

This article is published in a peer-reviewed section of the Utrecht Law Review

Towards a Transnational Application of the Legality Principle in the EU's Area of Freedom, Security and Justice?

Michiel J.J.P. Luchtman*

1. Introduction: choice of forum as a test case

In their introductory remarks to this special issue of the *Utrecht Law Review*, Gless and Vervaele conclude that a new path must be taken which puts the individual as a rights bearer at the centre.¹ We need – as they call it – ‘aspirational principles’ for transnational criminal justice, in order to provide guidance to lawmakers, courts, et cetera. Yet they also point to the fact that existing principles of criminal justice, including human rights standards, are not specifically designed to deal with problems of *transnational* crime.

The gap between the current practice and the expressed aspirations offers food for thought. For instance, when speaking of guidance, in what direction should that guidance go? Towards the individual as a rights bearer in transnational relationships? If so, what would be the theoretical basis for such a redefined position of the individual? Could that be the concept of national citizenship? Or the individual being a human being as such? Or a cosmopolitan à la Kant? And can we redefine the legal position of the individual without simultaneously redefining his duties and the ‘common good’ (the fight against transnational crime for instance)? Should nation states therefore transfer a part of their *ius puniendi* to the international level (the UN, Council of Europe, European Union) for that purpose? Last but not least, how ‘solid’ will the legal ground for any ‘aspirational’ answer to the previous questions be, where legal practice sometimes does not point in that direction and may even run counter to it? Can we then realistically expect nation states to make a turn, also considering that this will require a certain level of mutual trust in each other’s legal systems and a further loss of national sovereignty? What story needs to be told in order to convince them to do this?

The project of the University of Basel aligns remarkably well with my own research project on the choice of forum in the European Union’s area of freedom, security and justice (AFSJ).² The existing European framework for the decision on which state investigates, prosecutes and tries cases of transnational crime is very fragmented and depends heavily on soft law and executive practice.³ The pitfalls of that system are well documented. Overlapping jurisdictional claims of the Member States cause

* Associate professor, Willem Pompe Institute for Criminal Law and Criminology & Utrecht Centre for Regulation and Enforcement in Europe (RENFORCE), Utrecht University, Utrecht (the Netherlands), email: m.luchtman@uu.nl.

1 S. Gless & J. Vervaele, ‘Law Should Govern: Aspiring General Principles for Transnational Criminal Justice’, 2013 *Utrecht Law Review* 9, no. 4, pp. 1-10. See also A. Eser et al. (eds.), *The individual as subject of international cooperation in criminal matters*, 2002, in particular pp. 697 et seq.

2 M. Luchtman (ed.), *Choice of forum in cooperation against EU financial crime – Freedom, security and justice & the protection of specific EU-interests*, 2013.

3 See, in greater detail, *ibid.*, pp. 4-9.

problems for individuals, lead to an inefficient use of investigative resources or to negative conflicts of jurisdiction, for instance in cases of fraud against the EU's financial interests (including VAT fraud). Although this does not mean that the European Union is not concerned with these issues,⁴ it does show how difficult it is, even in the setting of the European Union, to reconcile interests of crime control with those of the European citizens in transnational relationships.

The European Union, with its unique institutional features – including the ambitions with respect to the free movement of EU citizens in the AFSJ (Article 3(2) TEU), the presence of powerful supranational bodies, a binding Charter of Fundamental Rights (CFR), enforceable free movement rights and an enhanced framework for dealing with problems of transnational crime (where the unanimity rule no longer applies) –, offers an ideal testing ground for the concept of principles of transnational criminal law. The genealogy of a transnational *ne bis in idem* guarantee (as well as the problems related to it) is an important illustration of this.⁵ Yet I think the debate could – and should – be extended to other fundamental rights too. More in particular, I wish to examine the current system of forum choice in light of the legality principle under its substantive and procedural criminal law heading.⁶ If the European Union truly wishes to promote the free movement of its citizens, should European law not offer European citizens (and state authorities) a more detailed – and hence more foreseeable and accessible – framework for choice of forum than it does now, in order to protect individuals against arbitrary investigation, prosecution, conviction and punishment? If so, what elements should such a system contain? What would be its limits? What lessons can be learned from this for the debate on principles of transnational criminal law in general?

In this article, I will defend the position that Gless and Vervaele are right, to the extent that it is indeed time to introduce the European citizen as an autonomous actor in the transnational setting of the AFSJ. In order to substantiate this position, I will use the key concepts of the legality principle as an analytical framework for assessing the state of affairs with respect to choice of forum in the European Union (Section 4). Second, I will assess whether the principle also provides a normative yardstick for the European legislator (Section 5). Should the latter be the case, then that legislator would be forced to intervene in issues related to forum choice. In Section 6, I will transpose the consequences of my findings into a more concrete, general outline for a European system of forum choice. I conclude with some final observations (Section 7). Yet before we come to all that, the next two sections first introduce the current EU system for forum choice (Section 2) and the problems it causes for European citizens (Section 3).

Two final remarks remain. First, European citizenship is a key concept in this contribution. Although European citizens may both commit crimes, as well as be the victims thereof, this contribution focuses mainly on the position of European citizens as suspects. Second, the reader will have noted that I announced that I would introduce the *European citizen* as a full actor at the transnational level. European citizenship is granted only to nationals of EU Member States. That means that the status of other individuals is left undiscussed here. I wish to stress that this is a direct result of the current EU institutional setting (for which it is rightly and widely criticized),⁷ and nothing more.

2. Discretionary powers in choice of forum: a necessity or an option?

If we were to describe the efforts of the European Union to deal with transnational cooperation and coordination, we could say that the European system hinges upon three axes: 1) the harmonisation of criminal law (Article 83 TFEU) and procedure (Article 82 TFEU) in order to widen jurisdictional bases for certain types of (serious) crime through extraterritorial jurisdiction and to create a level playing field; 2) institution building, in order to facilitate the EU system of indirect enforcement and loyal cooperation through the creation of networks and European agencies (in particular Eurojust; Article 85 TFEU)

4 See, for instance, the Green Paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings, COM(2005) 696, p. 2.

5 See the contribution by Vervaele in this special issue: J. Vervaele, '*Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?*', 2013 *Utrecht Law Review* 9, no. 4, pp. 211-229.

6 For further explanations, see Section 2, *infra*.

7 See, for instance, U. Beck & E. Grande, *Cosmopolitan Europe*, 2007; É. Balibar, *We, the people of Europe? Reflections on transnational citizenship*, 2004; S. Benhabib, *The rights of others – Aliens, residents and citizens*, 2006.

and, possibly, to replace it in part by a system of direct enforcement (the European Public Prosecutor; Article 86 TFEU), as well as 3) increased transnational operational cooperation, on the basis of the concept of mutual recognition.

This system is essentially operated through the national authorities of the Member States, without formal procedures or much substantive guidance by the European level.⁸ National authorities therefore retain, like in international criminal law, the final say on whether or not to commence prosecutions, to transfer proceedings to other states, or to halt proceedings, for instance because of parallel proceedings in another Member State or a third country. No European institution, not even Eurojust, is in the position to force Member State authorities to commence or to stall proceedings, for instance because the common European interest so requires. The fragmented European framework, and the degree of executive discretion it leaves to national authorities, leads to the situation where choices of forum are made in a *black box*, in which *insiders* take decisions, which may also affect the legal position of *outsiders*, i.e., actors in criminal justice not involved in the forum choice (defendants, courts, European institutions, victims). Choices to be made in this regard by the insiders include the decision on who to contact, the stage at which to seek cooperation (e.g., a transfer of the investigation, of the prosecution, of the trial or the execution of the sanctions), the channels for communication with those authorities (liaison officers, one's own network, OLAF, Eurojust, EJNI), the instruments to be used (e.g., the transfer of proceedings or extradition), the criteria to be applied and procedures to be followed, et cetera.

Fearful of new bureaucracies and more red tape, national prosecutors are generally hesitant to intervene in this status quo.⁹ Many national governments come to the same conclusion, concerned as they are with a further loss of national sovereignty and/or being aware of the exceptional difficulties of designing a framework for forum choice that reduces executive discretion. They will point to the fact that, like in international criminal law, the lack of a regulatory framework, and the discretion resulting therefrom, are to be taken for granted in a transnational context. Because a reduction of discretion will also mean a further loss of influence on their criminal justice systems, at the very least Member States need some sort of reassurance that their interests are being looked after by others. It requires a high degree of mutual trust.

At the same time, the ambitions put forward in the European Treaties,¹⁰ the much heard rhetoric that criminals should not profit from free movement,¹¹ the introduction of mutual recognition as the dominant concept for cooperation and the advanced institutional framework provided for by the Treaties, and Articles 67 et seq. TFEU in particular, also cast doubt on the foregoing position. Is discretion in choice of forum really still a *necessity* or has it become an *option*, among other options? Does this system adequately protect all the interests involved or primarily the interests of Member States? In the latter case, how does the assumption, common in international public law, that the interests of national citizens are adequately protected by their governments – represented in the Council – relate to the concept of EU citizenship? And who guards the interests of the EU itself, not only those interests concerned with the fight against crime,¹² but also those concerned with the rule of law (cf. Article 6 TEU)?¹³ Finally, and arguably most importantly at this stage, are these questions to be decided upon by the legislator alone and the Council in particular?

Within the context of the nation state, the legality principle in substantive and procedural criminal law offers an excellent starting point for an analysis of executive discretion. Brought back to its essence, that principle stipulates that certain issues may only be dealt with by a competent lawmaker. By doing so, effective safeguards can be provided against *arbitrary* prosecution, conviction and punishment.¹⁴

8 An important exception being the Eurojust Guidelines of 2003, discussed by Herrnfeld and Luchtman in Luchtman (ed.), supra note 2.

9 See M. Wade, *EuroNEEDs – Evaluating the need for and the needs of a European Criminal Justice System – Preliminary report*, 2011.

10 See Section 3, infra.

11 Cf. the Report on the implementation since 2007 of the European arrest warrant, COM(2011) 175, p. 3, 10, or <<http://ec.europa.eu/justice/criminal/criminal-law-policy/>>: 'To prevent criminals from misusing those EU countries with the most lenient legal systems and "safe havens" from appearing, a certain approximation of national laws can be necessary.'

12 Cf. the Communication on the protection of the financial interests of the European Union by criminal law and by administrative investigations, COM(2011) 292.

13 See also U. Sieber, 'Die Zukunft des Europäischen Strafrechts – Ein neuer Ansatz zu den Zielen und Modellen des europäischen Strafrechtssystems', 2009 *Zeitschrift für die Gesamte Strafrechtswissenschaft*, no. 1, pp. 1-67.

14 Cf. with respect to Art. 7 ECHR, ECtHR 17 September 2009, *Scoppola v Italy (No. 2)*, appl. no. 10249/03, Para. 92.

The principle not only influences the criminalisation of conduct as such, but also regulates the actions of state organs – the police, the prosecution services, the judiciary – in response to crime; it not only prescribes that only a legitimate lawmaker may define criminal *offences* and sanctions, but also holds that subsequent *criminal charges* may only be brought before a ‘tribunal established by law’. Where a person is consequently found guilty according to the law and sanctions are imposed, deprivations of liberty or property must have a legal basis too. The legality principle thus deeply influences the content and shape of every Member State’s jurisdiction to *prescribe* norms (*offences*) to its citizens, as well as their jurisdiction to *adjudicate* and *enforce* (violations of) these norms by their judicial and executive bodies.

