Michiel Luchtman, 'Choice of forum and the prosecution of cross-border crime in the European Union – What role for the legality principle?', in M. Luchtman (ed.), *Choice of forum in cooperation against EU financial crime – Freedom, security and justice and the protection of specific EU-interests*, The Hague: Eleven 2013, p. 3 – 61.

Choice of forum and the prosecution of cross-border crime in the European Union – What role for the legality principle?

Michiel Luchtman[*]

1 Introduction

Choice of forum is a term originating from international private law. It is now a current term in criminal law too. It centres around the question of which state should investigate, prosecute and try cases of cross-border crime, as well as which state should take responsibility for the execution of sanctions.[1] Choice of forum is becoming an area of particular concern to the European Union, which has dedicated itself to offering its citizens an area of freedom, security and justice (AFSJ) 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 (art. 3(2) TEU). Obviously, the process of integration within the framework of the European Union increasingly forces national authorities to cooperate, as well as to coordinate their efforts with respect to the fight against crime. The case law of the Court of Justice on the Articles 54-58 of the Convention implementing the Schengen Agreement (CISA) has shown that they may otherwise be confronted with unpleasant results. A prior conviction in another state could bar a second prosecution for the same acts somewhere else.

This research project, and the conference held in Utrecht in April 2012, were borne out of a certain amazement that the European Union, despite the clear and widely recognized problems related to forum choice,[2] is hesitant to deal with this topic comprehensively. Of course, explanations for that are easily found. Yet any answer that simply refers to 'politics' or 'sovereignty' ignores the fact that sometimes 'politics' or 'nation states' have to adhere to legal rules and principles too, particularly within the European Union.

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* The author wishes to thank dr. Hans-Holger Herrnfeld and professor John Vervaele for their comments on an earlier version of this article. Any remaining mistakes are of course entirely my own.

1 This project disregards the latter element.

2 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.

This contribution approaches choice of forum in light of the legality principle, which is a cornerstone of every EU Member State's criminal justice system.[3] It aims to offer a more-or-less comprehensive overview of the field of research, in order to be able to fully appreciate all the contributions to this book. It does so by taking a twofold approach: first, it uses the key concepts of the legality principle as an analytical framework for assessing the state of affairs in the European Union (section 4); second, it assesses whether the principle also provides a normative yardstick for the European legislator (section 5). Should the latter be the case, than that legislator would be forced to intervene in issues related to forum choice. In section 6, I will finally transpose the conclusions of my analyses into a general outline for a European system of forum choice.

Obviously, the legality principle is an extremely wide and variable concept. It may differ per Member State or EU policy area. I therefore choose to focus on two aspects of the principle, most closely related to forum choice in criminal matters, i.e., the principle of *nullum crimen, nulla poena sine lege* and the principle that all courts be established by law. I will also pay attention to the criminal law guarantee which is by far the most developed in the AFSJ: the *ne bis in idem*-principle of Articles 54-58 CISA. These principles are all embedded as legal guarantees in the European Convention on Human Rights (ECHR), including its 7th Protocol (P7 ECHR), and the Charter of Fundamental Rights of the European Union (CFR). A focus on these legal sources therefore ensures a common—albeit minimum—frame of reference with respect to the scope and meaning of the legality principle. Yet before I come to this, I will first introduce the general outline of the current EU system of forum choice (section 2), as well as the problems it poses, in particular for European citizens and the European Union (section 3).

One final remark remains. European citizenship is a key concept in this contribution. Although European citizens may both commit crimes, as well as be the victims of it, this contribution focuses mainly on the position of European citizens as suspects.

2 The EU framework for choice of forum *de lege lata*[4]

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) harmonisation of criminal law (art. 83 TFEU) and procedure (art. 82 TFEU) in order to create a level playing field; 2) institution building, in order to facilitate the EU system of indirect enforcement

3 For further explanations, see Section 3.1.

4 This section is based to a large extent on 'auto-plagiarism' from M. Luchtman, 'Principles of European criminal law: Jurisdiction, choice of forum, and the legality principle in the Area of Freedom, Security, and Justice', *European Review of Private Law* 2012, p. 358-361.

and loyal cooperation (and, possibly, to replace it in part by a system of direct enforcement – the European Public Prosecutor), as well as 3) increased transnational operational cooperation.

