrative violations and competition law.


65 In the wake of the decision of the ECJ of 13 September 2005, there seems to be, among various governments, the idea that there is no basis for harmonisation of the law of criminal procedure at this point.

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giving them access to a common language. In any event, it seems clear that harmonisation would benefit from a common legal language.67

Cooperation in criminal matters
In the area of cooperation, new cooperative forms have arisen. The following developments can be observed. The first is that of the simplification of the cooperation or the expansion of the options for cooperation. One example is the EU mutual legal assistance convention 2000. The second is the establishment of new bodies, such as Europol, Eurojust and the European Judicial Network, which increase the options for cooperation even for the national police and judiciary. The third development is that of the formal harmonisation as a facilitator of the cooperation.68 Here, the cooperation rests strongly on the concept of mutual recognition. Member states are in agreement that they regard certain legal figures as equivalent in order to avoid creating obstacles to cooperation. These legal figures are not at all identical, but that difference is overlooked for the cooperation. Consider the lists à la Article 2, Framework Decision on the European Arrest Warrant,69 in which the differences between the member states are abstracted. While previously, the double criminality rule always had to be evaluated based on the entire complex of facts, now the requesting state determines, by checking one of the offences on the list, that the offence is one for which legal assistance must be given. Although this is based on the assumption of double criminality for the offences on the list, this need not necessarily be the case. This is, after all, only about the name of the offence: the same label need not necessarily comprise the same message. In addition, member states may change their legislation. It would appear to be more important to note that such a system must not change the substantive criminal law of the member states, but only regulate (or make uniform) the cooperation between the member states.70

67 The Council of Europe adheres to only two language versions, and just these two give rise to more than enough problems. The United Nations uses six. The ECJ is increasingly forced to concern itself with different language versions. This is not promoting unity of law. In ECJ, 11 February 2003, Gözütökö and Brügge, C-187/01 and 385/01, the ECJ draws on every available language version of the Schengen convention.
68 Delmas-Marty observes that ‘while states have the political tendency to prefer cooperation to integration, it is also possible to observe the opposite tendency in legal reality through integration disguised as cooperation’. M. Delmas-Marty, ‘Comparative Law and the Internationalisation of Law in Europe’, in: M. Van Hoecke (ed.), Epistemology and Methodology of Comparative Law, Oxford and Portland, Oregon, Hart Publishers, 2004, p. 253.
69 It is interesting to note that here, the EU evidently ignores the development of several hundred years of extradition law. Here, too, in the past there was only an obligation to extradite for the offences appearing on a list attached to the convention. Over the years this list became so ponderous that 50 years ago, a decision was made to abolish this list.
70 This did not happen systematically. An example: Because of the fact that in surrender procedures the guarantee of repatriation to serve out the sentence in the perpetrator’s own country is required, there must be a check of whether the conditions for the transfer of the execution of the sentence are met. One of the most important of these conditions is the double
Mutual recognition can be characterised as a sort of horizontal exclusive bilateral cooperation form that can be ‘cashed in’ in criminal proceedings. Mutual recognition acknowledges or assumes differences, allows them to exist, but writes these differences off as an impediment to the cooperation. This assumes a unilateral imposition of a normative standard by the state that initially makes a request. In a request for surrender, the receiving state must work around the fact that it may use a different definition of the offence or another criterion of suspicion. This means that mutual recognition does not force a change in the requesting state’s own law. Still, mutual recognition can, in my opinion, force incorporation of foreign standards. This lies in the element that mutual recognition acknowledges a foreign component in a larger whole. This can mean that legal certainties for suspects are no longer applied.

It is striking that mutual recognition is not defined, although the concept has been considered one of the cornerstones of the European area since the Tampere Summit in 1999. The consequences of mutual recognition have not been well thought-out here. This will be addressed further below. It is, of course, possible to transfer a piece of evidence from the Netherlands to Belgium, but it derives its existential status from Dutch law. Requiring the Belgians to blindly accept the evidence could have a harmonising effect if the Belgians take no more than just the Netherlands into account. This could then be addressed by compensating for any lack of legal certainties. But this is not the case; along with the Netherlands, there are another 23 member states, each with totally different prescriptions. Mutual recognition cannot contribute to harmonisation this way, but rather can have the opposite effect: anarchy or a ‘wild west’ scenario: anything is allowed so long as it comes from abroad.

Foundation of new bodies

The foundation of new bodies like Europol and Eurojust represents something new, something pan-European. Because it does, this institutional integration has an effect different than that of the normative harmonisation or integration, by virtue of more comprehensive cooperation. Where the normative harmonisation leads to changes in the national law of the member states (while differences also continue to exist), institutional integration creates a European body that is the same for all. This can have a harmonising effect. Of course, some harmonising influence from the common body can be expected. There is also an opposite effect, in that all existing national structures remain in place (the national police forces have not, of course, been disbanded, and have not lost their authority). Prior to the foundation of Europol, all information exchange took place between the national police forces, as equals, and was always bilateral in nature. Now that Europol is operational, the criminality rule. Incidentally, the list does not eliminate the double criminality requirement. What the list does is set a number of offences for which, by definition, this condition is met.

71 The integrative element is weakly developed, because it depends on the criminal policy of 27 different entities.

72 My assessment is that this effect is considered little, if at all, within the Union.
horizontal-bilateral contacts are supplemented by a vertical line, with Europol. Here it is important to recognise that setting up new bodies involves fundamentally different consequences. These are steps that could ultimately lead to a European criminal justice system. That is not the case with the instruments intended to harmonise the legislation of the member states. These instruments leave the national systems, as discrete systems, unaffected.

*Soft law: form and means*

The influence of Europe is extending ever further and is also making inroads into more policy-oriented areas (‘soft law’) and, to a lesser degree, enforcement. In its legislative initiatives, the EU is making choices on what it does and does not consider an offence and on priorities in investigation and law enforcement. This relates to the criminal policy and prosecution policy. The incessant insistence on by the Commission and the European Parliament that EC fraud is the greatest evil known to man, notwithstanding some dissatisfaction with the Commission about the result, does seem to have had some effect. In regard to the offences considered most important in a given period, one sees that this prioritisation leads to initiatives in the legislative area, enforcement and engagement of persons and means. In this case the EU does not determine exactly the rules that must be formulated, but does determine that action must be taken on a particular theme. The higher the political priority, the more difficult it is for a member state to escape a common policy and follow its own course, because the legal instruments are drafted more forcefully and there is more political pressure. Member states hardly deviate from the general line on combating terrorism, but in regard to combating drugs they do allow themselves some room for differences.

*Policy objectives*

The policy-based aspect is outlined particularly well in the conclusions of the presidency and a number of action plans. The latter do not harmonise law  

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73 An initiative in that direction is the Commission’s proposal for a Decision on the Improvement of Police Cooperation between the Member States of the European Union, especially at the Internal Borders and amending the Convention implementing the Schengen Agreement, 11407/05, Brussels, 20 July 2005.

74 For example, for decades the Netherlands found it unnecessary to make the possession of virtual child pornography a crime. Nor did the Netherlands vest extraterritorial jurisdiction on the basis of the law of the domicile. Now, thanks to European decision-making, this too is in the law.

75 Prevailing opinion on this does shift over time. An example from the 1970s, 1980s and early 1990s was EC fraud. In the second half of the 1990s, drugs, trade in nuclear material, trafficking in women and child pornography rose as priorities. Since 2001, all of these have been superseded by terrorism.