The question is to what extent choice of forum is a matter of which the legality principle stipulates that it should be dealt with by law, and if so, which law (national or European). Here, we not only come across the complex situation that this question is already difficult to answer within the context of one particular nation state, we must also bear in mind that the guarantees just discussed may not be applicable outside that particular context, because they were not designed for it and there is no authoritative legal source (as yet) that provides otherwise. For the sake of the argument, I do not wish to automatically accept the latter argument. The main reason for that is that the rationale of the principle – offering effective safeguards against *arbitrary* prosecution, conviction and punishment – may call upon the European legislator to deal with choice of forum. We therefore need to explore, first, if and to what extent choice of forum leads to arbitrary interferences with a person’s legal position.¹⁵ When doing so, we also have to keep in mind that in the context of public international law the position of the individual as an autonomous legal actor vis-à-vis states is complicated. As a general rule, his interests in interstate relationships are traditionally presumed to be taken care of by his state of nationality or residence. Why, then, is this different in European law?¹⁶ I will elaborate on this point first.

3. The position of the individual: the case for EU citizenship

The position of the European citizen is certainly one of the hot topics in European criminal law today. Article 3(2) TEU holds that the Union *shall* offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to, inter alia, the prevention and combating of crime. The Stockholm Programme solemnly dedicates itself to an open and secure Europe serving and protecting citizens.¹⁷ Still, the potential of European citizenship for the further development of the AFSJ is as important as it is unclear. This for instance concerns the relevance of the concept for both transnational relationships, as well as purely internal situations.¹⁸ It also holds true for the scope of the rights of European citizens in relation to criminal proceedings, as well as their duties.¹⁹

One of the core duties of those moving over European territory will undoubtedly be to respect the laws of the host state. Indeed, ‘since a Union citizen now has, in every Member State, largely the same rights as those of that State’s nationals, it is fair that he should also be subject to the same obligations in criminal matters. That means that if he commits an offence in the host Member State, he should be prosecuted and tried there before the courts of that State, in the same way as nationals of the State in question, and that he should serve his sentence there, unless its execution in his own State is likely to increase his chances of reintegration.’²⁰

15 O. Lagodny, *Emphiehlt es sich, eine europäische Gerichtsbarkeit für Strafgewaltkonflikte vorzusehen? Gutachten im Auftrag des Bundesministeriums der Justiz*, 2001, pp. 99 et seq., chooses a comparable approach.

16 Cf. A. Klip, *European criminal law – An integrative approach*, 2012, pp. 470-472.

17 The ‘Stockholm Programme – An open and secure Europe serving and protecting the citizens’, Brussels, 2 December 2009, *Council Document 17024/09*.

18 On that, see also E. Muir & A.P. van der Mei, ‘The “EU Citizenship Dimension” of the Area of Freedom, Security and Justice’, in Luchtman (ed.), *supra* note 2, pp. 123-142. In this contribution, I will disregard the relevance of EU citizenship for internal situations.

19 The European Union has recently started to enact legislation that strives to harmonise procedural safeguards for suspects and victims; cf. Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C 295, 4.12.2009, p. 1, and the legislation resulting from it.

20 AG Bot, Case C-123/08, *Wolzenburg*, [2009] ECR I-9621, Opinion, Para. 142.

This duty is of course inextricably linked to free movement rights given to EU citizens and economic actors.²¹ Those rights give (economically active) EU citizens (and others) the right to ‘vote with their feet’;²² when providing (or seeking), for instance, cross-border services. Individuals seeking access to the markets of other Member States may not, as a rule, be confronted with obstacles that limit market access (unless the host state has good reasons for that). This effectively leads to a rule of mutual recognition; the host state is obliged to recognize the effects given to a particular occurrence by the legal system of the home state and should in principle not impose its own standards as well.²³ The latter would lead to what European lawyers call a *double (or multiple) regulatory burden*. The Court of Justice’s case law has made clear that these burdens hamper further European integration and must be approached with caution.

There are no indications that this prohibition of ‘mere obstacles’ – applicable to freedom of goods and services for instance – also applies to the free movement of EU citizens, as provided for in Article 21 TFEU (and Article 45 CFR).²⁴ Still, its reasoning helps to demonstrate that European citizens, when confronted with concurring and sometimes conflicting claims of criminal law jurisdiction by several Member States for the same or related offences, face duties which de facto exceed the duty to respect the laws of their host state. Conflicts of jurisdiction lead to the situation where citizens may have to defend themselves in several Member States at once. The difficulties this causes, particularly the risk of being confronted with diverging or conflicting criminal law systems and the risk of *ne bis in idem* situations,²⁵ are generally recognized as problematic.²⁶ These types of problems certainly qualify as a *double (or multiple) regulatory burden*.

A second category of problems, partly overlapping with the possibility of double burdens, is related to problems of foreseeability and accessibility, because individuals are not always able to establish either the link of their actions to a particular state (*jurisdiction to prescribe*),²⁷ or the competence of a particular Member State to prosecute and try the case (*jurisdiction to adjudicate*). Similar concerns exist with respect to the jurisdiction to enforce, particularly where European warrants are issued on the basis of extraterritorial jurisdiction, as is well illustrated by the *Darkanzanli* case of the German Constitutional Court.²⁸ Extraterritorial claims of jurisdiction, and conflicts resulting therefrom, will therefore hamper or even eliminate free movement, as the EU citizen will have to stand trial in a state other than that of his choice.

Why is this problematic? Obviously, in criminal law, the argument that EU citizens are deprived of or limited in their rights to ‘vote with their feet’ sounds awkward, at least when understood as some sort of right to choose the legal order that is most beneficial to them. That argument would at best facilitate forum shopping; it would make no sense to facilitate the European citizen in his assessment of where the circumstances to commit crimes, given the differences between legal systems, are most lenient to him.

The problem, therefore, lies somewhere else. The Treaty of Lisbon does not only offer its citizens an area in which they are allowed to move freely (the AFSJ as a territorial unity), it has also expanded a framework (the AFSJ as a policy area) which makes it increasingly difficult to attribute interferences with a person’s legal position to a single Member State. In criminal law, these interferences may take the form of serious deprivations of liberty or property.²⁹ Mutual recognition instruments have the potential

21 The well-known traditional four freedoms are for workers, goods, services, capital. Free movement for EU citizens (Art. 21 TFEU) is often referred to as the fifth freedom.

22 Cf. M. Poiars Maduro, ‘So close and yet so far: the paradoxes of mutual recognition’, in S.K. Schmidt (ed.), *Mutual recognition as a New Mode of Governance*, 2008, p. 150.

23 Cf. J. Pelkmans, ‘Mutual recognition in goods’, in Schmidt (ed.), supra note 22, pp. 33 et seq.

24 Muir & Van der Mei, supra note 18, p. 128.

25 Art. 54 CISA will not always prevent this: see Art. 55 CISA.

26 See, among many others, Sieber, supra note 13; A. Biehler et al. (eds.), *Freiburg Proposal on Concurrent Jurisdictions and the Prohibition of Multiple Prosecutions in the European Union*, 2003; M. Böse & F. Meyer, ‘Die Beschränkung nationaler Strafgewalten als Möglichkeit zur Vermeidung von Jurisdiktionskonflikten in der Europäischen Union’, 2011 *ZIS*, no. 5, pp. 336-344; A. Sinn (ed.), *Jurisdiktionskonflikte bei grenzüberschreitender Kriminalität – Ein Rechtsvergleich zum Internationalen Strafrecht*, 2012, pp. 576 et seq.

27 Well-known examples are the application of the passive personality principle, the principle of subsidiary jurisdiction and sometimes even the territoriality principle (at least where the territory is defined as the state where the harmful consequences of an individual’s actions were felt); cf. Luchtman (ed.), supra note 2, p. 22, with further references.

28 *Bundesverfassungsgericht*, 18 July 2005, 2 BvR 2236/04, accessible via <www.bundesverfassungsgericht.de>.

29 S. Lavanex, ‘Mutual recognition and the monopoly of force: limits of the single market analogy’, in Schmidt (ed.), supra note 22, pp. 98-99, points out that the concept of mutual recognition in the AFSJ produces different effects than the one of the internal market.

of widening the reach of these powers far beyond the Member States' borders. This framework was created, because the opening of the internal borders made the Member States jointly responsible for fighting crime.³⁰ Yet the overlap of competences and the intensified cooperation it has produced seriously complicates the position of the individual. These complications are difficult to attribute to one particular Member State. The problems related to conflicts of jurisdiction are, by their very definition, the result of the coordinated or uncoordinated efforts of *several* Member States, which are accountable only for their own authorities.

The free movement analogy therefore first and foremost illustrates that the position of the individual is seriously thwarted in this 'inter-state field of force'. Extraterritorial claims of jurisdiction, and the conflicts of jurisdiction resulting therefrom, are actively promoted, also by the European Union, in order to prevent criminals from escaping justice. Yet by doing so, the current EU approach seems to lose the concept of citizenship out of sight. An orientation on the laws of the host state will teach the individual nothing with regard to the *additional* consequences his actions may have, through extraterritorial claims of jurisdiction, under the laws of other EU Member States. This is at odds with the concept of citizenship, if understood to imply membership of a social and political entity in which the individual has associated himself with his fellow citizens through some sort of mutual agreement,³¹ while simultaneously guarding his autonomy and freedom through protection by fundamental rights and political representation.³² Accessible and foreseeable laws are a vital instrument for this, particularly with respect to criminal law.

The issue is therefore whether this particular, 'classic' concept of citizenship also fits the European context. I think it does, and should, but with some modifications. The concept of European citizenship, in combination with the goals of Article 3(2) TEU and the framework of Articles 67 et seq. TFEU could be constructed in a 'cosmopolitan fashion'.³³ Based on the findings of, inter alia, Ulrich Beck and Edgar Grande the European Union is then perceived as both the expression, as well as the instrument of the horizontal integration of modern-day societies.³⁴ Beck's and Grande's analyses show that European citizenship is not likely to – and should not – replace national citizenship (a 'federalist approach'). Yet its scope will neither depend solely on a positive decision by EU Member States to grant their nationals certain well-defined rights within the common European area (an 'intergovernmentalist approach'). Rather, their observations with respect to the gradual horizontal integration of EU Member States' societies and their finding that '[e]ver more individuals are producing internationally, working internationally, loving internationally, marrying internationally, living, travelling, consuming and cooking internationally'³⁵ logically imply that EU citizens should not merely be 'defined' as legal subjects – as bearers of rights and duties – exclusively by their membership of the state of nationality. Those individuals unite multiple memberships in them, including membership of the European Union, which they – within the limits set by the common good, of course – may form and shape according to their own preferences, in particular by exercising their free movement rights.³⁶ Should conflicts between the rights and duties of these different memberships occur, they will have to be solved.³⁷

The cosmopolitan concept of EU citizenship, in conjunction with the enhanced framework to protect the common, European good (Articles 67 et seq. TFEU),³⁸ could then be perceived as referring to

30 Cf. AG Bot, Case C-123/08, *Wolzenburg*, [2009] ECR I-9621, Opinion, Paras. 104-105.

31 In the national context often referred to as a '*contrat social*', a term which will be controversial in the EU setting; on this, see also R. Lööf, '54 CISA and the Principles of *ne bis in idem*', 2007 *European Journal of Crime, Criminal Law and Criminal Justice* 15, no. 3-4, pp. 324-325.

32 Cf. Willem Pompe Instituut, *Gedachten van Willem Pompe over de mens in het strafrecht*, 2008, p. 13.

33 See Luchtman (ed.), supra note 2, pp. 14-19.

34 Beck & Grande, supra note 7; see also G. Delanty, 'The Idea of a Cosmopolitan Europe – On the cultural significance of Europeanization', 2005 *International Review of Sociology* 15, no. 3, pp. 405-421.

35 Beck & Grande, supra note 34, p. 36.

36 Beck & Grande, supra note 34, p. 35. Or as Delanty, supra note 34, p. 417, puts it, 'European identity is a form of post-national self-understanding that expresses itself within, as much as beyond, national identities'. See also Benhabib, supra note 7, pp. 148-149; Balibar, supra note 7, p. 162; or the term 'nested citizenship' by P. Kivisto & T. Faist, *Citizenship – Discourse, Theory, and Transnational Prospects*, 2007, pp. 122 et seq.