2.1 Harmonisation of substantive criminal law and jurisdiction[5]

The European Union has been quite active in the area of substantive criminal law. Many conventions and framework decisions that deal with particular forms of crime (PIF, counterfeiting, terrorism, *et cetera*) contain rules on the establishment of jurisdiction, including (a modest use of) extraterritorial jurisdiction.[6] The latter usually concerns the mandatory use of the active personality principle,[7] sometimes restricted by certain conditions, such as double criminality. This approach effectively leads to the creation of the legal basis for a network of law enforcement authorities in which the competences of those authorities overlap *ratione territoriae*, allowing them to effectively share responsibility for law enforcement in the European Union. Still, this approach did not lead to the frequent use of other principles of extraterritorial jurisdiction. On the contrary, that has been termed problematic on more than one occasion. In few – if any – cases do these instruments for instance oblige Member States to create jurisdiction on the basis of the passive personality principle, which is traditionally regarded as challenging due to the problems of foreseeablity it causes.[8] This is then left to national law.

There are indications that the latter is changing. Under 'Lisbon', the EU has been given wider powers to intervene in national criminal law, particularly in the area of serious, cross-border crime (cf. art. 83 TFEU). Recently, Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims was adopted.[9] This directive also contains provisions on jurisdiction. Article 10 (1) obliges the Member States to establish jurisdiction on the basis of the territoriality and active personality principles. But Member States must furthermore inform the Commission where they decide 'to establish further jurisdiction over the offences referred to in Articles 2 and 3 [the trafficking offences, *ML*] committed outside its territory, *inter alia*, where (a) the offence is committed against one of its nationals or a person who is an habitual resident in its territory, (...) or (c) the offender is an habitual resident in its territory' (art. 10(2) Directive). In other words, although the European legislator does not oblige Member States to use the passive personality principle, it

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5 On the relationship between choice of forum and jurisdiction, see also Böse in this book.

6 For overviews, see A. Klip, *European criminal law - An integrative approach,* Antwerp: Intersentia 2012, p. 191 *et seq*.; U. Sieber et al. (eds.), *Europäisches Strafrecht,* Baden-Baden: Nomos 2011, p. 281 *et seq*; S. Peers, *EU Justice and Home Affairs Law,* Oxford: Oxford University Press 2006, p. 456 *et seq*.

7 Cf. art. 11 of the proposed directive on the fight against fraud to the Union's financial interests by means of criminal law, COM(2012) 363.

8 Cf. Klip, supra note 6, p. 196.

9 Directive 2011/36/EU, OJ EU 2011 L 101/1.

certainly does not discourage it either. Moreover, it turns out that Member States are no longer *allowed* to require, *inter alia*, double criminality in relation to the active personality principle and that they *may* decide not to use that condition in relation to the principles, mentioned in article 10(2). This is possibly because trafficking is considered 'one of the most serious crimes worldwide, a gross violation of human rights, a modern form of slavery, and an extremely profitable business for organised crime.'[10] There can therefore be no misunderstanding as to its criminality.

Obviously, the main goal of this network approach is to prevent impunity. The competences of the Member States deliberately overlap, in order to prevent the suspect from fleeing to a safe haven and escaping justice. It is in line with this approach that national authorities are consequently under the obligation to enforce these European norms and, where necessary, to cooperate with each other and to coordinate their efforts.[11] Yet despite their existence, these obligations do not always produce an effective level of protection of the interests (or *Rechtsgüter*) that were defined at European level.[12] Rather, they stress the need for additional mechanisms, dealing with positive and negative conflicts of jurisdiction, as we will see in the following sections.

2.2 Institution building[13]

In an attempt to guide and coordinate the efforts of the Member States in their fight against crime, the European Union actively facilitates the creation and operation of network structures. Coordination and cooperation takes place on the basis of direct contacts between the competent authorities, in stead of through lengthy diplomatic channels. Yet the EU's efforts go further to the extent that it does not rely completely on the abilities of the Member States' authorities to cooperate in a horizontal, interstate setting. The European Union is increasingly monitoring those efforts (in order to develop new policies), and tries to ensure that national authorities not only focus on the national perspective to a case. Particularly OLAF, being a part of the European Commission, and Eurojust, being an EU agency, operate on a level that allows them to keep watch over the

10 COM(2010)95, p. 2.

11 Cf. art. 6 (2) of the 1995 PIF Convention: 'Where more than one Member State has jurisdiction and has the possibility of viable prosecution of an offence based on the same facts, the Member States involved shall cooperate in deciding which shall prosecute the offender or offenders with a view to centralizing the prosecution in a single Member State where possible.'