76 This, incidentally, without doing a thing about the patently criminogenic effects of EC policy.


78 To name a few randomly selected examples: Council and Commission Action Plan of 3 December 1998 on how best to implement the provisions of the Treaty of Amsterdam on the creation of an area of freedom, security and justice; Council and Commission Action Plan to
directly, but do force further legislation or enforcement on a particular theme. Other examples are: centralised databases, which can be consulted by all member states.\footnote{79} There are also the phenomena of ‘best practices’,\footnote{80} and the ‘scoreboard’,\footnote{81} which sets out in a table what response follows which arrangements, and by whom.

**Enforcement**

Finally, there is an enforcement aspect that can be ascertained within the legislation, although it is somewhat more weakly developed. According to the tradition of community law, many legal instruments impose a reporting obligation on the member states. Often, this obligation is limited to the legislative level,\footnote{82} but in some cases more materially detailed reporting obligations appear separately. The risk with this method is in confirming formal harmonisation. If the reporting request consists of a member state having to report on the method in which it has met the obligations of the instrument, there is a significant chance that the report will conclude that this has happened (‘five-year plan effect’ or desired answer).\footnote{83} This self-affirming effect will be even stronger if the evaluation is performed by the institution (or official of that institution) responsible for the implementing legislation. This type of monitoring construction elicits predictable answers to questions of compliance.

The most recent development implemented by the EU concerns a modest level of integration in the area of enforcement. Various tendencies are pushing towards common enforcement. In the area of investigation and analysis of offences, Europol has an important role here. OLAF has a major role specifically in the area of EC fraud. With the foundation of Eurojust and the joint investigation teams, the way is
paved for actions by units that are not organised strictly nationally to have effects on criminal law enforcement. While all other developments discussed thus far lead to harmonisation of legislation, decisions by Eurojust actually have an impact on individual criminal proceedings. Their consequences, however, go further than that: they can take a hand in determining the crime policy (that is, criminal law policy). What offences should be given priority in law enforcement? What resources should be deployed to that end?

2.5.2. Results of Integration and Harmonisation

Fragments of a European criminal justice system

The results of the collective work of the EC, the EU and the member states has been the creation of non-cohesive fragments of what could develop into a European criminal justice system, if European integration progresses further. There has been a European police force for over ten years now, and ever more intensive cooperation at the Public Prosecutor’s Office level is being seen. Eurojust and OLAF are examples of this. The rejected Constitution for Europe showed that the governments of the member states could conceive of the establishment of a European Public Prosecutor’s Office (Art. III-274). Of course, there is no European criminal court and there is no European penal code/code of criminal procedure in sight. What there is, though, is a reasonably well-developed body of case law with general legal principles of community law and a very, very great deal of penal legislation. In all these instruments there are found, albeit in an uncoordinated way, bits and pieces of a General Part of European criminal law. In turn, this acquis builds up a catalogue of behaviour that, by European standards, is considered an offence. This way, a Special Part is slowly coming together. The snippets of a procedural nature are so small as to be negligible.

Much paper, little insight into reality of harmonisation and criminal law enforcement

This judgement does, of course, go together with my definition of harmonisation, which is not limited to European legislation and its transposition into national law, but also looks at the actual legal practice in the national legal systems. The distinction to be made in this paper is the distinction between a more formal interpretation of harmonisation versus harmonisation understood from a material perspective. Formal harmonisation is harmonisation if a common system is being implemented nationally. At the other end of the spectrum is harmonisation envisioned from a material perspective that brings law enforcement in the member states closer together.

84 D. Flore, ‘Droit pénal matériel et Union européenne’, in: G. De Kerchove, and A. Weyembergh (eds.), Quelles réformes pour l’espace pénal européen?, Collection ‘Études européennes’, Bruxelles, Editions de l’Université de Bruxelles, 2003, p. 73, formulates it thus: ‘And we arrive at this paradoxal situation, in which we are locked up more and more nowadays, which is that the approximation achieved brings us in a situation where there is nothing more to approximate, because we conclude instruments that do not oblige anyone to anything’. 
The union’s efforts are primarily focused on paperwork: legislation, reports and evaluation. There is a striking tendency observed towards concluding conventions on themes that are already regulated (often in an identical manner) in conventions in the Council of Europe.85 The main intention seems to be to show that the EU is there and to push the Council of Europe (literally) into the background. And this has, at this point, succeeded, with the EU legal instruments designed to achieve more than cooperation alone (examples being the common definitions of offences and the foundations of institutions for the European judicial authorities and police force). At present, no further initiatives in the Council of Europe are expected from the 25 EU countries. The ‘copycat’ behaviour has now turned around, and the Council of Europe is adopting provisions that have already been included in EU instruments.

The incessant urging for full ratification or transposition of third-pillar instruments can almost be called neurotic.86 After a few disappointing experiences with the member states’ willingness to approve such instruments, the EU gradually changed its strategy. For effective dates depending on ratification by all member states, a system of ‘rolling ratification’ was chosen, meaning that the convention becomes effective for the member states that ratify it, in other words, those member states need not wait until the last member state ‘gets there’. Thereafter, directly binding framework decisions (not dependent on ratification, or in some cases not dependent on implementing legislations) began to appear. The second development is that of consolidation of previously ratified legislation. The accumulation of harmonising EU instruments is taking on such proportions that it itself is being absorbed into a new, all-encompassing instrument (see, for example the EU mutual assistance convention 2000). The efforts in the third pillar are primarily oriented towards legislation and only very minimally towards enforcement.

I conclude that the method of harmonisation of penal legislation being followed is not, in any way, meeting its objectives. The selected method is counter-productive.87 The actual influence of the harmonisation and integration model is, so far, very slight if not non-existent.88 This is firstly related to the nature of the


86 There have now been separate mechanisms conceived for this. See, for example, Implementation of the Action Plan to Combat Terrorism, 14734/1/05, 29 November 2005.

87 In the sense that the material legislation is not moving closer together. This effect is not impeding cooperation, which again underscores the fact that different substantive criminal law does not stand in the way of cooperation, and that the harmonisation we have achieved is strictly official.

88 See J.P.H. Donner, supra note 1, p. 23: ‘The structure and the current integration mechanism of the Union offers no adequate balance to these centrifugal forces’; T. Vander Beken, From Brussels with Love, Bespiegelungen over de invloed van de Europese Unie op het Belgisch strafrecht, Preadvies voor de Vereniging voor de vergelijkende studie van het recht van België en
compromise legislation. This bothers criminal lawyers, who prefer to have clarity on statutory or convention-based terms. We also have a tendency to see legislation as law, but European integration is a principally political process. This may, in part, be an explanation for the vague and noncommittal nature of EU criminal legislation, but also for the criticism levelled against the Union from the legal field. Real jurists would never have described it in this manner. In my opinion, herein lies one of the major problems for the application of the law. Political decision-making is set out in a legal instrument, or, to put it another way, much more than national legislation, European legislation comprises an indicator of the direction of a political decision, and leaves a great deal of leeway for more specific national legislation. On 1 May 2004, the European Union grew from 15 to 25 member states, from 375 million inhabitants to 450 million inhabitants. This size makes finding a common denominator more difficult than ever. The expectation that the unifying power of harmonisation will further decrease would appear justified.

Measures may be intended to result in slight, moderate or comprehensive harmonisation, or even be designed to move towards unification. Examples are definitions of offences. Article 2, paragraph 1, of the Framework Decision on attacks against information systems, reads:

‘Each Member State shall take the necessary measures to ensure that the intentional access without right to the whole or any part of an information system is punishable as a criminal offence, at least for cases which are not minor’.