37 Those conflict rules are evolving as we speak. The Court of Justice has held, for instance, that 'citizenship of the Union is intended to be the fundamental status of nationals of the Member States' and that 'Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union', ECJ 8 March 2011, Case C-34/09, *Ruiz Zambrano*, Paras. 41 and 42.

38 On that, see Section 5, infra.

free movement as a powerful instrument to challenge the existing state-centred cooperation structures and to protect the autonomy of the individual citizen vis-à-vis the joint European Member States. Free movement implies that the legal order of reference for EU citizens is the legal order to which that citizen has subjected himself, except perhaps in cases of an *abuse* of free movement rights. The result of this is that other Member States, i.e. other states than the state of stay, should in principle refrain from exercising jurisdiction (and, by doing so, limiting free movement), *unless* they have good reason to do so. Limitations on free movement must therefore serve a legitimate goal, be proportionate to that goal and must respect fundamental rights,³⁹ including the legality principle in criminal law.⁴⁰

In addition, free movement should have an active and a passive connotation; its redefined, transnational notion of personal autonomy must not be limited to cases of active movement by citizens, it should also protect those who did not move, but are confronted with the consequences of free movement by others.⁴¹ That, too, is a direct consequence of the EU's ambitions to promote horizontal integration through free movement (Article 3(2) TEU).

As a result, I propose that limitations on the autonomy of EU citizens, through limitations on their free movement by national criminal justice systems (the double burden), meet the well-known standards of accessibility or foreseeability (at least where the legality principle is in play) *and* that those guarantees, where applicable, be interpreted in light of the goals of Article 3(2) TEU.

4. The principle of legality as a tool for analysis

Our finding that Charter guarantees need to be interpreted in light of Article 3(2) TEU does in itself not solve the question of whether conflicts of jurisdiction are actually covered by those guarantees. Certainly, choices of forum, and conflicts of jurisdiction in particular, may cause problems of foreseeability and accessibility, as we have seen. But are these problems a concern in terms of the legality principle? We therefore need to explore to what extent these conflicts: a) relate to a state's jurisdiction to prescribe norms and, possibly, to the substantive legality principle of Articles 7 ECHR and 49 CFR; b) its jurisdiction to adjudicate those offences (Articles 47 CFR and 6 ECHR: 'a tribunal (previously) established by law'); as well as c) what could be learned from this.

4.1. Jurisdiction to prescribe

Whether the guarantees of the principle of *nullum crimen, nulla poena sine lege*, including *lex certa* (Articles 7 ECHR and 49 CFR), apply to the laws on jurisdiction is controversial.⁴² A much heard position, at least on the Continent, is that there is indeed a nexus between these guarantees and the rules on jurisdiction.⁴³ These guarantees do not apply directly, but without a clear and accessible link to a criminal law system, one does not have a chance to become acquainted with its offences and penalties either.⁴⁴ That means that the requirements of accessibility and foreseeability (German: *Erkennbarkeit*; Dutch: *kenbaarheid*) are also of relevance for rules of jurisdiction. However, most authors are satisfied that the thresholds of these requirements are met, once the individual could have known that his actions are *criminal* (*somewhere*), for instance through the application of the requirement of double criminality. They therefore deny their relevance with respect to the issue of *which particular state* ultimately prosecutes the offender.⁴⁵

39 Cf. ECJ 18 June 1991, Case C-260/89 *E.R.T.*, [1991] ECR I-2925.

40 Cf. ECJ 4 June 2002, Case C-483/99, *Commission/France*, ECR I-4781, Para. 50, with respect to free movement and capital and the principle of legal certainty: limitations on free capital must pass the rule of reason test, including standards of legal certainty. The problem in our case – extraterritorial jurisdiction and conflicts – is of course that the traditional four freedoms may not be applicable, while the fifth freedom is still evolving (*supra* note 24). To that extent, the position defended is (far) more ambitious than the status quo and the reference to the aforementioned case is only by analogy. I think that it is warranted in light of the goals the EU has set for itself and the problems that currently exist for European citizens (and, thus, for the European Union).

41 For instance, through a claim of jurisdiction on the basis of the passive personality principle.

42 See Luchtman (ed.), *supra* note 2, pp. 121-128.

43 See also European Committee on Crime Problems, *Extraterritorial criminal jurisdiction*, Strasbourg: Council of Europe 1990, pp. 22-25.

44 Most notably by G.A.M. Strijards, *Internationaal strafrecht, strafrechtsmacht – Algemeen deel*, 1984, pp. 43-47; see also K. Ambos, *Internationales Strafrecht*, 2006, pp. 5-6.

45 Minority positions are taken by Strijards, *supra* note 44, and D. Oehler, *Internationales Strafrecht: Geltungsbereich des Strafrechts, internationales Rechtshilferecht, Recht der Gemeinschaften, Völkerstrafrecht*, 1983.

In light of my findings in the previous section, I wonder if this conclusion is also worth following in the specific context of the AFSJ. After all, any orientation on the legal order of the state of stay (for instance, the state of residence) will teach an individual nothing as to the additional consequences his actions may have under the criminal laws of other Member States. Yet it is precisely this double burden which complicates the legal position of the European citizen and interferes with the goal of free movement. Particularly where these specific consequences cannot reasonably be foreseen at the time of action, they will catch that citizen by surprise. That citizen is then confronted with the consequences brought forward by a legal system which he did not choose, possibly does not know and could in any event not foresee. He may also be confronted with diverging or even contradictory national rules on offences and sanctions, and with the possibility of multiple prosecutions. From a European citizen's perspective an element of arbitrariness may indeed creep into the system, which is closely connected to the guarantees of Articles 7 ECHR and 49 CFR.

In light of this finding, three observations need to be made with respect to the current EU approach, as well as its alternatives:

1. Fragmented harmonisation of criminal law jurisdiction. The efforts of the European Union are currently geared towards the extension of the jurisdictional bases beyond the national territory for serious, cross-border crimes. They are limited to the scope of Articles 83 and 325 TFEU. Other areas of criminal law remain in the hands of the nation states. That means that not only the 'real crooks', but also all EU citizens who 'are producing internationally, working internationally, loving internationally, marrying internationally, living, travelling, consuming and cooking internationally'⁴⁶ are left to the discretion of national authorities. The current situation does not prevent these citizens from being confronted with a double burden, the scope of which they could not have predicted at the time of their actions. This may happen, either because they themselves crossed the internal borders, or because they were confronted with the actions of others. As long as EU law is silent on this matter, technically, there is no link with the EU legal order or the Charter (cf. Article 51(1) CFR), even though the EU promotes free movement.

One problem that is particularly urgent is the problem of the 'true' or 'actual' conflicts of jurisdiction, i.e., those types of conflict where a certain type of behaviour is not a criminal offence in the state of stay, but does constitute an offence in another state claiming extraterritorial jurisdiction over it. In those cases, the Member State where the actions took place is at most excused from its duty to provide cooperation. Obviously, these situations interfere with free movement as it is defined here.

2. The foreseeability of the double burden. In those cases where European laws do interfere with national law, our analysis reveals other problems. The network approach of the European Union – wide jurisdictional bases and enhanced cooperation – aims to prevent impunity, yet is not concerned with double burdens and related problems of foreseeability and accessibility. A recent directive on human trafficking, for instance, seems to encourage the use of the passive personality principle, rather than to discourage it.⁴⁷ To that extent, the European legislator clearly goes in another direction than advocated here. As soon as the *criminality* of behaviour is foreseeable (which will be so in cases of (minimum) harmonisation),⁴⁸ the double burden is apparently not regarded as a problem in terms of substantive legality.

The cogency of this approach depends, in my view, on the perspective one takes. If one agrees that the European Union should grant, in principle, its citizens the right to subject themselves to the legal order of their choice and that limitations to this (caused by extraterritorial jurisdiction) must meet certain standards, then that legal order will principally determine the consequences of their actions. This is then the expression of the autonomous position of the EU citizen vis-à-vis the Member States. Although this rule is not absolute, it does influence the concept of foreseeability. At the least, the full potential of the consequences of one's actions, brought forward by the criminal laws of the joint Member States, should be foreseeable at the time of action, and not only those of his state of stay. If this turns out to be unachievable, those consequences should be mitigated. At present, only Articles 54-58 CISA offer

⁴⁶ *Supra* note 35.

⁴⁷ See Arts. 9 and 10 of Directive 2011/36/EU, OJ L 101, 15.4.2011, p. 1; Luchtman (ed.), *supra* note 2, pp. 3-4.

⁴⁸ Assuming, of course, that all Member States correctly transpose European *norms* into national *offences*.

some degree of protection, in cases of consecutive proceedings. Yet there are certainly other examples of how to do this, for instance by applying the *lex mitior*, by a ranking of jurisdictional principles or by enhancing the procedural position of the defendant.⁴⁹ These solutions are however not explored, let alone enacted into law. That means that the legal position of the defendant is seriously flawed, compared to domestic criminal proceedings.

3. *The quest for viable alternatives.* Assuming that the guarantees of Article 49 CFR indeed cast their shadow on the laws of jurisdiction and that certain jurisdictional criteria – for instance the passive personality principle, the principle of subsidiary jurisdiction, or, sometimes, even the territoriality principle⁵⁰ – are problematic in terms of their capacity to show the citizen the full range of the possible consequences of his actions, what should be the consequence of this? Should the laws of that particular state remain inapplicable? Some have argued that these types of problems could lead to a successful plea of *error iuris/error facti*.⁵¹ That might be a reasonable solution. Yet it also has a few downfalls. One might expect that the more the legal orders of the European Member States become intertwined and the more the European Union continues to promote the establishment of extraterritorial jurisdiction, the more this leads to a need for these types of exceptions.

Ultimately, I think, the situation calls for a more substantial solution. Successful pleas with respect to *error iuris* or *error facti* must remain a means of last resort, now that they could harm the legitimate interests of victims, other States or the European Union. This applies in particular where the state of the *locus delicti*, although competent, does not take further action.⁵² The question therefore arises as to what the European Union and its Member States should do to prevent problems like these. Once again, with EU law being silent, these issues are currently left to the national level and seem to be ignored there, leaving the European citizen in a particularly complicated position.

4.2. Jurisdiction to adjudicate and to enforce

In criminal law, a state's jurisdiction to adjudicate is usually dependent on that state's jurisdiction to prescribe.⁵³ The same holds true for the jurisdiction to enforce. This means that the national laws on jurisdiction not only have a substantive law, but also a procedural law dimension.⁵⁴ They also define the ground rules for case allocation over the European territory in the pre-trial, as well as the trial stage. With respect to the jurisdiction to adjudicate, the legality principle plays an important role too. The principle *nullum iudicium sine lege* is dealt with, in particular, by the requirements of Article 6 ECHR that tribunals be independent, impartial and 'established by law'. The latter requirement (or: *previously* established by law, in Article 47 CFR) aims to ensure that 'the judicial organization in a democratic society [does] not depend on the discretion of the executive, but that it [is] regulated by law emanating from Parliament'.⁵⁵ Its rationale lies in the separation of powers, as well as the rule of law.⁵⁶

With regard to forum choice in the European Union, once again, the challenges and problems do not so much lie in the court organisations of the Member States per se, but in the interplay between these systems, which may result in negative or positive conflicts of jurisdiction. Interpreting the requirement of a 'tribunal established by law' in light of the goals of Article 3(2) TEU draws our attention to three issues of particular interest:⁵⁷

49 Cf. the proposals in Section 6, *infra*.

50 *Supra* note 27.