12 See, with respect to PIF, the Communication on the protection of the financial interests of the European Union by criminal law and by administrative investigations, COM(2011) 292; L. Kuhl, 'The initiative for a Directive on the protection of the EU financial interests by substantive criminal law', *Eucrim* 2012(2), p. 63.

13 See also the contributions in this book by Kuhl, Deboyser, Herrnfeld and Vervaele on the respective tasks and competences of OLAF, Eurojust and the EPPO.

bigger picture and to set their agenda's in light of the tasks assigned to them in relative autonomy.[14]

Simultaneously, OLAF and Eurojust face difficulties in performing these tasks. After having concluded its investigations, OLAF may transfer its reports to national authorities in order to take further actions. This is arguably, in itself, a forum choice where multiple states are competent.[15] Yet the national authorities are by no means obliged to take further action. That means that follow-ups to the reports are not guaranteed and negative conflicts of jurisdiction not always prevented.[16] In a similar fashion, Eurojust has proven to be a vital institution for coordinating forum choices, but it leans heavily on 'peer pressure'.[17] In the end, it is not able to force Member States to commence proceedings, to force others to refrain from doing so, or to start investigations itself (cf. art. 85 TFEU). To that extent, as is the case with OLAF too, the final say remains with the Member States authorities.

2.3 Choice of forum and transnational cooperation in the AFSJ[18]

The European Union is currently replacing the Council of Europe framework by instruments of European law that are adapted to the specifics of the AFSJ. Almost all forms of cooperation under international law now have European counterparts, with the transfer of proceedings as the important exception. The dominant principle is that of mutual recognition (cf. arts. 67(3) and 82 TFEU): where the authorities of a Member State issue a European warrant – for instance, an arrest warrant – the authorities of another Member State are obliged by law to execute it, without formalities or much further ado.[19]

Since the introduction of mutual recognition as the dominant concept for cooperation, the question has been whether recognition is possible without

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14 Cf. art. 5 of the amended proposal for the new OLAF-regulation, *Council document* 12735/12 ADD 1, where reference is made to investigation policy priorities. See also M. Groenleer, *The autonomy of European Union Agencies,* Delft: Eburon 2009, p. 318-319, with respect to Eurojust. Obviously, this also raises questions as to the accountability of these organisations.

15 On this, see also Kuhl in this book and S. Gleβ and H. Zeitler, 'Fair trial rights and the European Community's fight against fraud', *European Law Review* 2001, p. 225.

16 Art. 9(5a) of the amended proposal for the new OLAF-regulation, *Council document* 12735/12 ADD 1, obliges national authorities, when asked, to provide information on the follow-ups. See also the Addendum to "Final report on the fifth round of mutual evaluations: Summary of results of the fifth round of mutual evaluations, Brussels, 24 September 2012, *Council document* 12657/12 ADD 1 REV 1, p. 79-82.

17 Cf. Deboyser in this book; Herrnfeld, p. 147, 149, 155-156 in: A. Sinn (ed.), *Jurisdiktionskonflikte bei grenzüberschreidender Kriminalität – Ein Rechtsvergleich zum Internationalen Strafrecht,* Göttingen; Osnabrück: V&R unipress; Universitatsverlag Osnabrück 2012; V. Mitsilegas, *EU criminal law,* Oxford; Portland, Oregon: Hart 2009, p. 153-154; Groenleer, supra note 14, p. 319-320.