The chance that member states will significantly differ from each other is extremely high: what are the necessary measures, what is intentional, what is without right, and what cases are not minor? Here, the controlling effect is as good as non-existent. Article 7 of that same framework decision offers somewhat more of a controlling influence. Offences committed within the framework of a criminal organisation are defined as aggravating circumstances for which a maximum penalty of 2-5 years is attached.

Another example is the description of the offences in Article 1 of the Convention on the protection of the European Communities’ financial interests. These offences are already described in such detail that only exactly the same offence must be made a crime. This is different for areas such as the minimum/maximum penalty. Here, the Framework Decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking only imposes the obligation to set at least a penalty of a given length as the maximum penalty for the offence. The degree of freedom that a

For example, Article 4, paragraph 1, of the Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking: ‘Each Member State shall take the necessary measures to ensure that the offences referred to in Article 2 are punishable by
member state has in approaching this is great. It can opt to fix a longer penalty. If the member state already maintains a longer penalty, it need do nothing.

The second reason for the meagre influence of integration and harmonisation is the use of the 21 legal languages. By definition, this leads to differences in the language versions of all legal instruments. In the European ‘Tower of Babel’, every member state interprets European law in its own language (legal language), and talks at cross purposes with other states. The fact that implementation must happen is the third reason for the divergent enforcement in the member states. In the national implementing legislation, a member state that gets the worst of the negotiation process can still ‘get its own back’ afterwards by interpreting the implementation obligations in an extremely national manner. The cumulative effect of the first two factors observed: vague standard-setting for each in its own language offers plenty of scope to do so. The fourth reason consists of the effective lack of a common court. The actual role of the Court of Justice in the interpretation of framework decisions in preliminary questions is gradually taking on more shape, but is rather fragmented. The reason lies in the fact that not all member states have given the Court of Justice competency in the same way. There are countries that give all courts the competence for preliminary referrals, but there are other countries that limit this to the highest court. The Commission can only ask the Court of Justice to evaluate the lawfulness of framework decisions.

The fifth reason is the deficiency in criminal law expertise among the Commission. The lack of expertise in the area of criminal law impedes the production of usable, non-redundant legislation. My assessment is that here, too, this effect is twofold. On the one hand, this effect is felt at the level of legislation. The Commission has insufficient knowledge of the current situation to create rules that properly address it. One example is the minimum/maximum penalty. Even if all member states were to adopt the exact same maximum penalty, this correspondence would only be superficial. The penalty provided in the Penal Code does not take into account all manner of other factors that go into determining the sentence (including, but not limited to, conditional or early release, detention system, pardon). A good deal of decision-making has no clear problem analysis and evidences little insight into the various penal systems, and the quality is

criminal penalties of a maximum of at least between one and three years of imprisonment’. It is unclear to me why the framework decision does not stipulate that ‘at least 1’ year must be incorporated into the national legislation. The addition ‘to three’ has no value.

91 See A. Weyembergh, supra note 88, p. 342. Just the offences on the list appended to the Framework Decision on the European Arrest Warrant exhibit many differences: ‘computer-related crime’ is different from informaticacriminaliteit. The Dutch version stipulates intentional arson (opzettelijke brandstichting), while in German, evidently Brandstiftung (without intent) is enough.

92 G. Vermeulen, ‘Where do we currently stand with harmonisation in Europe?’, in: A.H. Klip and H.G. van der Wilt (eds.), Harmonisation and Harmonising Measures in Criminal Law, KNAW LNR part 186, Amsterdam, Royal Netherlands Academy of Arts and Sciences 2002, p. 75, notes that the EU does not so much harmonise as call for more severe sentences.

93 One may, however, wonder whether this is a condition for harmonisation. If you want to go somewhere new, where you are coming from may not be so important.
substandard. The member states do not correct this, because in the negotiations their efforts are directed more towards as little deviation from their own laws as possible than towards the objectively ‘best’ regulation. On the other hand, there is insufficient insight, or no insight at all, into the effects of the legislation in reality. Evaluations usually comprise investigations into the implementation process and not into legal practice. The sixth reason is that where the policy refers to common action and should thus be oriented towards coordination of operational performance, the structure of the Union assumes common general rules and guidelines.

2.6. Two Convergent Areas

The internal market and the area of freedom, security and justice occupy the same space, but that is not the end of the story. The picture outlined above portrays the process of unifying European legal principles with those of national criminal law as an eternal struggle. In section 2.4 I endeavour to highlight the peculiarities of criminal law that pose problems for European law. In this section, I reverse this perspective, and examine the peculiarities of European law that are problematic from a criminal law standpoint. By doing so, I hope to focus on and identify the precise points of friction.

The internal market, an economic area with no internal borders, with free movement

The criminal law interpretation of this is the area of freedom, security, and justice, with free movement of persons, in regard to which the Union devotes most attention to the element of security. The internal market was developed with the intention of eliminating customs borders that impeded trade. In terms of economic traffic, there is indeed a European area in which borders no longer exist. Community law created its own legal order. Union criminal law does at this point exhibit some ‘order’, but it is still a long way off from being a legal order. Because each state has its own criminal law, and this criminal law does not go beyond that state’s borders, there are 27 criminal law areas (or 27 national legal orders). A European legal order would only arise if a common criminal justice system, and one that also offered legal protection, appeared. There is no criminal law ‘market’ in which market participants compete. It would be hard to imagine any free movement of criminal law or products. This is related to another element of the conceptual apparatus: ‘mutual recognition’.

Mutual recognition

This concept endeavours to make the differences arising from the requirements set on products, services or diplomas irrelevant for the purposes of their recognition in

95 See J.P.H. Donner, supra note 1, p. 65.
another member state. In community law, this means that if a beer brewed in the Netherlands meets the requirements set for beer in the Netherlands, this beer should also be able to be marketed on the German market, even if that Dutch beer does not meet the requirements placed on beer brewed in Germany under German law. The consequence is that Germany may not set further requirements on admission to the German market. What makes mutual recognition of criminal law products problematic? Firstly, it is important to consider the types of products to which we are referring. These products may be an order for arrest and surrender, evidence or a judgement, but may also be legislation and competent authorities. Each of these products is a legal fiction that represents no economic value. The Italian order for arrest and surrender is, in a manner of speaking, composed solely of Italian legal rules. Without this composition and its Italian context, it would simply not exist. Context, after all, is everything: who may issue an order, under what circumstances, and what legal consequences the order has. If such an order goes across the border, then (unlike the beer), it is no longer the same product; more to the point, it is no longer a product at all. It has become a legal fiction, lacking the context it requires to exist. The product 'Italian order' does not exist outside of Italy. Foreign law will prescribe other authorities, other circumstances and other legal consequences and modalities.

With regard to the condition developed in community law of mutual recognition of an unconditional admission to the market without conditions, there can be no such thing with regard to criminal law. This is not because the member states in question would not want to help each other, but because there is no Italian product on the Dutch market. The criminal law markets are not competitive markets but state monopolies, as are the other core tasks of the government: national administration, foreign policy and defence. The criminal law markets do not live by supply and demand and do not follow any economic law. Stronger still, the product 'criminal law' is by definition non-economic, produces no durable goods or consumer goods, and restricts trade commerce and freedom. These shortcomings in its economic profile make using economic concepts, without any conversion into criminal law terms, extremely difficult.

The most problematic aspect of mutual recognition is that the concept only has regard for the repressive side of criminal law. The concept completely ignores the idea that in every member state, evidentiary material arises in a context (of legal certainties). This context makes the material legitimate and reliable (or, as the case may be, illegitimate and unreliable). The rules on this differ from country to country.