51 On this, see also H. Scholten, *Das Erfordernis der Tatortstrafbarkeit in § 7 StGB*, 1995, pp. 97 et seq.; Strijards, *supra* note 44, pp. 47-49; Ambos, *supra* note 44, p. 4; M. Böse, 'Die Stellung des sog. Internationalen Strafrechts im Deliktsaufbau und ihre Konsequenzen für den Tatbestandsirrtum', in R. Bloy et al. (eds.), *Gerechte Strafe und legitimes Strafrecht – Festschrift für Manfred Maiwald zum 75. Geburtstag*, 2009.

52 This is why Böse & Meyer, *supra* note 26, pp. 336-344, suggest, with reference to the principle of non-discrimination, that the latter state should protect those interests.

53 Cf. European Committee on Crime Problems, *supra* note 43, p. 20.

54 Cf. M. Böse, 'Choice of forum and jurisdiction', in Luchtman (ed.), *supra* note 2, pp. 79-81.

55 Cf. ECtHR, 12 July 2007, *Jorgic v Germany*, appl. no. 74613/01, Para. 64; ECtHR 22 June 2000, *Coëme et al. v Belgium*, appl. nos. 32492/96, 32547/96, 32548/96, 33209/96 & 33210/96, Para. 98.

56 Cf. ECtHR, 12 July 2007, *Jorgic v Germany*, appl. no. 74613/01, Para. 64.

57 See also M. Panzavolta, 'Choice of Forum and the Lawful Judge Concept', in Luchtman (ed.), *supra* note 2, pp. 143-166.

1. *The quest for reasonableness.* First of all, the requirement of a 'tribunal established by law', in addition to being a human right, is also a fundamental principle of judicial administration. It is not so much geared towards offering the individual the utmost certainty (*lex certa*), but rather to warding off extraneous factors influencing the proper administration of justice. There is no such thing as a right for the defendant to choose his own court, or to have proceedings against him combined.⁵⁸ Whereas Articles 7 ECHR and 49 CFR guarantee that the law (and the law alone) may only address its subjects through 'clearly defined' offences (*lex certa*), its procedural counterpart therefore sets a lower standard in terms of the *ex ante* accessibility and foreseeability of court competence for individuals.⁵⁹ In that respect, one could say that this guarantee has relatively little to offer to individuals; once a court has a solid legal basis, which defines its territorial and material competence, 'Strasbourg' (and presumably 'Luxembourg' too)⁶⁰ will only apply a marginal test of the reasonableness of the forum choice.

However, it is *because* there is a legislative framework in place that abuses of power may be *presumed* to be unlikely and a marginal test of the decision suffices. As 'criminal charges' (defined autonomously)⁶¹ may only be brought before a properly established court (with sufficiently clear competences *ratione materiae, personae, territoriae*), legislators are effectively forced to roll out the overall design of their judicial system in advance, in order to avoid conflicts of jurisdiction. The more concerned the legislator is with avoiding and solving these conflicts, the stricter its laws will be, and the more solid ground there is for testing the reasonableness of forum choices.⁶² The Strasbourg Court has repeatedly held that legislation, once in place, must also be observed, in order to fulfil the requirement of a 'tribunal established by law'. Deviations from statutory law will therefore constitute an infringement of this requirement.⁶³

The premise that the overall judicial organisation will prevent abuses by the executive (or the judiciary) is put into question where a legislator fails to design the basic scheme for assuring reasonableness, either through substantive criteria and/or proper procedures. Overlapping court competences in the European Union are for instance not encroached in a pyramidal system, which will ultimately – at the latest at the start of the trial – force authorities to settle their conflicts,⁶⁴ but stand next to each other, without guarantees of reducing the double burden for citizens (at least until the first set of proceedings is concluded).⁶⁵

In addition, we face the dilemma that, on the one hand, mutual differences in legal systems may themselves become a relevant factor in forum choice, which could be perceived as a challenge to the integrity of those systems instead of their guaranteeing justice (forum shopping) and therefore also a danger to the proper operation of the principle of mutual recognition, whereas, on the other hand, the element of arbitrariness that thus creeps into the system is difficult to pinpoint, because the yardstick to assess these choices remains vague and open to many interpretations. The absence of a framework for dealing with forum choices thus leads to the situation where forum decisions may very well be 'lawful' (because of the competence of the courts under national law), but their reasonableness is, at times, questionable and depends entirely on the integrity of the person who operates the system.

In my opinion, the requirement of a 'tribunal established by law' defines as the overarching challenge for the European Union the design of a statutory system that supports a workable concept of

58 Cf. EComHR, 10 October 1990, *G. v Switzerland*, appl. no. 16875/90 (competence *ratione loci*); EComHR, 2 December 1992, *Kübli v Switzerland*, appl.no. 17495/90 (competence *ratione materiae*).

59 Cf. Luchtman (ed.), *supra* note 2, pp. 30-31.

60 This is confirmed by cases of the Court of Justice in competition law; see ECJ 11 November 1981, Case 60/81, *IBM v Commission*, [1981] ECR 2639, Paras. 18-21, and CFI 8 March 2007, Cases T-339/04 and T-340/04, *France Télécom v Commission*, [2007] ECR II-521, Paras. 77-91, discussed by M. de Visser, *Network-based governance in EC law – The example of EC competition and EC communications law*, 2009, pp. 295-301; S. Brammer, *Co-operation Between National Competition Agencies in the Enforcement of EC Competition Law*, 2008. See also J.F.H. Inghelram, *Legal and institutional aspects of the European Anti-Fraud Office (OLAF)*, 2011, pp. 203 et seq.

61 Cf. ECtHR 21 February 1984, *Öztürk v Germany*, appl. no. 8544/79; see also ECJ 5 June 2012, Case C-489/10, *Lukasz Marcin Bonda*, discussed by A. De Moor-van Vugt, 'Administrative sanctions in EU law', 2012 *Review of European Administrative Law*, no. 1, pp. 5-41.

62 Incidentally, Lagodny, *supra* note 15, pp. 104-105, rightfully points to the fact that in national law these criteria may well be of a purely 'formal' nature, for instance the place where proceedings were first started. Applying these criteria to the transnational setting would mean that they also determine the competent legal order.

63 Cf. M. Kuijjer, *The blindfold of Lady Justice – Judicial independence and impartiality in light of the requirements of article 6 ECHR*, 2004, pp. 190-191, with references to the Strasbourg case law.

64 Cf. Lagodny, *supra* note 15, pp. 99-100.

65 Art. 54 CISA. Exceptions are possible, however, see Art. 55 CISA.

‘reasonableness.’⁶⁶ That system should reduce the double burden on European citizens as far as possible, protect the common interest and avoid arbitrariness in the way forum choices are made, forum shopping in particular. This, therefore, is my first point: ‘reasonableness’ should be interpreted in light of the goals that the EU has set for itself and should ensure the proper administration of justice in light of all the interests involved; those of the Member States, those of the EU and those of its citizens.

2. *The need to break open national law.* My second point concerns the need to ‘break open’ national criminal law systems. It is not that difficult to identify factors which currently lead to a certain degree of legal protectionism or to preferential treatment for national citizens or national perspectives above the interests of those of other European Member States, citizens or the EU itself. We see traces of this, for instance, in the limited powers of Eurojust members who are not always given the power to operate without consulting their superiors at home;⁶⁷ in the fact that Member States sometimes exclude cooperation, *ipso iure*, in cases where national interests are involved; in their preference to exert jurisdictional control over their nationals (instead of their residents) when they travel abroad; or in their reluctance to assume responsibility for EU citizens from other states, for instance at the stage of the execution of sanctions.

Clearly, this attitude is not only explained by the desire simply to retain as much power at the national level as possible. The German Constitutional Court, for instance, has consistently linked it to considerations of *national* democracy.⁶⁸ At the same time, this position seems to take it for granted that non-nationals, or nationals crossing the internal borders, are a lesser concern and that the interests of national criminal justice take precedence over other interests *qualitate qua*.⁶⁹ In light of the concept of European citizenship, I find this difficult to accept.⁷⁰ What is particularly problematic is that national laws sometimes even block the application of a test of reasonableness. Although this is, in my opinion, clearly not in the interest of a proper administration of justice, seen from an EU perspective, we may doubt whether the requirement of a ‘tribunal established by law’ prohibits this. The term ‘law’ refers to statutory legislation, not to constitutional law.⁷¹ This means, in my opinion, that the final word remains with the national legislators, unless the European legislator intervenes.

3. *The need to coordinate national legal systems.* Even where national law does not openly protect national interests, interests other than national interests may not always be accounted for, also where the actors involved are fully aware of the European dimension of their tasks and cases. Conflicts of jurisdiction are by their very definition a problem that is caused by the interplay between multiple legal orders. Still, there is no overarching framework for forum choice at present. My third point is that even where national systems do not pose statutory impediments to European coordination, ‘reasonableness’ as such will remain an empty phrase without intervention at the European level. The European legislator must not only undertake action to break open national systems, it must simultaneously unfold a general perspective on ‘reasonableness’. Without providing guidance on the substantive criteria, on the procedures and on the organisational framework, including supervision, national authorities will continue to have insufficient materials to work with.⁷²

66 Cf. T. Vander Beken et al., *Finding the best place for prosecution – European study on jurisdiction criteria*, 2002; T. Vander Beken et al., ‘Kriterien für die jeweils “beste” Strafgewalt in Europa’, 2002 *NStZ*, no. 12, pp. 624-628; and Lagodny, *supra* note 15, who refers to a *Qualitätsprinzip*.

67 I must admit that this statement may be challenged. It depends on the view one takes on Eurojust’s tasks. Those who submit that Eurojust (unlike the EPPO for instance) is there to assist national investigations will object to this statement. Yet those who are of the opinion that the coordination of criminal proceedings is something more than that, also in light of preventing negative conflicts, will find this statement presumably less difficult to accept.

68 *Supra* note 28. See also M. Bovens et al. (eds.), *The real world of EU accountability – What deficit?*, 2010, pp. 188-191, with respect to that court’s Lisbon ruling.

69 The German Constitutional Court’s *Darkazanli* ruling, *supra* note 28, is a good example of this; see in particular Paras. 85 and 86, where a difference is made between acts with *maßgeblicher Inlandsbezug* and acts with *maßgeblicher Auslandsbezug*. A similar reasoning can be found in B. Schünemann (ed.), *Ein Gesamtkonzept für die europäische Strafrechtspflege – A programme for European Criminal Justice*, 2006, pp. 95 et seq.

70 Cf. Bovens et al. (eds.), *supra* note 68, p. 190: ‘The point the *Bundesverfassungsgericht* missed, it simply cannot reach any of what happens at the collective supranational level, and nor can any of the national parliaments. In effect, this kind of purely intergovernmentalist attitude is the equivalent of the ostrich with its head in the sand, choosing to ignore the realities around it that it does not wish to see or engage with.’

71 S. Trechsel, *Human Rights in Criminal Proceedings*, 2005, pp. 50-51.

72 Cf. De Visser, *supra* note 60, pp. 293-294.

Of course, it is one thing to emphasise the need for substantive criteria, but quite another to define criteria which are precise enough to offer clarity to the authorities and the possibility of control for others. The original ambitions of the 2009 Framework Decision on conflicts of jurisdiction were mitigated precisely as a result of this.⁷³ On another occasion,⁷⁴ I have argued that the Swiss system of intercantonal case allocation is interesting in this respect, because it 'reverses' the approach: instead of enumerating a non-exhaustive list of (positive or negative) factors for forum choice, like in the Eurojust Guidelines of 2003,⁷⁵ it combines a system of statutory case allocation, with room for deviations from that system, provided that a series of goals is achieved, at all times.⁷⁶ Forum choices must in any case take account of the interests of the place where most of the damaging effects of criminal conduct were felt; those of the suspect (and his counsel) to effectively defend himself; those of the courts, which must be put in the position to obtain, as far as possible, a complete overview of both the person of the accused and his actions; and those of the speedy and efficient administration of justice.⁷⁷ These criteria put the burden on the authorities, to the extent that they – when asked by a relevant 'accountability forum' – have to show how these criteria have been met.⁷⁸ On the other hand, these criteria also show that these forums should not 'second guess' the forum choice: their task is to test the reasonableness of these decisions.