18 See also the contribution by Spencer in this book.

19 See, in extenso, J. Ouwerkerk, *Quid pro quo - A comparative law perspective on the mutual recognition of judicial decisions in criminal matters*, Cambridge; Antwerp; Portland: Intersentia 2011, in particular p. 45-80.

harmonising criminal law and procedure.[20] The ambition to facilitate interstate cooperation has been one of the main reasons for the EU's activities in the area of substantive criminal law, transnational crime in particular. But the EU is becoming increasingly active in the field of criminal procedure too (art. 82 TFEU). Ambitions are put forward in the Stockholm Programme,[21] in the Roadmap with a view to fostering the protection of suspected and accused persons in criminal proceedings[22] and in the Communication on Strengthening victims' rights in the EU.[23] This last document states that measures are needed that ensure that victims of crime are given non-discriminatory minimum rights across the EU, irrespective of their nationality or country of residence. This will not only facilitate free movement, but also enhance mutual recognition. Recent directives[24] and legislative proposals[25] therefore strive for the (minimum) harmonisation of areas of criminal procedure with a view to improving the position of the defendant and the victim.

By contrast, conflicts of jurisdiction do not seem to occupy a high position on the political agenda, apart from the debates on the reforms of OLAF and Eurojust (art. 85 TFEU) and the establishment of a European prosecution service (art. 86 TFEU). To a certain extent, this is surprising, because the European Commission already stressed in its 2000 Communication on Mutual Recognition of Final Decisions in Criminal Matters that, given the potential for jurisdictional conflicts, 'in the absence of a ranking of competent jurisdictions, all one could do would be to foresee a derogation from mutual recognition in cases where the recognising Member State has jurisdiction and does prosecute or had jurisdiction but decided not to take proceedings. This, however, appears like a serious undermining of the principle of mutual recognition.'[26]

Indeed, many instruments that implement the principle of mutual recognition allow for the refusal or postponement of European Warrants, as long as, *inter alia*, national investigations into the same or related offences are ongoing in the executing state. Not even Eurojust is currently in the position to settle conflicts in cases were Member States cannot reach an agreement.[27] In addition, the Framework Decision on the prevention of conflicts of jurisdiction in criminal proceedings only obliges Member States to search for 'effective solutions' in *ne*

20 Cf. Spencer in this book.
21 Cf. the 'Stockholm Programme – An open and secure Europe serving and protecting the citizens', Brussels, 2 December 2009, *Council Document* 17024/09.
22 *Council document* 11457/09, Brussels, 1 July 2009.
23 COM(2011) 274.
24 Cf. Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, OJ EU 2010 L 280/1.
25 Cf. the proposal for a Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM(2011) 326.
26 COM(2000) 495, p. 18.
27 Admittedly, peer pressure by Eurojust or its members will be an equally effective weapon in many cases.

bis in idem situations, without defining these solutions.[28] The proposal for (what was then still) a Framework Decision on the transfer of proceedings in criminal matters does seek to bring about binding legal consequences.[29] Its goal is 'to increase efficiency in criminal proceedings and to improve the proper administration of justice, including the legitimate interests of victims and suspected or accused persons, within the area of freedom, security and justice by establishing common rules facilitating the transfer of criminal proceedings between competent authorities of the Member States' (Article 1 proposal). It was, however, never enacted into law.[30]

3 Defining the problem

3.1 Discretionary powers: necessity or option?

The picture that emerges from the foregoing analysis is that choice of forum is essentially still regarded as a matter to be dealt with by the executive bodies of the Member States. The system leads to the retention of discretion by national authorities. The consequence of this is that the framework for choice of forum in many aspects resembles 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).[31] Choices to be made in this regard by the insiders include the decision on who to contact, the stage in 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, EJN), the instruments to be used (e.g., transfer of proceedings or extradition), the criteria to be applied and procedures to be followed, *et cetera*.

Moreover, these choices need not necessarily be made by prosecuting authorities, they are also made by police or administrative authorities.[32] The latter happened in a market manipulation case, in which the Committee on

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28 OJ EU 2009 L 328/42. The framework decision is much criticized; see, for instance, Klip, supra note 6, p. 475; Ouwerkerk, supra note 19, p. 275-277; M.J.J.P. Luchtman, 'Choice of Forum in an Area of Freedom, Security and Justice', *Utrecht Law Review* 2011, p. 77-101.