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96 The international legal assistance in criminal matters also has mutual recognition, but applies a certain conversion step. For example, in the transfer of the execution of the sentence, foreign judgements are transposed on Dutch standards. This creates something that fits into the Dutch legal order without losing the essence of the foreign decision.

97 The Kingdom of the Netherlands has centuries of experience with unconditional mutual recognition. This is currently set out in Article 40 of the Charter for the Kingdom of the Netherlands. The most important difference with the EU is that the law of the three countries is already so similar that this is also safeguarded by the concordance principle and that there is a common highest court of the three countries: the Supreme Court of the Netherlands.
country, and the safeguards take shape in different phases. By transferring evidentiary material to another country without looking at how it came about, the context factors that provide for the existence of the evidentiary material disappear. If in France the defence may not be present in every stage of a hearing of witnesses, this is compensated at a later stage. The right to a fair trial unavoidably means that for the evaluation of the question of whether a trial was fair, the proceedings as a whole must be evaluated. Mutual recognition obliges the member state to no longer investigate a given element (the foreign evidence) for its conformity to Article 6, ECHR. That makes the concept of mutual recognition in violation of Article 6, ECHR.98

Harmonisation or approximation of rules

These concepts were also developed in relation to the four freedoms: Products, employees, capital and services that cross borders. Harmonisation of legislation, then, fosters the intensity and ease of the exchange. In criminal law, harmonisation does not foster the exchange of criminal law products. While it may be so that these criminal law products begin to look more and more alike, they still do not cross borders as such. The exchange is primarily fostered by solving practical problems such as increasing the capacity of the judiciary and law enforcement.

Further, the concepts prompt typical questions in the area of criminal litigation. Can the harmonisation obligation be used in the context of prosecution, in the sense that whether or not this obligation is met can have legal consequences for citizens? In other words, could a suspect in criminal proceedings be able to invoke a certain interpretation because that interpretation specifically goes the farthest towards the intended harmonising effect? This question appears to revolve around the aspect of harmonisation and not that of implementation in general. Although harmonisation should bring the different legal systems closer together, the control mechanisms steer towards an effect that brings an individual legal system closer to the common instrument. In my opinion, what is missing here is that this should be placed in the light of how other member states deal with the same standard. In my opinion, the Court does not do this, it assumes an established European standard and only reviews the extent to which the member state in question addresses this standard. The way in which member states interpret this standard does not influence the Court’s interpretation. The mutual (horizontal) relationship is not, then, as prominent as the relationship to the community/union legislator (vertical). This requires some explanation. Approximation entails the notion that the point of orientation for a member state’s legislation is the legislation of other member states. Amongst each other, or in other words horizontally, they should be better coordinated. The existing review mechanism looks at the potential of the national

98 This could be remedied if the European Court of Human Rights were to oblige the member states to bear accountability for the actions of other member states. So far, the Court has not been inclined to entertain this notion. See A.H. Klip, ‘Die EMRK und die internationale Zusammenarbeit in Strafsachen’, in: J. Renzikowski (ed.), Die EMRK im Privat-, Straf- und Öffentlichen Recht, Grundlagen einer europäischen Rechtskultur, Zürich/Basel/Genf, Manz/Nomos/Schulthess, 2004, p. 123-143.
legislation to be reconciled with European law, and disregards how that national legislation looks in other member states. To conclude, this means that the currently available instruments do not facilitate bringing the legal practice of the various member states closer together – this despite the fact that if all member states continue to move closer to the common instrument, the harmonisation effect is of course greater.99

**Enforcement obligation**

The enforcement obligation developed in community law as a result of the principle of sincere cooperation in the community formulated in Article 10, EC Treaty. The enforcement principles of effectiveness, proportionality and dissuasiveness, from the case law of the Court of Justice in the matter of the *Commission v. Greece*, are codified in various third-pillar instruments.100 These criteria, however, have a different effect here, because they only cover the sanctions to be stipulated in the national law, not the enforcement thereof. Union criminal law lacks the principle of loyalty to the community. There is, however, an implementation obligation, comparable with other international law obligations. Previously, I described that the need for enforcement for the affirmation of the standard is greater in criminal law than in community law.

**Minimum harmonisation**

This is a tried and true method of harmonisation from community law. In regard to a given policy area, the member states must minimally undertake the stated obligations. They remain authorised to establish supplemental provisions. As required by the scope of the instrument, their supplemental provisions may be either more or less rigid. The minimum standards/provisions must be seen in community law in the context of an alternative for full harmonisation. In some cases, minimum provisions are also a gateway towards full harmonisation of a policy area.

How ‘minimum’ must be interpreted therefore depends on the objective of the instrument and the broader context of the internal market. This ‘spirit’ must show what the intended direction is without imposing it on the member states right away.101 Acting contrary to this spirit is therefore not permitted. This does pose a problem in the area of criminal law. The Framework Decision of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking concerns the ‘adopt[ion of] minimum rules relating to the constituent elements of the offences…’. How should ‘minimum’

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99 Looking at the nomenclature used, it would appear that the mutual relationship is better expressed in the mutual recognition, but I have already concluded that this is not the case.


101 On the effect of European directives, see F. Kristen, *supra* note 66, p. 33-103.
be interpreted here? If this means that the national penal code must contain at least
the constituent elements summarised in the framework decision, but may
additionally contain more constituent elements, this would appear to be contrary to
the more repressive spirit of the framework decision. Of course, the more
constituent elements, the stricter the proof and the more difficult the position of the
Public Prosecutor’s Office. I conclude that this simply means that the conduct
described must be criminalised.

If the Framework Decision of 25 October 2004 laying down minimum
provisions on the constituent elements of criminal acts and penalties in the field of
illicit drug trafficking describes as minimum provision acts that must be made an
offence, should this be interpreted such that member states can criminalise other
conduct or enforce more strictly? Based on a standard-setting that prescribes a
minimum criminalisation and punishment, exceeding that minimum level can only
mean harder repression. On the one hand, this satisfies the requirements that the
area of freedom justice and security sets on the fight against crime, but on the other
it conflicts with the likewise acknowledged freedom of movement of citizens.
Checking everyone who crosses a border for drugs violations and imposing life
sentences for drug offences might well make a significant contribution to
suppressing this form of criminality, but would still be contrary to the free
movement of persons. Moreover, this example violates the principle of
proportionality, which may not be a general principle of union criminal law, but is
stipulated in the framework decision in question. This paper considers that
‘minimum provisions’ in criminal law instruments offer no added value. Member
states must meet the transposition obligations from the instruments, regardless of
whether these are labelled as ‘minimum provisions’ or not.102

External borders
The demolition of the internal borders created the internal market, and at the same
time, made the external borders even higher. While within the European Union
everything is free, movement from outside the Union into the Union is subject to
severe restrictions. This interest is also allocated to the external borders in the
asylum and aliens policy. In criminal law, the concept of external borders does not
play a role; criminal law is not oriented towards an area that must be defended
against and by others, but on fighting undesirable behaviour of persons residing
within the area, regardless of whether they are allowed to reside there or not.

In the area of freedom, security and justice, the external border concept
translates into the guarantee that in the Union, this area is ensured for its citizens.103
With this formulation, the concept shuts the door on non-citizens claiming the
benefits of the area. The Union frequently makes a distinction between citizens and
terrorists or citizens and criminals, thereby underscoring that ‘terrorists’ and

102 See D. Flore, supra note 84, p. 72: ‘La question est là: le minimum est-il un minimum? La
réponse à l’heure actuelle est: <<pas vraiment>>’.
103 The formulation of Article 29, EU Treaty (‘citizens’) is somewhat weaker than that of Article
I-3, Constitution for Europe (‘its citizens’).
‘criminals’ can make no claim on the area. Apart from the fact that this will in many cases be factually in error (terrorists and criminals can, of course, also be European citizens), the principal point is more important. Criminal law must make no distinction between types of people, both in terms of legal enforcement and legal certainties.