A final remark on the procedural aspects: substantive criteria need to be backed by procedures for two reasons.⁷⁹ In the first place, procedures are necessary to guarantee that all interests are indeed taken into consideration *before* the decision is taken. In that regard, we may notice that the position of the defendant,⁸⁰ as well as that of the European institutions, is virtually non-existent at present. In the second place, forum choices – although perhaps not causing any *direct* changes in legal position – certainly determine the future scope of rights and duties of all actors involved. They determine the applicable legal regime, as well as the scope of the double burden. These consequences are often irrevocable. This is why, as a matter of procedural fairness,⁸¹ forum choices need to be accounted for by the decision makers to a 'forum' (political or legal) with the power a) to extract information from them, b) to engage in a debate with them regarding their performance, and, possibly, c) to create non-trivial consequences.⁸²

At present, there is no such forum; or rather: there is no coordination between the many forums available. On the one hand, it is doubtful if forum choices will become a real issue before national courts. The task of those courts is after all to establish their own competence, not the reasonableness of the outcome of the deliberations between the prosecution services. On the other hand, technically speaking, forum choice is in many aspects not a matter for European law. The European framework is fragmented. That implies, once again, that our primary point of reference for assessing legality – the Charter of Fundamental Rights – is only applicable where there is secondary EU legislation in place that needs implementation or – possibly – where national law interferes with the Treaty freedoms (cf. Article 51(1) CFR). Moreover, even in those rare instances where European laws do provide for rules on choice of forum, the question is who is in the position to steer and supervise the complex interplay of legal orders. At present, the competences of Eurojust, as well as the Court of Justice, are

73 Cf. H.H. Herrfeld, 'Mechanisms for Settling Conflicts of Jurisdiction', in Luchtman (ed.), supra note 2, pp. 189-190. Compare also the original proposal for a Council Framework Decision on prevention and settlement of conflicts of jurisdiction in criminal proceedings, *Council Document* 5208/09 of 20 January 2009, with the final text, published in OJ L 328, 15.12.2009, p. 42.

74 M. Luchtman, 'Choice of Forum in an Area of Freedom, Security and Justice', 2011 *Utrecht Law Review*, no. 1, pp. 74-101.

75 Luchtman (ed.), supra note 2, pp. 34-36.

76 On that system, see P. Guidon & F. Bänziger, 'Die aktuelle Rechtsprechung des Bundesstrafgerichts zum interkantonalen Gerichtsstand in Strafsachen', 2007 *Jusletter*, 21 May; E. Schweri & F. Bänziger, *Interkantonale Gerichtsstandsbestimmung in Strafsachen*, 2004; M. Waiblinger, 'Die Bestimmung des Gerichtsstandes bei Mehrheit von strafbaren Handlungen oder von Beteiligten', 1943 *ZStr*, pp. 81 et seq.

77 Cf. *Bundesstrafgericht*, 21 October 2004, no. BK_G 127/04, to be found at <<http://www.bstger.ch/>>.

78 Cf. the proposals by Vander Beken et al., 'Kriterien für die jeweils "beste" Strafgewalt in Europa', 2002 *NStZ* no. 12, 2002, p. 626; and particularly Lagodny, supra note 15, pp. 106 et seq.

79 Cf. Vander Beken et al., *Finding the best place for prosecution – European study on jurisdiction criteria*, 2002, pp. 16-17; A.H.J. Swart, *Een ware Europese rechtsruime: wederzijdse erkenning van strafrechtelijke beslissingen in de Europese Unie*, 2001, p. 16.

80 Cf. the contributions by A.A. Franken, 'The Perspective of the Defence Lawyer: Choice of Forum and the Proper Administration of Justice', p. 109-113, and J.M. Sjöcrona, 'The perspective of the Criminal Defence Lawyer: Choice of Forum, a Legal Vacuum in the EU', p. 113-122, in Luchtman (ed.), supra note 2. In some instances, there is a duty to inform the defendant at most; see for instance Art. 17 of the 1972 Convention on the transfer of proceedings.

81 I therefore oppose the idea that 'the allocation of cases is hence not a question of transferring competence but merely one of dividing work', De Visser, supra note 60, p. 298. A similar line of reasoning is found in Recital 4 of the Preamble to the 2009 Framework Decision.

82 Cf. Bovens et al. (eds.), supra note 68, p. 176; M. Bovens, *The quest for responsibility – Accountability and citizenship in complex organisations*, 1998.

limited.⁸³ Eurojust itself does not take decisions on choice of forum; these decisions are ultimately taken by national authorities. The Court's competences under Article 263 TFEU are therefore not in range.⁸⁴ Simultaneously, that Court has no competences over the 'operational' activities of the authorities of the Member States (Article 276 TFEU).

All of these factors easily lead to the situation that no one is really responsible for the problems faced by European citizens at the interface of multiple European criminal justice systems or for the negative conflicts that hamper the EU's financial interests. To that extent, practice in choice of forum shows a clear accountability gap: the powers of national authorities are limited, and the same goes for those of the European institutions. This is a fine example of the *problem of many hands*, where many are competent, and, thus, no one is accountable, particularly not for those interests that supersede or compete with the national perspective.⁸⁵

5. Old wine in new bottles – The principle of legality as a normative benchmark?

It is one thing to interpret the legality principle in light of the goals of Article 3(2) TEU, but quite another to use that redefined concept of legality as a normative, 'court-enforceable' benchmark for the status quo.⁸⁶ It would mean that in cases of, for instance, negative integration, interferences with the Treaty freedoms are assessed in light of these redefined Charter rights. That, in turn, could lead to the inapplicability of national law. The interpretation of secondary EU legislation in light of these redefined guarantees could cause similar problems for the European Union and its Member States. Under both scenarios, Member States would have to rely on the European Union and on better-placed Member States to protect their interests. In other words, it would need a high degree of mutual trust and coordination and, almost by definition, intervention by the European Union. After all, where Charter guarantees become genuine '*Abwehrrechte*' in transnational relationships, the European legislator will be forced to intervene in order to protect and preserve the common interest, defined by the Treaties, and to ensure free movement '*in conjunction with* appropriate measures with respect to (...) the prevention and combating of crime' (Article 3(2) TEU). The autonomous position of European citizens vis-à-vis the cooperating Member States would thus be supplemented by political representation at the European level. To that extent, free movement rights, redefined human rights guarantees and political representation at the European level could interlock and lead to an 'activation of European citizenship'. It would be a powerful answer to the criticism that citizens are offered a fair amount of fine things by the EU, without being in the position to decide over them autonomously,⁸⁷ and that the focus has traditionally been on protecting the citizen against crime, rather than on also offering him protection against the state in its fight against crime.⁸⁸

The question is therefore when may measures be considered to be 'appropriate' as referred to in Article 3(2) TEU, and who determines this. The obvious answer would be that this is, in principle, the legislator. There are good examples of how the European legislator indeed actively balances crime control against legal protection, and thus promotes the protection of fundamental rights. For instance, the very existence of Articles 54-58 CISA allowed the Court to gradually develop the *ne bis in idem* principle. It rejected in *Brügge and Gözütok* the objections of some Member States that out-of-court settlements be kept out of the scope of Article 54 CISA by pointing to the subsequent legislative developments which

83 Incidentally, there are arrangements for the accountability of Eurojust, but these concern the overall functioning of the agency, not its operational activities; see M. Busuioc, *The Accountability of European Agencies – Legal Provisions and Ongoing Practices*, 2010; M. Groenleer, *The autonomy of European Union Agencies*, 2009, pp. 309-342.

84 Cf. Art. 263(2) TFEU (annulment action by a Member State, which is problematic in light of Art. 276 TFEU) and Art. 263(4) TFEU (annulment by an individual). In the latter case, we would have to ask ourselves whether these types of decisions bring about changes in the legal position of the individual. Cases from the area of competition law are reason enough for serious doubt in that regard; supra note 60.

85 Cf. Groenleer, supra note 83, pp. 103-104; Busuioc, supra note 83, p. 8; Bovens *et al.* (eds.), supra note 68, pp. 44-46, 192-193; C. Harlow & R. Rawlings, 'Promoting Accountability in Multilevel Governance: A Network Approach', 2007 *European Law Journal* 2007, pp. 542-562; Y. Papadopoulos, 'Problems of democratic accountability in network and multilevel governance', 2007 *European Law Journal*, no. 4, pp. 473-476; Bovens, supra note 82, pp. 45-52.

86 That is also why the case law of the Court of Justice with respect to *ne bis in idem* is as progressive as it is controversial; see Vervaele, supra note 5; Luchtman (ed.), supra note 2, pp. 38-41.

87 Cf. J. Monar, 'The Area of Freedom, Security and Justice', in A. Von Bogdandy & J. Bast (eds.), *Principles of European constitutional law*, 2011, p. 579.

88 Cf. Swart, supra note 79, pp. 7 et seq.

the Member States themselves had set in motion. That means that the positive influence of the Court's case law on the reduction of the double burden on European citizens (the *ne bis in idem* guarantee) is to a significant effect the result of prior legislative intervention. Put differently, the free movement argument of the Court might have led to different solutions⁸⁹ had the Member States themselves not agreed to an ambitious internationalised *ne bis in idem* guarantee.⁹⁰

What we do not know as yet is whether the ambitions of the Lisbon Treaties – including the goal of, inter alia, Article 3(2) TEU; the binding Charter; the provisions on citizenship; the enhanced EU powers in criminal justice (Articles 67 et seq. TFEU) – lead to an even higher standard, which does not take the legislative state of the art as its point of reference for the interpretation of fundamental rights, but the institutional setting of the European Union. That would mean that whether measures to combat crime are 'appropriate' as in Article 3(2) TEU must be determined with reference to the institutional duty of the EU to take all involved interests into account, in combination with the scope of its *institutional potential* – its powers of legislative intervention – to resolve these issues.⁹¹ It would imply a normative yardstick for assessing the current legislative affairs, which is also binding on the European legislator.

Obviously, that approach also creates new problems. It leads to a series of interesting questions. For instance, what should we think of the current framework for choice of forum, where legislation is fragmented and, on occasion, points in the opposite direction than advocated here? The Preamble to the 2009 Framework decision on conflicts of jurisdiction for instance reveals that its focus is not on reasonable forum choices, but on '*any effective solution* aimed at avoiding the adverse consequences arising from parallel proceedings and avoiding waste of time and resources of the competent authorities concerned [emphasis added, ML]'; without defining what these adverse consequences may be. Would such a framework pass the test of, for instance, Article 47 CFR?

The added value of interpreting Charter rights in light of the goals of Article 3(2) is clearly that it not only comprises questions of vertical integration (top-down; bottom-up), but also includes the horizontal integration of the legal orders of the Member States and the delusion of responsibilities resulting from it, including mutual recognition. In a system based on the indirect enforcement of EU law and loyal cooperation, this is a crucial point. Arguably, it is also in line with the '*effet utile* approach' of the Luxembourg Court or the 'living instrument approach' of the Strasbourg Court. Fundamental rights need to be adaptable to changing circumstances and must be interpreted in light of the goals they aim to achieve, i.e., the protection of the individual against all *arbitrary* governmental power, irrespective of the national or European source of these powers, or the type of power (executive, judicial or legislative).