29 Draft Council Framework decision on the transfer of proceedings in criminal matters, *Council document* 11119/09, of 30 June 2009, which has been altered substantively during later negotiations; see *Council documents* 13504/09 COPEN 173 of 21 September 2009; 14133/09 COPEN 191 of 7 October 2009; and 16437/1/09 REV 1 COPEN 231 of 26 November 2009. For the Explanatory Report, see *Council Document* 11119/09 COPEN 115 ADD 1.

30 See Luchtman, supra note 28, p. 74-101, and M. Ludwiczak, 'Jurisdiction and applicable law in the EU directive on transfer of proceedings in criminal matters', *New Yournal of European Criminal Law* 2010, p. 343-361, for further analysis and references.

31 Cf. the *cri de coeur* by Sjöcrona in this book.

32 Cf. Sjöcrona in this book; O. Lagodny, Emphielt es sich, eine europäische Gerichtskompetenz für Strafgewaltskonflikte vorzusehen? Gutachten im Auftrag des Bundesministeriums der Justiz, Berlin: Bundesministerium der Justiz 2001, p. 67-68, 85.

Securities Regulators (CESR; now: ESMA)[33] was actively involved in what certainly would qualify as a forum choice. Administrative authorities from different Member States may agree on which of them is to contact its national prosecution service, without the latter even being aware of the existence of that agreement.[34] That also means that criminal law procedures, where applicable, are not set in motion.

Fearful of new bureaucracies and more red tape, national prosecutors are generally hesitant to intervene with this *status quo*.[35] Many national governments come to the same conclusion, concerned as they are with a further loss of national sovereignty and/or 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 from it, 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 looked after by others. It requires a high degree of mutual trust. In that respect, it is telling to note that the transfer of proceedings is the only form of cooperation that is not dealt with by EU law (yet).

At the same time, the ambitions put forward in Article 3(2) TEU, the much heard rhetoric that criminals should not profit from free movement,[36] 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? If so, 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 (financial) crime (cf. art. 325 TFEU),[37] but also those concerned with the rule of

33 See < http://www.esma.europa.eu/ >

34 See P. De Sousa Mendes, 'Was tun im Falle von transnationalem Marktmissbrauch? - Der Fall Citigroup', *ZIS* 2009; cf. also the example of the Fortis case by Vervaele in this book.

35 See M. Wade, EuroNEEDs – Evaluating the need for and the needs of a European Criminal Justice System – Preliminary report, Freiburg i. Br.: Max Planck Institute for Foreign and International Criminal Law 2011.

36 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.'

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

law (cf. art. 6 TEU)?[38] 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 on 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.[39] The principle not only influences the criminalisation of conduct as such, but also regulates the actions of state organs – police, prosecution services, 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 be brought only before a 'tribunal established by law'. Where a person is consequently found guilty according to 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 law *empowers* state organs to act within the boundaries of the criminal law and simultaneously *limits* the effects and scope of these powers.

The question is to what extent choice of forum is a matter of which the legality principle stipulates that it be dealt with by law, and if so, which law (national or European). Here, we not only come across the difficulty 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, simply because they were not designed for it and there is no authoritative legal source (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 ratio 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 (section 4).[40] Only in case of an affirmative answer to that first question will it make sense to deal with the question of whether or not the legality principle is applicable outside the context of the nation state and serves as a yardstick to the European legislator (section

38 See also U. Sieber, 'Die Zukunft des Europäischen Strafrechts – Ein neuer Ansatz zu den Zielen und Modellen des europäischen Strafrechtssystems', *Zeitschrift fur die Gesamte Strafrechtswissenschaft* 2009, p. 1-67.

39 Cf. with respect to Article 7 ECHR, ECtHR 17 September 2009, *Scoppola v. Italy* (*No. 2)*, appl.nr. 10249/03, para 92.

40 Lagodny, supra note 40, p. 99 *et seq*., chooses a comparable approach.

5). 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.[41] Why then, is this different in European law? A brief answer to that question would be: because the interests of the Member States and their nationals do not coincide, and the same goes for a large number of national and EU interests.[42] I will elaborate on these two points first in paragraphs 3.2 and 3.3 respectively.