Coordination
Pursuant to Article 4, EC Treaty, the community will adopt an economic policy based in part on the close coordination of Member States’ economic policies. The criminal law translation of this principle is ‘common action among the member states’ (Artt. 29, 30 and 31, EU Treaty). This common action is described primarily in terms of legislation and not operationally, making it singularly ineffective.

Internal market and the area of freedom, security and justice
My impression is that the problems observed lie not so much in the criminal law that is supposedly so unique and special, nor with the EU, which just doesn’t know what it’s talking about. What actually causes the problems is that concepts that germinated in an economic setting in community law are mechanically transposed into a criminal law context. And this has happened without ever asking the question of whether this is actually such a good idea. Key concepts such as mutual recognition and minimum harmonisation cannot be applied in criminal law. The application of other concepts is also anything but natural.

2.7. Conclusion: going around in Circles, with Hope for the Future

Along with the set of instruments provided by the Union, and focusing in practice on formal harmonisation rather than material harmonisation, the additional question is whether harmonisation is actually something that one would want. This last question comes from the idea that the will to achieve the expressed goal can be derived from the means that can lead to that goal. In other words: if the method cannot lead to the goal, is the goal something we actually want? I do not want to rule out the possibility that the member states are well aware of this and intentionally leave it at this. This means that any party with an individual interest can say that the emperor’s clothes are fabulous.\footnote{104} It must be noted that there is a large gap between what the member states say and arrange officially and the actual performance. I suffice here with the example of the mutual confidence that all states have in each other. This confidence is so great that it must be ordained at regular intervals that there shall be mutual confidence. Despite this, in mutual recognition all manner of old grounds for refusal are steadfastly adhered to.

The harmonisation on paper and the Commission’s monitoring of the implementation process give evidence of a focus on legislation and a certain disinterest in the practical realities of law. The Commission does nothing more than give the impression of devoting its efforts to expanding its own position of power at

\footnote{104} Once again, each government may have all manner of motives at work.
the cost of both the Council and the member states. The role of the Court of Justice in this is entirely different. For decades, the Court of Justice has proven to be averse to taking political considerations into account. In preliminary decisions, but also infraction procedures, the Court of Justice has proven to be willing to break new ground in its decisions.\textsuperscript{105}

It is difficult to determine the direction in which the member states, the Commission and the Council wish to go. Of each of them, it can be said that one minute they come across as very decisive and then the next adopt measures contradicting what they have done in the past. Across the board, however, actual deeds fall far short of the rhetoric. What the member states want all seems so contradictory. A never-ending succession of conventions and framework decisions are adopted. States then take years to ratify the conventions, and framework decisions are not always implemented. When this happens often, the question is begged whether the states in fact stand so firmly behind the decisions they take.

The Commission continues to pursue EC fraud; first, the member states had to do the work, then it was OLAF and Europol, and after that the Commission hit upon the idea of the European Public Prosecutor’s Office, and in the meantime Eurojust has also been charged with this task. The Council sometimes catches up with the Commission by making use of the benefits of the first and third pillars. Sometimes it makes it clear that it will have none of it, by getting into a power struggle with the Commission on the authority for sanctions under environmental criminal law, while it previously consented with the Constitution for Europe, which itself allowed those two pillars to converge.

The only constant factor in the actors relevant to criminal law is the Court of Justice. In the cases \textit{Gözütok} and \textit{Brügge},\textsuperscript{106} \textit{Pupino}\textsuperscript{107} and \textit{Commission v. the Council},\textsuperscript{108} the Court of Justice has exhibited quite some creativity in the interpretation of the significance of a Europe with no internal borders and its consequences on criminal law. In practice, the Court of Justice has looked more at the generally formulated requirements of European integration than at the specific legal instruments. If the Court of Justice continues to execute its authority in a similar way, a further retreat of national criminal law autonomy and a greater degree of actual influence of union criminal law can be expected. The Court of Justice has shown time and again that it places a very high value on the integration concept. In this regard, it should be noted that the Court of Justice provides for a legal structure of harmonisation.

\textsuperscript{105} In the area of criminal law, I consider the following three decisions to be groundbreaking: ECJ, 11 February 2003, \textit{Gözütok} and \textit{Brügge}, C-187/01 and 385/01; ECJ, 16 June 2005, criminal proceedings against \textit{Pupino}, C-105/03; ECJ, 13 September 2005, \textit{Commission v. the Council}, C-176/03.

\textsuperscript{106} For example, by giving an interpretation of the Schengen convention which was explicitly rejected by the convention parties at the time the convention was negotiated.

\textsuperscript{107} By applying a framework decision \textit{de facto} directly, even though Article 34, paragraph 2(b), EU Treaty, stipulates that framework decisions shall not entail direct effect.

\textsuperscript{108} By granting the community the authority to execute its policy areas with criminal penalties, this notwithstanding the explicit choice, since the founding of the EC, to not extend this authority to the community and leave it with the member states.
The Court of Justice fills the role of a continuity-providing legislator-deputy. Nothing in the set of instruments currently available, however, prevents the Union from taking the primacy in influencing legal practice. When expressed like this, it would appear to be so obvious, yet in a European context must be repeated time and again. What is the problem? Will a criminal law response contribute to a solution for the problem, and are there no undesirable side effects? Is action by the EU called for, or action by the member states? Even the more weighty questions can simply be asked and answered. Do we want an integrated criminal law system in Europe, and if so, why? What does that encompass and how do we get to where we want to go?

3. Need for Integration and Harmonisation

It is striking how little the question of the need for integration and harmonisation of criminal law comes up in the discussions in the Union. This is striking because up until the advent of the Treaty of Maastricht in 1992, it was in fact a basic assumption that the EC and criminal law would have as little to do with each other as possible. Criminal law was the exclusive domain of the member states. The fact that the need for integration and harmonisation is so marginalised as a theme may have something to do with the fact that the member states are not in agreement on the issue, as well as the fact that the objectives are formulated extremely vaguely. Because of this, the level of the discussion is rather low: who would be against freedom, security and justice?

*Three levels of rationalisation of the need*\(^{109}\)

From the collective acquis of EG and EU, I derive three different levels of motives for further unification. There is the ‘macro-level’. At this level is the great ideal: One Europe! Or: united we stand against terrorism. At the ‘meso-level’, the argumentation revolves around the general purpose of fighting crime or the improved cooperation. The arguments at the ‘micro-level’ relate to solutions for all manner of practical problems.

**Macro-level**

Starting in Brussels, the need for harmonisation is portrayed as a sort of manifest destiny framed with rhetorical arguments (harmonisation as a goal in itself);\(^{110}\) in a united Europe, we simply cannot have someone being sentenced to 4 years in the Netherlands while that person would get 6 years in Spain for the same offence, or that something is prosecuted in Sweden while in Slovenia it is not a crime at all, can

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\(^{109}\) Compare the three motives in European private law identified by Smits.

\(^{110}\) See point 12 of the Resolution of the European Parliament of 18 September 1997 on the Convention relating to Extradition between the Member States of the European Union, OJ 1997, C 304/131. The rhetorical character lies in the incorrect supposition that ‘the same acts’ are a common occurrence in criminal matters; after all, a judgement depends not only on the criminal act itself, but the circumstances in which it is committed and the person of the suspect.
we? An equivalence argument can also be discerned herein, but I have not encountered it as a separate argument. My overwhelming impression is that integration and harmonisation as goals in themselves are extremely strong in the political process. In that light, there are also arguments that follow from free movement and the achievement of the internal market.