However, simultaneously there is a considerable number of weighty counterarguments for constructing these redefined guarantees as 'court-enforceable' (or: directly applicable) rights. At least three interrelated arguments should be mentioned:

1. *What is the scope of the institutional competences of the European Union?*⁹² A first objection is that the scope of the institutional competences of the European Union may not be as evident as suggested here. It is one thing to assess the legality of a specific legislative measure in light of those competences, but quite another to determine the scope of the latter *in abstracto*. The European Union does not have the *Kompetenz-Kompetenz*. Criminal justice is still the domain of the Member States.⁹³ The policy area called the AFSJ does not deal with forum choice as such. Instead, it contains a series of provisions on interrelated issues, such as preventing and solving conflicts of jurisdiction, mutual recognition, the harmonisation of certain types of substantive criminal law and parts of criminal procedure, Eurojust and the EPPO. The precise scope of the powers of the European Union depends on the complex interplay between

89 Cf. M. Luchtman, 'Transnational law enforcement in the European Union and the *ne bis in idem* principle', 2011 *Review of European Administrative Law*, no. 2, pp. 15-17, 20-22.

90 Cf. the reverse situation in ECJ 21 September 1999, Case C-378/97, *Wijzenbeek*, [1999] ECR I-6207, Paras. 40, 44, where the Court refused to disconnect free movement rights from accompanying legislative measures.

91 In a similar fashion, AG Sharpston in her opinion to ECJ 8 March 2011, Case C-34/09, *Ruiz Zambrano*, Opinion, Paras. 166-170; see also Muir & Van der Mei, *supra* note 18, pp. 135-138.

92 On the phenomenon of competence creep and its problems, see S. Prechal, 'Competence creep and general principles of law', 2010 *Review of European Administrative Law*, no. 1, pp. 5-22.

93 ECJ 18 April 2011, Case C-61/11 PPU, *Hassen El Dridi*, Para. 53.

these provisions, which, incidentally, also has to take into account another principle of constitutional importance: the principle of subsidiarity. By its very definition, this seems to be a task for the European legislator, not the judiciary.

2. *Gradual integration.* Europeanisation is a gradual process, not one that is superimposed on the Member States with a ‘big bang’. There are ample references in EU law that confirm this, for instance the Preamble to the Charter (‘ever closer union’). Interpreting the redefined Charter rights as enforceable rights could lead to negative or positive conflicts of jurisdiction without there being a legislative framework in place to deal with them. Obviously, there is a real risk of ‘implosion’: guaranteeing rights in these circumstances can harm the common good and, ultimately, European citizens too. It could conflict with the duties resting upon states (and the European Union?) to protect their citizens against violations of their human rights. This stresses the need for gradual integration, in which Charter rights gradually adapt to legislative developments and thus may prevent the legislator (and other actors) from moving backwards, but do not push any of those actors forward.

3. *Methodological considerations.* We also have to take account of what may be called methodological considerations.⁹⁴ First and foremost, there is uncertainty as to a series of questions with respect to the legality principle in the internal legal orders. For instance, we do not know what the Strasbourg Court thinks of the relationship between the laws on jurisdiction and the substantive legality principle of Article 7 ECHR (or, for that matter, Article 49 CFR). Is that principle directly applicable to jurisdictional rules? Or does it merely cast its shadow? Alternatively, are jurisdictional rules a matter for procedural criminal law? What does this mean in terms of their accessibility and foreseeability?

It may well be that the uncertainty surrounding the conceptual scope of these guarantees in the national context alone will *a fortiori* hamper their application in transnational constellations. Member States may disagree on their scope and there is as yet no sign of convergence, for instance through the case law of the Strasbourg or Luxembourg Courts. Indeed, one could then conclude that the fundamental rights discussed here are simply not designed for transnational application, and therefore need positive confirmation by the legislator to confirm that application.

The foregoing arguments reveal two problems: first, there is the problem with respect to the conceptual scope of the guarantees, particularly as far as Article 49 CFR is concerned; second, there is the issue of enforceability. With regard to the first problem, indeed, rules on jurisdiction and the substantive legality principle do not seem to go well together.⁹⁵ Still, the scope of a Member State’s *jurisdiction to prescribe* may be fully unknown to the European citizen at the time of action and, as a consequence, so too will the joint consequences his actions may entail. Although this situation in my opinion is certainly capable of producing arbitrary results from the perspective of the European citizen, it is doubtful whether it is covered by existing ‘hard law’ fundamental rights guarantees.

With respect to Articles 47 CFR, the problem is somewhat different in my opinion. In light of its *rationes*, there is nothing that prevents these guarantees from being applied in a horizontal, transnational context. Yet the aforementioned arguments do prevent these guarantees from being ‘court enforceable’, directly applicable safeguards where legislation is absent, even though this may cause problems with respect to the foreseeability of the *jurisdiction to adjudicate* and *enforce* of the Member States involved.

This finding does not however mean that these guarantees are not relevant to the European legislator in another way. Charter rights also have a guiding function; they should influence the direction of the EU’s criminal justice policies.⁹⁶ The interpretation of these guarantees in light of the goal of Article 3(2) TEU then means that the legislator is obliged by the Treaties to take into account in its legislative agenda and legislative proposals all the interests concerned (those of the Member States, the EU and EU citizens)

94 See also T.P. Marguery, ‘The protection of fundamental rights in European criminal law after Lisbon: What role for the Charter of Fundamental Rights?’, 2012 *European Law Review*, no. 4, p. 449, who discusses the relevance of Art. 52(5) Charter, which differentiates between rights and principles.

95 See Section 4.1.

96 Gless & Vervaele, *supra* note 1, speak of ‘aspirational principles’; see also Lagodny, *supra* note 15, pp. 62 et seq., with respect to German law.

and, when doing so, must reconcile these interests to the extent that the adverse consequences from forum choice – in particular: the double burden and problems related to the accessibility and foreseeability of extraterritorial jurisdiction to prescribe, enforce and adjudicate – are mitigated in full, or – and only where the latter is not possible – to the largest extent possible. For that, it should use the full potential of the powers granted to it by the Treaties. What this means for choice of forum is discussed in the next section.

6. The EU framework for choice of forum *de lege ferenda* – Recommendations⁹⁷

In this section, a general outline for a model on forum choice is presented. I will introduce its different elements by pointing first to its underlying general observations and consequently to the different elements of the proposal with respect to its impact on the jurisdiction to enforce, investigate and adjudicate.

6.1. General observations

The specific recommendations of Sub-sections 6.2-6.4 are based on the following general observations:

1. *The need for a horizontal statutory framework at the European level.* Choice of forum is a matter that affects all areas of crime, as well as all forms of interstate cooperation. In its 2000 Communication on mutual recognition, the Commission already envisaged that positive conflicts of jurisdiction could harm the operation of mutual recognition. To that, I would like to add that these instruments serve as their mutual alternatives. Prosecutors therefore usually have the choice between, for instance, extradition or transfer of proceedings. This harms the position of the individual, because safeguards and procedures can be played off against each other.

Efforts to coordinate positive and negative conflicts of jurisdiction are limited mostly to *ne bis in idem* situations, as well as serious cross-border crime. That means that in all other cases where EU citizens are 'producing internationally, working internationally, loving internationally, marrying internationally, living, travelling, consuming and cooking internationally',⁹⁸ problems of foreseeability and double burdens remain unsolved. They are considered a matter for national law (cf. Article 51(1) CFR). This fails to do justice to the horizontal aspects of Europeanisation. The goal of Article 3(2) TEU offers *all* citizens an area of freedom, security and justice.

Choice of forum should therefore be dealt with in a horizontal regulation, taking priority over all other forms of international cooperation, applicable to all sorts of crime, both inside and outside the premises of Eurojust,⁹⁹ and with a broader scope than *ne bis in idem* situations. It should also include forum choice in cases involving multiple defendants and multiple offences. Existing regulations on cooperation, as well as the competences of Eurojust, should be adapted to this regulation. Deviations are possible where the circumstances so require, for instance in the case of the establishment of the European prosecutor.¹⁰⁰

2. *Choice of forum in an integrated legal order.* Choice of forum takes place within a legal and political entity, where the European Union and its Member States 'share' territory, citizens and national *ius puniendi*. National criminal justice systems need the EU to deal with problems that have become too big to solve individually; the EU needs national criminal justice systems to achieve its goals. Unlike the United States, there is no doctrine of double sovereignty, nor can we say that there is one single legal order. The nation state plays an essential role in the EU system of indirect enforcement, but must cooperate loyally with the EU and other states. Mutual differences and conflicts of jurisdiction will always exist in such a system.

97 See also Sinn (ed.), supra note 26, pp. 597-616; Biehler et al. (eds.), supra note 26; Schünemann (ed.), supra note 69; VanderBeken et al., supra note 66; Lagodny, supra note 15.

98 Supra note 35.

99 Cf. H.H. Herrfeld, 'Die Rolle von Eurojust bei der Beilegung von Jurisdiktionskonflikten', in Sinn (ed.), supra note 26, p. 159.

100 See also J. Vervaele, 'European Territoriality and Jurisdiction: the Protection of the EU's Financial Interests in Its Horizontal and Vertical (EPPO) Dimension', in Luchtman (ed.), supra note 2, and the relevant provisions in the Model rules for the procedure of the EPPO, <<http://www.eppo-project.eu/>>, in particular rule 64.

Their inevitability does not mean that these problems do not deserve attention. In line with the principle of loyal cooperation, choice of forum presupposes a strong network approach, a further strengthening of European institutions and an effective system for sharing information (where necessary in addition to existing arrangements). However, it seems to me that having it both ways is not possible: where mutual cooperation and coordination is fostered and strongly stimulated, any national *Alleingang* or failed coordination should not come at the expense of the interests of the European Union or the European citizen.¹⁰¹

The interests of the European citizen should be protected in particular against the coordinated or uncoordinated efforts of the European Member States to fight crime where they produce arbitrary interferences with that citizen's legal position vis-à-vis those states. The term 'arbitrary' thereby refers to its meaning under both substantive, as well as procedural law. Any system for forum choice should preferably allow citizens to assess the full scope of the potential burden placed on them by the joint Member States and ultimately achieve the elimination of that burden,¹⁰² as well as excluding the possibility of any actor being able to supersede its own interests above the proper administration of justice. I propose to approach this problem like a twofold test of proportionality: the longer multiple prosecutions run in parallel (or even consecutively), the greater the need for their justification;¹⁰³ and the same goes for the burden put on the European citizen by a legal system other than the one he has subjected himself to.

3. *A European system of forum choice with respect to the jurisdiction to enforce and adjudicate.* Preference should be given to a European system that regulates forum choice by coordinating the Member States' jurisdiction to enforce and adjudicate, rather than their jurisdiction to prescribe.¹⁰⁴ That system should aim to ensure the proper administration of justice in the European area, by assigning the power to investigate, prosecute and try offences to a particular Member State (or Member States), while equally preventing other states from exercising their powers *after* the forum choice.

It is highly doubtful whether any set of predetermined criteria or any ranking with respect to jurisdiction (for instance, priority for the territoriality principle) or the proper administration of justice (for instance, the availability of evidence or the suspect) will be able to achieve reasonable results *per se*. Without a sufficiently strong common frame of reference on a whole range of issues of both substantive criminal law and procedure (and thus interference with national criminal law),¹⁰⁵ the integrity of any statutory criterion (or set of criteria) is easily put into question in a specific case.¹⁰⁶ Such a system will therefore need considerable room for deviations, which would in turn further affect the integrity and validity of what is then nothing more than a statutory *assumption*. Such a frame of reference is developing only gradually (and is therefore not in place at this time) and has to take into account the limits of the institutional powers of the European Union to deal with criminal law in general. What is more is that even sophisticated systems like the Swiss are still in need of deviations from statutory criteria, although substantive criminal law and procedure are fully harmonised.

Instead, it is proposed here to force Member States to coordinate their efforts, thus emphasising their joint responsibility for law enforcement in the European Union, and to take into account all interests involved.¹⁰⁷ That system does not designate *ex ante* the 'best placed' Member State by fixed statutory criteria, but instead aims to achieve that:

101 Cf. Luchtman, *supra* note 89, pp. 18-20.

102 Cf. the Green Paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings, COM(2005) 696, pp. 2, 7; Lagodny, *supra* note 15.