3.2 The potential of EU citizenship

3.2.1 EU citizenship: brief introduction

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. Still, one cannot escape the impression that citizens are offered a fair deal of fine things by the EU, without being in the position to decide over them autonomously.[43] Moreover, the focus has traditionally been on protecting the citizen against crime, rather than on offering him protection against the state in its fight against crime,[44] although we should note that the European Union has recently started to enact legislation that strives to harmonise procedural safeguards for suspects and victims. These instruments have another effect too: they support free movement by ensuring a minimum set of rights to all those travelling over and residing on the European territory.[45] The first signs of a *civis Europaeus* in the AFSJ therefore emerge, be it only because the legislator decided to offer its citizens these rights.

The potential of European citizenship for the further development of the AFSJ is as important, as it is unclear. We know that the Court of Justice has stressed that 'citizenship of the Union is intended to be the fundamental status of

41 See the ground breaking work of A. Eser, Lagodny Otto & C.L. Blakesley (eds.), *The individual as subject of international cooperation in criminal matters,* Baden-Baden: Nomos 2002, in particular p. 697 *et seq*.

42 Cf. Klip, supra note 6, p. 470-472.

43 Cf. Monar, p. 579, in: A. Von Bogdandy & J. Bast (eds.), *Principles of European constitutional law,* Oxford; München: Hart; Beck 2011.

44 Cf. A.H.J. Swart, *Een ware Europese rechtsruime: wederzijdse erkenning van strafrechtelijke beslissingen in de Europese Unie*, Deventer: Kluwer 2001, p. 7 *et seq.*

45 Cf. the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ EU 2009 C 295/1, Recital 3. Obviously, this approach goes further than discrimination on the basis of nationality, which the ECJ already prohibited in ECJ 24 November 1998, Case C-274/06 *Bickel and Franz* [1998] *ECR* I-7637.

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',[46] thereby stressing the primacy of the EU legal order and availing itself of a powerful instrument to promote European integration. We also know that the Treaties and Charter offer citizens the right to free movement and residence in the Union,[47] as well as voting rights for local and European elections.[48] Still, the exact scope of citizens rights remains unclear: for instance, what does the Court mean with the phrase 'substance of the rights'?[49]

A topic that is even less explored is the scope of the obligations that are attached to EU citizenship. AG Bot refers to one of them, where he points out in *Wolzenburg* that '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.'[50]

Although this makes good sense, we should keep in mind that the obligation to obey the laws of the host state is currently not the only obligation resting upon citizens. Positive conflicts of jurisdiction cause problems which exceed by far the problem of differences in treatment in the host state (or the state of origin). First of all, the risk of having to defend oneself in several Member States and the difficulties this causes, the risk of being confronted with diverging criminal law systems, the risk of *ne bis in idem*-situations,[51] *et cetera*, are generally recognized as problematic.[52] These types of problems certainly qualify as what European lawyers would call a *double (or multiple) regulatory burden*.[53]

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46 ECJ 8 March 2011, Case C-34/09, *Ruiz Zambrano*, para 41 and 42.

47 See arts. 20 and 21 TFEU and art. 45 CFR.

48 See art. 22 TFEU and 39/40 CFR.

49 See Muir and Van der Mei in this book, section 2.2; D. Kochenov, 'The right to have what rights? EU Citizenship in need of clarification', *Staff seminar, York University School of Law* 2012; H. Van Eijken & S.A. de Vries, 'A new route into the promised land? Being a European citizen after Ruiz Zambrano', *European Law Review* 2011, p. 704-721.

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

51 Article 54 CISA will not always prevent this: see art. 55 CISA.

52 See, among many others, Sieber, supra note 38, p. 1-67; A. Biehler *et al*. (eds.), *Freiburg Proposal on Concurrent Jurisdictions and the Prohibition of Multiple Prosecutions in the European Union,* Freiburg i.Br.: Max Planck Institute for Foreign and International Criminal Law 2003; M. Böse & F. Meyer, 'Die Beschränkung nationaler Strafgewalten als Möglichkeit zur Vermeidung von Jurisdiktionskonflikten in der Europäischen Union', *ZIS* 2011, p. 336-344; Sinn, supra note 17, p. 576 *et seq*.

53 On that, see also Muir and Van der Mei in this book, section 2.1, who submit, however, that is as yet unclear whether the prohibition of 'mere obstacles' to freedom of movement is as relevant for free movement of persons (art. 21 TFEU) as it has been for other freedoms provided by the Treaties.