_Meso-level_

The arguments that fighting crime is more effective if it happens in a harmonised way, or, a variation on this argument, that harmonisation leads to better law, is found at this level. The argument that eliminating differences between legal systems would remove the supposed advantage that perpetrators of crimes may have is a purely rhetorical one. This is based on the idea that good citizens and the criminal investigative system are being impeded by the existence of borders, while ‘the criminals’ have free reign. The development of various framework decisions on cooperation, in which grounds for refusal are declared invalid, and the concept of mutual recognition is elaborated, are related to this.

_Micro-level_

This level pertains to practical matters that must be regulated. On the whole, there are no big concepts behind this. Examples are setting up joint investigation teams, Eurojust, the European Judicial Network and the description of ‘good practices’ in mutual legal assistance.

_Necessity-obscuring factors_

A number of aspects interfere with the discussion of the necessity of harmonising criminal law in Europe. The first is a difference of opinion on the role that criminal law should play in European society. Across Europe, trust in the effectiveness of criminal law differs fundamentally. The Commission expects much from criminal law (and harmonisation of criminal law), and walks Alice in Wonderland-like through the garden of criminal law, wide-eyed in amazement at all the wonders that several centuries of modern criminal law have produced. Many discussions that now seem to be about harmonisation, therefore, are in essence discussions on the question of whether criminal law is the appropriate cure for the disease. The notion of the manipulability of European society is rooted here. The criminal law literature offers an entirely different perspective. Generally, very little can be found in the literature on the need and/or potentially positive effects of harmonisation.

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112 See U. Sieber, supra note 64, p. 370. I have never understood this argument. It is based on the assumption that one group of citizens, ‘the criminals’, is very well-versed in all details of European law, national and international criminal law and the comparison of criminal justice systems, and based on that evaluation makes well-considered choices when committing crimes, and that the other group of citizens, who are not involved in crimes, is having its liberties severely curtailed by the different scopes of penal legislation in the various member states.
The attitude is extremely defensive: the EU must not meddle in what is national criminal law. This is, in my opinion, not a real contribution to a debate. But here, too, the objections against substantive aspects of the proposed system and the harmonisation or integration as a system are jumbled together.

The second element that obscures the discussion of necessity is the power struggle within the European Union. Sometimes, it appears as though this discussion runs parallel with the question of whether or not Europe should have a controlling influence in the member states. The European Commission has tried for many years to obtain more authorities in the area of criminal law, and would be most happy to see a European Public Prosecutor appointed immediately. Recently, it has won an important victory in the matter of environmental criminal law.

Weak substantiation of the need for integration and harmonisation

I have frequently criticised the fact that the EU states that all manner of problems justify these new measures, but never substantiates these problems. The existing extradition practice and the double criminality rule are supposedly such great impediments that the system has to be completely reworked. At no time have any data that would evidence this been provided. Where the internal market can offer the citizens economic prosperity, work and freedom, the benefits of the area of freedom, security and justice pale in comparison. The question of whether the benefits outweigh the costs demands a convincing affirmative answer if the road to integration and harmonisation of criminal law is to be followed.

4. Application of Integration and Harmonisation in the National Legal Order

The influence of European harmonisation and integration in criminal law can be approached in various ways. In this paper, I identify a more policy-oriented side and a more legal-technical side. In terms of policy, it is unmistakable that all manner of action plans, conclusions of the presidency and other political compromises will lead to legislative or practical measures, including in the Netherlands. In addition, there are also European institutions that exercise a modest influence on the Dutch legal order (Europol, Eurojust, OLAF). In my opinion, this policy-oriented side has been sufficiently covered, so the focus here will be fully on the technical side.

Many obligations for making acts criminal offences have been transposed into Dutch law. I have not been able to ascertain that this has resulted in any

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113 See A.H. Klip, supra note 27, p. 7-8.
115 See J. de Hullu, supra note 94, p. 396-397.
fundamental change in prosecution policy.\textsuperscript{116} The developments in the area of cooperation in criminal matters have meant some progress, even though that progress may seem to be considerably more than it is. The EU has long been busily regulating matters that had already been regulated by the Council of Europe.

What has fundamentally changed, however, is the perspective on cooperation in criminal matters. The EU’s vision is a great deal different from that of the Council of Europe. In the network of the Council of Europe, it is not important which state prosecutes, judges or enforces; what is important is that it happens. The objective is the \textit{fair administration of justice} that answers to the requirements of both fighting crime and legal certainties, and which takes into account all relevant interests (of the states, suspect, victims and witnesses). The Council of Europe’s network of conventions offers an option for cooperation at every stage of criminal proceedings. By and large, the EU ignores this experience and attempts to reinvent the wheel.

The EU systems implicitly assume that for the prosecution, only one state is relevant and called for, and that is the state that takes the first initiative.\textsuperscript{117} That premise jeopardises efficient action, because it diminishes the options for cooperation. In the first ten years, the EU’s focus was exclusively on extradition and the furnishing of evidence. Recently, attention to cooperation in the execution of judgements has arisen, but there is still a blind spot for the transfer of criminal proceedings. The other fundamental difference with the Council of Europe’s model is that the EU cooperation looks decidedly egocentric-mandatory. The rise of all manner of orders (arrest, evidence, execution) rides roughshod over consultation with other parties. My colleague in this work, Smits, uses the analogy of a construction site with two architects, and I can take this analogy one step further. In essence, we have three legislators in the area of criminal law: the community legislator, the union legislator and the national legislator (leaving aside the other legislators at present), and further, another 27 prosecuting institutions and a few European bodies. It seems that none of them are keeping sight of the big picture; and this is, in fact, the case. On this point the European legislator does not look at the larger whole, but only at the needs of the requesting member state. The interests of the requested state and of the suspect do not count. The national legislator can only transpose, and the national \textit{law enforcement authorities} only implement without being in a position to have any control or make any choices of prioritisation.

In the Netherlands, a number of methods can be seen at the level of the implementation legislation. There are cases in which a European standard is ‘translated’ and transposed over an existing system, or converted into a new one.\textsuperscript{118} There are also cases in which the national legislation literally incorporates the standard, and there are cases in which the legislation provides a direct reference to

\textsuperscript{116} That would require an empirical investigation; an initial impression is that with migration criminal law, as a result of European policy, an intensification of prosecution efforts is taking place.

\textsuperscript{117} A telling example is the proposal for a Council Framework Decision on the exchange of information under the principle of availability, COM(2005) 490 definitive, Brussels, 12 October 2005.

\textsuperscript{118} See, for example, Articles 5a, 197a, 240b and 323a, Dutch Penal Code.
André Klip

the community law. There are also situations in which the significance of a term from the description of the offence is fixed by the underlying European law. These can be either very broad terms, such as ‘unlawful’, or very specific terms, such as ‘waste products’. Article 1, Economic Offences Act, contains interesting examples of the application of the standard-setting in Dutch criminal law. The Economic Offences Act features both direct and indirect reference to community law. An example of the former is that ‘violation of provisions set by or under Council Regulation (EC) No. 1338/2001 of 28 June 2001 laying down measures necessary for the protection of the euro against counterfeiting (OJ L181), Article 6, first paragraph, first and second sentences’ is defined as an economic offence. The latter method of implementation of community law incorporates any changes to the regulation automatically. From a legislative perspective, this is primarily apparent with technical regulations to which frequent changes can be expected. An example of the indirect version is the reference to Article 10 under b, Act on Prevention of Misuse of Chemical Substances. This act is the national transposition of obligations under Directive 92/109.