103 Cf. Sinn (ed.), *supra* note 26, pp. 598, 600; Lagodny, *supra* note 15, pp. 99 et seq.; Schünemann (ed.), *supra* note 69, pp. 5 et seq., referring to a concept of *transnationale Verfahrenskonzentration*.

104 Cf. Herrfeld, *supra* note 73, pp. 192-194.

105 One can think of questions related to preparation and attempt, *concursum idealis* and *realis*, complicity, et cetera; see Luchtman, *supra* note 74, p. 100.

106 To that extent, I agree with Schünemann (ed.), *supra* note 69, p. 107. That proposal, too, admits that any statutory system will continue to need room for deviations; see Art. 2(3) and the explanations thereon, p. 8.

107 Cf. C. Deboysier, 'Eurojust's Role in the Matter of Choice of Forum', in Luchtman (ed.), *supra* note 2, pp. 107-108; Herrfeld, *supra* note 99, pp. 147-148; V. Mitsilegas, *EU criminal law*, 2009, pp. 155-156.

- a) Member States are, *in principle*, prevented from commencing prosecution in cases where the actions of the individual did not constitute an offence in the *state of stay* (Section 6.2, no. 2, *infra*);¹⁰⁸
- b) Member States concentrate proceedings for the same acts in one state, at the latest at the start of the trial, applying the laws and procedures of that state (Section 6.4, no. 2, *infra*);
- c) multiple proceedings for different acts against the same offender are preferably concentrated in one state, also under the laws and procedures of that state (*ibidem*); and
- d) Member States find the *best* place for prosecution in light of all the parameters defined by the legislator (*ibidem*).

4. *The position of the European institutions.* In addition to European statutory regulations, forum choices require a role for European institutions, too. Although forum choice as such remains a matter for the national authorities (within the framework set by the European Union), conflicts of jurisdiction need to be solved. Eurojust should be given the task of designating the competent Member State(s), when so asked by prosecuting authorities, the defendant or European institutions. That also means that its powers *ratione materiae* have to be widened and that its political and judicial accountability with respect to its operational activities and policies becomes a bigger issue of concern than it is now.

In those instances where Eurojust has taken the decision on forum choice, the question arises as to who should supervise those decisions. It is at present uncertain whether EU courts are competent to exert control over (the legality and reasonableness of) those types of decisions. The key issue will be whether such a decision produces legal effects vis-à-vis third parties, i.e., whether it is of direct and individual concern to them (cf. Article 263(1 and 4) TFEU). That *could* be the case where Eurojust is given the power to *force* Member States to initiate investigations, in order to prevent negative conflicts of jurisdiction.¹⁰⁹ In those instances, forum choices can arguably be said to have binding, irrevocable consequences, because they determine the competent legal order, as well as the scope of rights and duties of the actors involved.¹¹⁰

Should decisions by Eurojust not produce legal effects as meant in Article 263 TFEU, then this is because the legal consequences of that decision are technically still determined by national law and not by European bodies.¹¹¹ An important argument for this is that, ultimately, it will be the national authorities that will decide on prosecution (Article 85 (1)(a) TFEU).¹¹² In those cases, the relationship between the national courts and Eurojust may become a concern. National courts may then be asked by the defendant to assess whether they are really best placed for trial.¹¹³ The obvious question is how this test relates to the decision of Eurojust, which is a European agency.¹¹⁴ In my opinion, any decision of a national court that it is not best placed does not by itself affect the decision of Eurojust. That system would therefore not contravene the institutional set-up of the European Union. Yet, obviously, as soon as the national court of the forum thinks that it is not best placed, it has to refer the case back to Eurojust for a new decision.

The downfalls of the latter scenario are clear, but also the direct result of the institutional design of the European Union, which cannot be easily altered. Theoretically, the situation could occur where all involved national courts think another of them is best placed for trial. Negative conflicts and lasting

108 The state of stay means the state where the person was present at the time of the offence.

109 Cf. Herrnfeld, *supra* note 73, p. 203; Sinn (ed.), *supra* note 26, pp. 613-614. The situation in criminal law seems to differ from competition law to the extent that in competition law, *supra* note 60, case allocation takes place in a single European (albeit largely decentralised) system of competition law.

110 Lagodny, *supra* note 15, pp. 34-40, 64-100, has argued that the opening of a criminal investigation is in itself an interference with the constitutional rights of the person concerned, the *allgemeines Persönlichkeitsrecht* in particular. He limits his analysis, however, to German constitutional law and does not seek a common European standard in this regard; see however Inghelram, *supra* note 60, pp. 208-214.

111 Incidentally, Art. 263(5) TFEU seems to be a basis for a further reduction of judicial review in the case of agencies. Cf. J. Schwarze, 'Artikel 231 EGV', in J. Schwarze et al. (eds.), *EU-Kommentar*, 2009, p. 1794.

112 Cf. the system of the 1972 Convention on transfers of proceedings, which does not oblige the requested state to take the case to trial. This is why the right of prosecution and of enforcement sometimes reverts to the requesting state; see, in particular, Art. 21(2)(d) of that Convention.

113 Obviously, courts and authorities from other Member States, cooperating loyally, then have the task of providing the relevant information, when so asked.

114 Cf. Inghelram, *supra* note 60, pp. 226-230, 265-267.

double burdens for the defendant would then be the result. Forum choices under court supervision at the European level are therefore to be preferred above the national level.¹¹⁵

Finally, it should be emphasised that it is not proposed here to assign Eurojust the task of making forum choices as such. Eurojust should deal with *conflicts* of jurisdiction.¹¹⁶ Not all forum choices will therefore be taken by European institutions. Still, they should be subject to court supervision. It seems to me that where forum choices are made in agreement between national authorities, the national court of the trial state must have the power to test if it is best placed for trial, on its own motion or at the request of the defendant.¹¹⁷ Courts, European institutions and authorities from other Member States, cooperating loyally, have the task of providing the relevant information. As soon as the designated trial court considers another state to be best placed, it has to refer the case to Eurojust for a decision on the matter.

With respect to the jurisdiction to prescribe, adjudicate and enforce, that system would bring along a series of consequences which are presented in the following sections.

6.2. *Jurisdiction to prescribe*

1. The system proposed here leaves the jurisdiction to prescribe relatively unaffected.¹¹⁸ This is not only because the substantive legality principle is insufficiently authoritative with respect to criminal law jurisdiction, but also because the problems with respect to the foreseeability of the double burden are almost mitigated in full by the measures that tackle the double burden as such. Of course, there may still be reason for the European Union to intervene in the Member States' jurisdiction to prescribe, including jurisdiction. In order to prevent negative conflicts of jurisdiction, the EU may for instance set further jurisdictional standards for Member States on the basis of Article 83 or perhaps Article 325 TFEU.

2. There is one issue that is so closely related to questions of national criminal policy that I choose to discuss it in this section. With criminal law still being a matter for the Member States, conflicts of prescriptive jurisdiction in a range of areas – euthanasia, (soft) drugs, et cetera – remain a real possibility.¹¹⁹ Member States still disagree thoroughly on the criminality of such behaviour, but they have also 'agreed to disagree' and to mutually recognise these differences. Present mechanisms and studies for dealing with conflicts tend to overlook this problem. Those mechanisms therefore accept that the 'most repressive system' is able to continue its proceedings. Other Member States are at most discharged, but not prohibited, from their duty to cooperate under mutual recognition schemes. Yet the double burden on the European citizen remains.

I propose to 'recalibrate' the notion of personal autonomy in light of the goals of Article 3(2) TEU. This means that EU Member States need to accept that EU citizens, in principle, determine autonomously which legal order is their order of reference (by their movement or non-movement). In order to assess the *criminality* of their actions, the laws of the legal order of stay are decisive. That does not mean that, in the absence of an offence in the state of stay, other Member States are precluded from establishing (extraterritorial) prescriptive jurisdiction; rather, it means that – as far as the AFSJ is concerned – they cannot prosecute and try those offences (not even in cases where the alleged offender shows up on their territory voluntarily) or use mutual recognition instruments for those purposes.¹²⁰

Obviously, there is a danger of the abuse of free movement, particularly where a particular Member State is chosen as the centre of activity, but the (foreseeable and harmful) consequences of those activities are felt mostly or exclusively elsewhere. The restriction on the Member States to investigate, prosecute

115 This, incidentally, seems to be the *communis opinio*; see inter alia Sinn (ed.), supra note 26; Biehler et al. (eds.), supra note 26; Schünemann (ed.), supra note 69; VanderBeken et al., supra note 66.

116 Cf. Herrinfeld, supra note 99, p. 160.

117 Other ideas, like supervision by a network of national courts (or perhaps even Ombudsmen) are not mature enough yet; on that, see Harlow & Rawlings, supra note 85, pp. 542-562.

118 Cf. Panzavolta, supra note 57, pp. 162-164.

119 See also C. Ryngaert, *Jurisdiction in International Law*, 2008, pp. 160 et seq., with respect to international law.

120 See also the discussion by H. Fuchs, 'Zuständigkeitsordnung und materielles Strafrecht', of the model proposed in Schünemann (ed.), supra note 69, pp. 113-114.

and try offences is therefore lifted where an abuse of free movement is established. The final word on this should be in the hands of the national court of adjudication (which of course can, and sometimes must, pose preliminary questions to the Luxembourg Court).

6.3. Jurisdiction to enforce

1. Jurisdiction to enforce and the investigative stage. The competences and powers of national authorities remain dependent on the jurisdiction and criminality of behaviour under the laws of their state (except for their activities under international/European cooperation schemes). Conducting acts of investigation in another Member State without an explicit basis remains unlawful.

Parallel proceedings in the early stages of the proceedings should not be prevented too readily. They emphasise the joint responsibility of all relevant authorities to fight crime. During the investigative phase, efforts should not only be geared towards finding the truth, but also towards finding the best forum for trial. Although authorities should strive for a forum choice as soon as possible, limitations during the investigative stage, therefore, cannot be too strict.

2. Transnational cooperation and forum choice. Instruments for cooperation should facilitate the process of finding the best forum, not vice versa.¹²¹ Instead of constituting limitations to a forum choice, the relevant European instruments on mutual recognition should be revised in light of their capabilities to facilitate the needs of the best forum. Grounds for refusal that allow for the preferential treatment of national interests above other interests are unacceptable.

3. Role and position of Eurojust. Should conflicts between authorities occur, Eurojust may be asked to intervene in the early stages of the investigation by any of those authorities.

European institutions – the Commission in particular – should have the right to ask Eurojust to initiate proceedings or to intervene in pending procedures in order to ensure that EU interests are taken care of. The central position Eurojust thus achieves in the development of an ‘EU prosecutorial policy’ allows it to integrate the concerns of European institutions into the overall picture.¹²² Eurojust should therefore be given the power to take over the initiative, as well as to order national authorities to initiate the necessary investigations (and, possibly, to ask others to refrain from doing so). Although the final decision remains with Eurojust, it should respond to such a request by European institutions in due time.