A second category of problems, partly overlapping with the first, is related to problems of foreseeability and accessibility, because citizens are not always able to establish either the link of their actions to a particular state (*jurisdiction to prescribe*), 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.[54]

We should keep in mind that these problems are closely linked to the EU's efforts to promote free movement, as well as to its efforts to widen the jurisdictional basis of its Member States for serious forms of crime. Conflicts of jurisdiction, in particular, are capable of causing two things. First of all, they may lead to (multiple) criminal prosecution(s) *as a result* of free movement. Second, they are capable of causing impediments to *future* free movement, as criminal proceedings will also hinder or even prevent such movement. Clearly, therefore, there is a nexus between free movement and conflicts of jurisdiction. However, the question is whether this nexus will *always* offer a sufficiently strong link to the European legal order. In other words, are these conflicts by definition a problem in terms of free movement? Regarding the first situation, one may oppose that free movement in itself will not always be the *cause* of any following extraterritorial claim. Why, then, should those who have used that right be treated any differently from those who have not? In the second situation, the link with the EU legal order is arguably even weaker where reference is only made to future situations. Those types of situations are generally not covered by EU law.[55]

3.2.2 Between federalism and intergovernmentalism?

Apart from the ECJ's case law on *ne bis in idem*,[56] there is hardly any material to go on. At present, we don't know whether conflicts of jurisdiction interfere with free movement or EU citizenship. In light of this legal vacuum, perspectives offered by sociology, and by Ulrich Beck and Edgar Grande in particular, are useful. In their book *Cosmopolitan Europe* these authors offer a perspective on Europeanisation that goes beyond the traditional federalism/ intergovernmentalism dichotomy.[57] Their aim is to offer a new narrative on Europeanisation, as well as a new political vision on and concept of political

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

55 *Cf.* ECJ 29 May 1997, Case C-299/95, *Kremzow*, [1997] *ECR* I-2629, para. 16. See also Muir and Van der Mei, sections 2.1 and 2.2 in this book.

56 Infra section 4.3.

57 Incidentally, this has repercussions for EU accountability schemes as well, cf. M. Bovens, D. Curtin & P. 't Hart (eds.), *The real world of EU accountability - What deficit?* Oxford: Oxford University Press 2010, p. 190, 193-194; infra section 4.2.2.

integration,[58] not based on typical nation-state concepts like *demos*, homogeneity or uniformity.[59] Rather, 'cosmopolitan Europe does not mean the dissolution and replacement of the nation but its reinterpretation in light of the ideals and principles for Europe in essence always stood and stands, that is, in light of a new conception of political cosmopolitanism.'[60] The authors suggest that this is not a naïve assumption, but the result of calculated self-interest of the EU Member States from the early days of the European Coal and Steel Community onwards.[61] Europeanisation as an empirical process has been going on for over fifty years already, as an answer to the history of colonisation and the regimes of terror in the last century and an attempt to stay afloat in the geopolitical fields of force.[62] According to Beck and Grande, the nation-state is not replaced or suppressed in these processes, but integrated in a variety of ways into new international and supranational regimes in order to deal with the problems of what they call the second modernity.[63] Europe, therefore, is to be regarded as a 'cosmopolitan empire', i.e., 'a non-hegemonic form of exercise of political authority which does not rest, at least primarily, on a hierarchical 'power of command' but on the political premium which consensus-based cooperation produces for all participants.'[64]

In a similar fashion, the ongoing everyday familial-biographical, civic and economic integration of Europe, does not amount to replacing national citizenship or trading one's national identity for a common European one.[65] That proposition ignores the horizontal – or transnational – dimension of Europeanisation, i.e., the networking and mixing of national identities, national economies, national education systems, national families,[66] *et cetera*, which was set in motion by the Member States themselves,[67] but proves very difficult for them to control. Yet instead of leading to a new, superimposed identity, these processes rather emphasise the need to recognise mutual differences, as the gradual mixture of the local or national with the global will take place in different form and shape, depending on time and place. Europeanisation is not limited to purely transnational constellations, nor to cross-cutting links between different societies or the simple co-existence of difference; rather, as Delanty