Under Dutch criminal law, criminal liability can only be established by means of a statutory criminal provision. In terms of criminal liability, application is by definition indirect. It requires conversion into national law. Standards other than those that establish criminal liability, for example, European law standards that lift criminal liability or criminal procedural standards, do not depend on conversion into national law. In concrete terms, this means that if the Dutch criminal court is of the opinion that Dutch criminal law is in conflict with European law, the Dutch court must acquit or dismiss the matter, as appropriate to the statutory provision. For standards of a criminal procedural nature, the Dutch court can apply the European law directly.

In the implementing legislation process, the national court must jump through all manner of hoops to keep the existing system in place. Choices must be made. Will transposition be in the relevant code, or in a separate act? It can be derived from the practice in the Netherlands that the legislator’s preference is to incorporate as much as possible into the existing system of a general code of law and special criminal law acts. The small number of cases of transposition into the Code of Criminal Procedure is not enough to assume otherwise, and the provisions on cooperation in criminal matters also follow the existing patchwork of Dutch arrangements in this area.

Yet another construction can be identified, as in Article 3a of the Opium Act, in which further rules must be interpreted partly in light of a Joint Action.

See ECJ, 8 October 1987, criminal proceedings against Kolpinghuis Nijmegen B.V., C-80/86, ECR 1987, 3969; ECJ, 3 May 2005, criminal proceedings against Silvio Berlusconi and others, C-387/02.
Disruptive effect of European legislation
Implementation of a European norm can have a disruptive effect on the ground at the national level.\textsuperscript{121} Take, for example, the Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime. This framework decision contains a ‘mutual recognition, without further questions’ of decisions for freezing objects, modelled on the form of the European Arrest Warrant. Freezing in this case is intended to prevent destruction, processing, relocation, transfer or alienation of objects that are subject to confiscation or that may serve as evidence. For this area, a new title XI has been incorporated into Book 4 of the Dutch Code of Criminal Procedure (Artt. 552jj-552vv). The framework decision ‘freezes’ objects.\textsuperscript{122} Insofar as authorities different than those for seizure are required (consider searches or orders to hand over), and that is extremely likely, such falls outside of the scope of the order, and traditional international judicial assistance is required. This means that along with the order via the normal channels, a second request will have to be made. By the same token, confiscation requires yet another request for international judicial assistance. Where ‘in the old days’ only one request was needed, now, the practice (requesting and requested parties) must strictly distinguish the element under which the request is being made and what element falls outside of the scope of that request and requires a different basis. One need not be clairvoyant to predict that this will result in protracted head-scratching and error. The act for the implementation of the aforementioned framework decision introduces separate legislation regarding confiscation and seizure at the request of EU countries. This results in an extremely complex arrangement that creates five different regimes for one material handling: confiscation at the request of the domestic authorities; the same, but at the request of an EU country; the same but at the request of a third country in the context of a treaty; the same, but without a treaty; and finally, requests from the Netherlands Antilles and Aruba.

Another point of discussion is that for the transposition of the European Arrest Warrant into Dutch law, a choice was made to make the District Court of Amsterdam competent to the exclusion of all other courts, while in the Freezing Order all district courts are competent. In terms of the unity of law in the interpretation of important concepts such as mutual recognition and the list of offences, the effect is a curious one. One could even wonder whether unity of law is not, by definition, contrary to implementation. Here I consider European unity of law. Based on the observation that divergence is promoted by transposition, unity of law would appear to be better served by dropping the transposition exercise. The question of why we transpose must be asked. Essentially, there are three reasons. The first is to meet the obligation for transposition. The second is to be able to ensure that transposition takes place in a manner consistent with the national system. The third is to meet the requirements of the principle of legality. The more

\textsuperscript{121} Or, as expressed somewhat more diplomatically by the government: ‘Union legislation can make unintended side effects felt in the national context’. See Parliamentary Documents II, 2004/2005, 30025 (R1783), no. 4, p. 26.

\textsuperscript{122} Freezing and order are both examples of European influence on legal terms.
adjustments to the national system are pursued, the more difficult it becomes to keep a national system in place. This raises the question of whether continuing the transposition process is actually all that efficient. At some point, the moment will come when the demand for a new consolidated system will be too loud to ignore.

Criminal law itself is disruptive
Due to its extra-territorial jurisdiction, criminal law itself is a disruptive element in harmonisation. Most EU states have a broad authority established to exert jurisdiction outside their own borders. If a Frenchman and a Greek conduct EC fraud with a company in Belgium, threatening a Polish customs official and bribing a Dutch official in the process, then at least five countries have jurisdiction over the acts (or some of them). The result is that there is a corresponding amount of different substantive and formal criminal law applicable to the same material act. Criminal law does not yield, even when applied to an act committed in another country. And all this, notwithstanding that the standard violated is of common European origin.

5. Author’s Proposals

The first proposal: A clear and realistic objective, based on the peculiarities of criminal law, for the role of criminal law in European integration and harmonisation

This would seem to be an open door, but in Europe this cannot be repeated enough. Aims and results must be formulated with complete precision. In the conclusion of section 2.7, I have already identified a number of these issues. There are already far too many elements that cause surprise in the course of European integration. This brings the danger of all making a contribution to a greater whole that no one wanted. Politicians swing back and forth between the national and the European, never daring to choose between the two. Until the choice is made, we can better bide our time and not adopt any new instruments. Key questions need to be asked and answered. What does Europe regulate, and what do the member states regulate? Is European criminal law enforcement coming, why, and how will we achieve it?

The second proposal: Restriction to territorial jurisdiction and abolishment of the double criminality rule

In the Minister of Justice’s memorandum on the double criminality principle, the government adheres to the condition of double criminality in the cooperation with other member states to the extent that the acts are committed in the Netherlands: that is, if the act is committed in the Netherlands and is not an offence

123 In fact, if the system is working then all 25 member states do, because the Convention of 26 July 1995 on the protection of the European Communities’ financial interests contains (in Art. 4) a stimulus for establishing extra-territorial jurisdiction.
in the Netherlands, the Netherlands cannot provide any legal assistance. I would like to propose a different model instead, which would be structured as follows: If the point is that foreign countries cannot claim jurisdiction over what is not an offence here and committed here, then the guiding principle should be restriction of the foreign jurisdiction. This leads to an entirely different rule: the jurisdiction of every member state is restricted to its own territory. Other principles of jurisdiction do not apply in the remaining 24 states of the European Union. Germany would then no longer be able to prosecute drug use in the Netherlands by a German subject (or anyone else). But that would also mean that if Greece deems it necessary to make keeping notes of airplane registration numbers an offence, we in the Netherlands would have to help them in the investigation and prosecution. This would do justice to the principle of legality. It requires a great deal of trust, but offers advantages for both legal enforcement and legal protection. It is always clear which state is called upon to enforce. Legal enforcement and legal certainties both rest with the same party. This fosters the autonomous rule of law and the efficiency of legal enforcement. The current overlapping jurisdiction does, after all, lead to never-ending discussions between member states on the criminality of certain acts and the criminal public policy to be conducted. If we abolish the double criminality rule and restrict jurisdiction to domestic territory, we can, moreover, better build on the network of international cooperation in criminal matters. The system of the Council of Europe has never managed to incorporate one theme: a system for jurisdiction conflicts. At one time, the expansion of jurisdiction beyond domestic borders arose from the concern that the suspect could beat the system by escaping; this was the reason the suspect had to always be able to be called to account in his own country, not in order to have an avenue for


125 Trust then takes on a different meaning. There must be trust that the right conduct is criminalised, and that prosecution and sentencing is appropriately pursued. This is in line with the case law of the Court of Justice, that community law assumes trust in each member state’s enforcement. ECJ, 14 January, 1988, Drexl, C-299/86, ECR 1228.