4. The position of the defendant. During the investigative stage, the defendant may be faced with a double burden. Although it is not generally unreasonable to accept this in the early stages, efforts should ultimately be geared towards designating the best forum for trial. In that regard, supervision should not be completely given away during the investigative stage. Particularly, three types of cases call for remedies:

- a. Ne bis in idem situations.* The defendant must have a legal remedy available at the national level to address a clear *bis in idem* situation, as defined by Article 50 CFR.
- b. Length of the investigations.* The efforts of the investigative authorities should be geared toward concentrating proceedings in one state. The situation may occur where investigations last beyond what may be deemed reasonable. In those situations, the defendant should be able to ask Eurojust to make a decision on the best forum (and to force other states to refrain from further actions).¹²³ The case law of the European Court of Human Rights with respect to the right to be tried within a reasonable time (Articles 5(3) and 6 ECHR) could be used as an inspiration in that regard. Eurojust is under a duty to respond to such a request.
- c. Prima facie cases of abuse.* Where forum choices will clearly lead to arbitrary results, i.e. where it is abundantly clear that authorities continue parallel investigations without there being a need to do so or that forum choices are made for other goals than mentioned in the next section, the defendant may

121 Cf. Lagodny, *supra* note 15, pp. 112-113.

122 On this, see also Groenleer, *supra* note 83, pp. 318-319.

123 In addition, that agency could also be given the power to dismiss the joint investigations altogether.

ask Eurojust to designate the best forum, and to stop parallel investigations by other states. Eurojust is under a duty to respond.

6.4. Jurisdiction to adjudicate

1. *Jurisdiction to adjudicate and the stage of prosecution and trial.* Like in the investigative stage, a Member State's prescriptive jurisdiction will continue to determine the scope of its jurisdiction to adjudicate. Yet with the investigation concluded and the joint prosecution authorities having gathered enough evidence to bring the case to trial and to designate the best forum for prosecution, the interests of the defendant require that a forum choice be made, at the latest during the stage of the formal indictment.

2. *Substantive criteria: both rule and principle based.*¹²⁴ Forum choices should always lead to a Member State having jurisdiction to deal with the offence and should be guided by the following two rules:

- a. a single competent Member State must be designated in case of simultaneous investigations for the same acts (as defined by the case law of the Court of Justice on Article 54 CISA);¹²⁵
- b. a single competent Member State must be designated in cases of simultaneous investigations for different acts by the same defendant, unless deviations from this rule are necessary in light of the legitimate interests of the Member States involved or of the European Union.

These rules do not yet determine the competent forum with sufficient precision. They reduce the double burden on the defendant beyond the scope of traditional *ne bis in idem* guarantees, but will not always prevent forum shopping by the authorities (or the defendant). That is why they need to be accompanied by a set of principle-based criteria in order to guarantee that the outcome of the decision-making process leads to the *best forum* available (among other *competent* forums). This, too, essentially boils down to a test of reasonableness. The Swiss example provides an excellent point of reference in this respect. Forum choices must in any case take account of:

- i. the interests of the place where most of the damaging effects of criminal conduct were felt (including the interests of the victim(s));
- ii. those of the suspect and his counsel to effectively defend himself (including language problems he may experience);
- iii. those of the courts, which must be put in the position to obtain, as far as possible, a complete overview of both the person of the accused and his actions; and
- iv. those of the speedy and efficient administration of justice.¹²⁶

These 'principle-based' criteria apply to both types of legal rules introduced above. They will force the authorities, when so asked, to justify their decision in light of other available options. Obviously, the problems related to multiple prosecutions in different Member States for different offences by the same alleged offender need to be balanced against the other principles at stake and justified in light of the absence of reasonable alternatives that do justice to these principles too.

3. *Court supervision.* The aforementioned criteria (rules and principles) put the *burden of proof* on the authorities, to the extent that these authorities – when asked by a relevant national court, Eurojust or possibly the Court of Justice – will have to show how these criteria have been met and why alternative choices were rejected. The presence of an accountability forum is vital for the operation of the system and the protection of the interests of the defendant in particular.¹²⁷ It is the task of the national prosecutors

¹²⁴ See, however, also the reservations with respect to such a list of criteria by Herrfeld, *supra* note 73, pp. 192-194.

¹²⁵ The question arises whether deviations from this system are necessary for the protection of vital interests of Member States. That could mean that, *in addition to* the system described here, another state would have the power to investigate, prosecute and try offences. I prefer the solution proposed by Sinn et al. to integrate vital state interests in the system, *without* banning the prohibition on the double burden; Sinn (ed.), *supra* note 26, pp. 604, 611. Obviously, there is a need for control by the Court of Justice, which may be asked to provide guidance on such a provision.

¹²⁶ *Supra* Section 4.2. Interests related to the re-integration of the convicted offender could play a role, yet for that the European Union has set in place a new system of mutual recognition in the stage of the execution of sanctions.

¹²⁷ It is thinkable to grant the victim a similar position like the defendant. I will leave that issue open here.

(or Eurojust) to search for the best forum, during the early stages of the investigation, and to justify their decision, when asked.

The task of accountability forums is to test the reasonableness of that decision; they should not 'second-guess' the forum choice, nor prelude to the substantive merits of the case.¹²⁸ Whether this will be the national court or the Court of Justice depends on the actor involved (Eurojust or not) and the scope of Eurojust's powers. The position of the courts can be complicated. One may wonder whether it will always be possible to separate forum choice issues from the merits of a case.¹²⁹ In my opinion, we have to take into account that the courts will be asked to perform this task only at the end of the investigation. They can rely on the case file of the authorities and the submissions of the defendant. The standard of a test of reasonableness emphasises the administrative law-like character of the test. Should a court conclude that it is not the best forum, it has to refer the case (back) to Eurojust.

7. Final observations

The Treaty of Lisbon formulates ambitious goals for the European Union. Among other things, the EU shall offer its citizens an area of freedom, security and justice, in which the free movement of citizens is guaranteed in combination with appropriate measures with respect to crime control (Article 3(2) TEU). This wording – which explicitly establishes a relationship between citizenship, free movement and a common area of justice – raises certain expectations. Still, the promotion of free movement introduces conflicts of jurisdiction. EU law encourages those conflicts further by obliging Member States to establish extraterritorial jurisdiction, in order to prevent negative conflicts. These types of conflict harm the interests of the European Union, as well as the position of the EU citizen.

This contribution analysed this problem in light of the legality principle, a cornerstone of every criminal law system. Its central argument was that with the transfer of powers from the national to the European level and the increased horizontal intertwinement of national criminal justice systems, it is also increasingly difficult to protect EU citizens against *arbitrary* investigation, prosecution, conviction and punishment in Europe's area of freedom, security and justice. Unilateral action by individual states easily hampers the goal put forward in Article 3(2) TEU. I therefore suggested to interpret the Charter rights in light of this goal, in order to activate the concept of European citizenship. A redefined notion of autonomy for European citizens means that it is in principle up to every citizen to subject himself to the legal order of his own choice, unless the common good limits this position. Those limitations, however, will have to pass the thresholds of the redefined legality principle. That will force the European Union to lay out the general outline of a system for choice of forum. This is how free movement and political representation at European level connect.

The question is to which extent this provides us with a court-enforceable yardstick for forum choices. I think there is reason for serious doubt in this respect.¹³⁰ Against this background, I would like to make a few final observations on the present legislative agenda of the European Union. It was noted above that one sometimes cannot escape the impression that citizens are offered a fair amount of fine things by the EU, without being in a position to decide over them autonomously.¹³¹ Balibar has discussed what could be the added value of democracy at the European level, in addition to the national level. He proposes that the EU should identify 'worksites of democracy' in order to add substance to abstract deliberations on European democracy in general.¹³² One of those worksites, according to him, is the 'question of justice'.¹³³ To that extent, the efforts of the European Union in the field of procedural safeguards are certainly a true test case.¹³⁴

128 There is one exception to this test of reasonableness. Where a situation as in Section 6.2, under 2, occurs (abuse of free movement), courts should exercise a full review.

129 Cf. ECJ 11 November 1981, Case 60/81, *IBM v Commission*, [1981] ECR 2639, Para. 20.

130 Section 5.

131 *Supra* note 87.

132 Balibar, *supra* note 36, p. 162.

133 Balibar, *supra* note 36, p. 162, p. 173: '[S]ince Hegel we know or ought to know that one of the symbolic keys of belonging to the community is the possibility of being judged as a criminal even while remaining a citizen, or the possibility for the criminal to recognize himself in the instance that judges him.'

134 *Supra* note 19.

This is not the place to pass judgment on those initiatives. Yet I do wonder whether the focus of the EU should not be wider than the current ambitions of the Stockholm Programme. That programme is almost silent on choice of forum. In Section 6 of this contribution, I sketched the general outline of a system that, in my opinion, would meet the standards of the recalibrated Charter rights. Yet, in the final analysis, the question remains who is to take the next step in this dossier, now that the European legislator remains silent, at least for the time being.¹³⁵ The main point for now is that the European legislator cannot discharge itself from the tasks and duties introduced by the Treaties. That legislator should consider itself obliged to reconcile all interests involved to the extent that the adverse consequences of forum choices are mitigated in full, or – and only where the latter is not possible – to the largest extent possible. Charter rights that are interpreted in light of Article 3(2) TEU offer an important source of inspiration and guidance in this respect, which also goes far beyond, for instance, the ambitions of the European Commission put forward in its Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union.¹³⁶ It is up to all actors involved in European criminal justice to remind the European and national legislators that more work is to be done.

I wish to make a few final observations with respect to the situation outside the EU. The concept of European citizenship is, I believe, an essential building block for a transnational application of fundamental rights in the EU. We should however note that using the concept of citizenship in this way is both a step forward as well as a retrograde step. It is a step forward because the redefined notion of autonomy will also protect the EU citizen in transnational cases. Yet it is also a retrograde step, because it leans heavily on the notion of citizenship, thereby excluding third country nationals. By contrast, the European Convention on Human Rights offers protection to all those present on the territory of the Member States (Article 1 ECHR).¹³⁷ There is no corresponding provision (except perhaps Articles 45 and 50 CFR) in Union law. For that, we will need to change the Treaties.

Outside the specific context of the European Union, the question therefore remains what should be the theoretical basis for introducing the individual as a full actor on the transnational level. There are a few paths worth exploring. Existing human rights treaties offer the advantage of taking the individual, and not the citizen, as their *protégée*, but their territorial and functional scope is, in principle, limited. We will have to see in what direction developments go.¹³⁸ Another path, i.e., the concept of cosmopolitanism, is even more controversial in the context of public international law than it is in the European Union.¹³⁹ It might be useful as a theoretical concept and offer a new narrative, but it will ultimately need support by a legal framework. Yet the third option, national citizenship, has certain inherent pitfalls too. The ban on the extradition of nationals, common to many national constitutions, will for instance offer national citizens protection in cases of transnational criminal justice, but it will occasionally also block a truly transnational approach towards a proper administration of justice. I doubt whether it will be possible to grant rights to the individual without facing these questions too. In order to achieve that, Member States will have to reach consensus on a series of incredibly difficult questions, including the design of a mechanism that ensures mutual respect for the agreements they have made. There certainly are best practices for this, also in the context of public international law.¹⁴⁰ However, they are rare and show how cumbersome the path is. This is precisely why the European Union is so interesting as an example. It is one of the few entities that has expressly formulated as its ambition to address issues like these. Despite of all its problems and pitfalls, we might indeed say that it is a unique cosmopolitan project. ¶

135 Obviously, proposals on the EPPO could trigger a debate. If so, it is to be hoped that it is not limited to the scope of Art. 86 TFEU.

136 COM(2010) 573 final.

137 To that extent, that Convention might also be qualified as ‘cosmopolitan’, cf. A. Stone Sweet, ‘A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe’, 2012 *Global Constitutionalism*, no. 1, pp. 53-90.

138 We might point to ECtHR 7 January 2010, *Rantsev v Russia and Cyprus*, appl. no. 25965/04, Para. 289, in which the Strasbourg Court, very cautiously, seems to expand the concept of ‘positive obligations’ to cases of international cooperation (in cases of human trafficking). That certainly is a new development and one of particular interest to us.

139 See for instance the debate between Benhabib and Waldron in Benhabib, *supra* note 7.

140 See for instance the treaties of the Council of Europe on the recognition of the validity of judgments in criminal matters, including *ne bis in idem* rules; on that see also Vervaele, *supra* note 5 (who also points out that the scope of these treaties are often limited by declarations, reservations, their optional wording, etc.).