126 Then, the Netherlands would also be able to distance itself from the extremely defensive and tentative attitude in regard to initiatives concerning European criminal law. See, for example, the Dutch government in its memorandum ‘Criminal law and criminal procedural law in Europe’, Parliamentary Documents II, 1998-1999, 26656, no. 1, and P.H.P.H.M.C. van Kempen, ‘Waarborgen tegen de onwrichtende werking van Eurostrafrecht’, in: M.S. Groenhuijzen and J.B.H.M. Simmelink (eds.), Glijdende schalen: liber amicorum J. de Hullu, Nijmegen, Wolf Legal Publishers, p. 247-266.


129 Once, in 1958, the reports of A.D. Belinfante and J.M. van Bemmelen touched on the theme referred to here. See A.D. Belinfante and J.M. van Bemmelen, Is het wenselijk, met het oog op de toenemende behartiging van belangen in internationaal verband, die belangen hier te lande
correcting the criminal policy of another country. Ultimately, this pertains to a fairly small number of offences over which there is a difference of opinion. The majority of offences are offences made punishable in some form throughout the Union. Where differences remain, they are relevant differences. In other words: this proposal does promote integration of the European legal systems, but makes harmonisation irrelevant. This delineation addresses the relationship between the various member states. It says nothing about difficult cases in which the *locus delicti* is not easy to place in one state. These cases could be regulated at the European level. We must therefore formulate criteria for what should be maintained at the European level. These are given a place in my third proposal.

The third proposal: A limited European criminal justice system

At the occasion of the opening of Eurojust in 2003, the Dutch Minister of Justice proposed creating a special European competency for certain cross-border offences and leaving the rest national. Briefly put, his position is that there is no point in harmonising the entire criminal justice system, because 90% of criminality does not go beyond a national context. The Minister’s proposal was not elaborated in detail, nor did a more detailed elaboration follow. In my opinion, a division between European and national criminal law presupposes a complete European criminal justice system, and that means with a European criminal court, European Public Prosecutor’s Office, and European police, all based on European legislation and all scrutinised by an elected European Parliament. If we do this, this requires a conceptualisation of what should be European and what should be national.

In a 2003 memorandum, the Minister of Justice referred to criminological insights into the manifestation of criminality, and in particular into whether the offences in question are of a cross-border nature. This seems to me to be the correct approach. The differentiation must be sought in substantive criminal law. For this reason, the choice of certain offences that will be part of a European
criminal law must meet a number of conditions. What are these conditions? I argue for three cumulative conditions:

1. the offence has, in its manifestation, a cross-border character;
2. there is more potential for prevention, identification and adjudication of the offence at the European level than at the national level;
3. the offence is related to a European policy area.136

This is an offence or a complex of offences with a locus delicti in more than one state, making it so that the determination of a given state as the most appropriate is not automatic. This may include, but is not limited to, customs crimes, subsidy fraud, money laundering, trafficking in women/human beings, and drugs/weapons trafficking. The second condition relates to efficiency. Even if the matter is one involving cross-border aspects, but national investigative services can deal with it fairly simply, there is no reason for European intervention.137 The third element must bring about that the various enforcement modalities are seen in their mutual connection, but also underlines the subsidiarity concept.

Of course, there will be suspects who, in planning and committing crimes, will not closely follow this type of competency distribution. There will be complexes of offences in which suspects commit offences punishable at the European and national levels. The principle of fair administration of justice, derived from the transfer of criminal proceedings, can also be decisive here for finding the most appropriate forum for adjudication.138 In this way, the European judicial area leads to three reasonably well-differentiated legal spheres: national, European and extra-EU.139

The fourth proposal: Voluntary harmonisation of national criminal law

Insofar as there is a demonstrable use for harmonisation, there must be room for harmonisation. In my proposal, I eliminate the mandatory element of present European law, in the assumption that the obligation is one of the decisive factors in vague standard-setting. Here, there is something to be learned from the United

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137 See Parliamentary Documents II, 2003-2004, (R1720) and 28351, B, p. 2.

138 A.H.J. Swart, supra note 127.

139 See also the Minister of Justice, Parliamentary Documents I, 2003-2004, 28350 (R1720) and 28315, B, p. 4.
States. In that country, the criminal law of the individual states is extremely similar, partly due to the use of the ‘Model Penal Code’ and the ‘Restatements of the law’. Whether or not this is the result of the discretion enjoyed, in any event the effect is one of much greater harmonisation than in the various member states of the EU.\textsuperscript{140} It is, of course, true that the starting position of the American states brought them much closer together. The initiative was taken, however, because American criminal law had taken on such chaotic proportions that case law was being compromised.\textsuperscript{141} Another notable difference is that the model legislation in the United States is made by academic institutions and not a governmental body. It should be clear that I find this approach a more sensible one, but the bottom line is that the Model Penal Code is logically constructed and the legal field can work with it. It is curious that insofar as I have been able to determine, unlike the Council of Europe\textsuperscript{142} and the United Nations have done with their Model Conventions, the European Union has never tried such an approach.\textsuperscript{143} The quality of European regulations could be considerably improved by removing the mandatory element. Vague compromises that primarily allow for the degree of deviation for the national system could be avoided. Clear choices could be made.

6. Concluding Remarks

The EU conducts essentially a three-track policy focused on harmonisation, mutual recognition, and integration. In harmonisation, the goal is to arrive at common regulations, in mutual recognition the parties allow the differences to remain but ensure that they do not impede the cooperation, and in integration, something shared and European is built up. Because the objectives are not clearly formulated and the relationship between the various policy instruments is not brought into the foreground, the picture of an unsteady course emerges. The guiding concepts: harmonisation, mutual recognition, etc. are not defined. For the legislator (and the body politic), this means that there is no template with which to align domestic policy. Without a clear objective (meaning without it being stated in crystal clear terms what Europe and criminal law can expect from each other), it is difficult to use the correct means. Put another way, or more rhetorically: there is nothing

\textsuperscript{140} In the area of cooperation in criminal matters, it is notable that one of the few conventions that contains no mutual obligations, but does offer many options for legal assistance, the Convention on the Transfer of Sentenced Persons, has a very wide level of ratification: a total of 60 states (as of 20 January 2006), more than any other convention on cooperation of the Council of Europe.


\textsuperscript{142} Could it have gone wrong with the Council of Europe in 1971, when rapporteur Enschedé published his study initiated after the introduction of the American Model Penal Code in 1962, under the title ‘Uniform European Criminal Law’?

\textsuperscript{143} In private law, it apparently did; see Smits on the Common Frame of Reference.
wrong with asking the question of whether introducing a European criminal justice system makes any sense, is there? This would appear to me to be a better approach than repeatedly tying the decision-making to a problem (real or imagined) resulting from a European summit that suddenly sets the course.144

If the European Union wishes to develop a European criminal justice system, it can only do this if, along with law enforcement, attention is given to the legal safeguards for individuals. If not, the result may well be some sort of order, but not a legal order.

144 Past examples being trade in nuclear materials, Dutroux’s child pornography networks, anti-globalisation protests at European summits, etc.
Bibliography