58 U. Beck & E. Grande, *Cosmopolitan Europe,* Cambridge, UK; Malden, USA: Polity Press 2007, p. 4, 18.
59 Beck & Grande, supra note 58, p. 5; see also Delanty, p. 6, in: G. Delanty (ed.), *Routledge Handbook on cosmopolitan studies,* London; New York: Routledge 2012.
60 Beck & Grande, supra note 58, p. 5, 33-35.
61 Beck & Grande, supra note 58., p. 20-21; see also Inglis, p. 18 *et seq.* in: Delanty (ed.), supra note 59.
62 Beck & Grande, supra note 58, p. 9, 20-21.
63 Beck & Grande, supra note 58, p. 32. See also G. Moro, *Citizens in Europe,* Dordrecht: Springer (electronic resource) 2012, p. 29-30.
64 Beck & Grande, supra note 58, p. 56.
65 Beck & Grande, supra note 58, p. 98-99.
66 Beck & Grande, supra note 58, p. 97.
67 One can think of the granting of free movement rights to economic actors and EU citizens which are enforceable before courts.

puts it, it deals with the cross-fertilisation that occurs when societies come into contact and the transformative processes that result from it.[68] Indeed, 'one can be a European, without ceasing to be a German, or a Turk, or a Turkish-German, or a post-Marxist Pole, or an anti-continental and pro-atlantic British Muslim.'[69] The conceptual analysis of Beck and Grande is helpful for assessing the legal *status quo*.[70] For the purposes of my analysis, two findings are of particular importance. First of all, while the EU may be qualified as a unique cosmopolitan project, it is clearly an imperfect project.[71] There is for instance the well-known problem of the democratic deficit,[72] even after the Treaty of Lisbon, but also the fact that only nationals of EU Member States can be EU citizens. Third-country nationals are therefore ruled out. That hardly corresponds with the cosmopolitan range of thought.[73]

Conversely, my second finding is that that range of thought is strongly emphasised with respect to EU citizens. Enforceable rights of free movement have helped to tear down centralistic, state-oriented structures many times in the past.[74] To a certain extent, these rights have served as an alternative to the limited democratic participation at EU-level, by granting economic actors, and later EU-citizens, the right to 'vote with their feet'.[75] Of course, free movement alone is not enough. Beck and Grande propose, *inter alia*, to strengthen European civil society, based on universally shared norms.[76] Their aim is to lay

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68 G. Delanty, 'The Idea of a Cosmopolitan Europe - On the cultural significance of Europeanization', *International Review of Sociology* 2005, p. 417.

69 Beck & Grande, supra note 58, p. 35. Or as Delanty, supra note 68, 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 S. Benhabib, *The rights of others - Aliens, residents and citizens,* Cambridge: Cambridge University Press 2006, p. 148-149; É. Balibar, *We, the people of Europe? Reflections on transnational citizenship,* Princeton; Oxford: Princeton University Press 2004, p.162; or the term 'nested citizenship' by P. Kivisto & T. Faist, *Citizenship - Discourse, Theory, and Transnational Prospects,* Malden, USA; Oxford, UK: Blackwell 2007, p. 122 *et seq*.

70 Cf. Delanty, p. 41-42, in: Delanty (ed.), supra note 59: 'Cosmopolitanism is thus both a normative theory (which makes cognitive claims) and a particular kind of social phenomenon.'

71 Beck & Grande, supra note 58, p. 136-170.

72 Cf. F. Meyer, *Demokratieprinzip und Europäisches Strafrecht: Zu den Anforderungen des Demokratieprinzips an Strafrechtsetzung im Mehrebenensystem der Europäischen Union*, Baden-Baden: Nomos 2009.

73 Cf. Benhabib, supra note 69; Balibar, supra note 69.

74 To that extent, there are certainly similarities with Europe's other big cosmopolitan project: the European Convention on Human Rights; cf. A. Stone Sweet, 'A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe' (November 1, 2011), *Journal of Global Constitutionalism*, forthcoming 2012, also available at SSRN: <ssrn.com/abstract= 1913657>.

75 Cf. Muir and Van der Mei, this book, section 4; Poiares Maduro, p. 150, in: S.K. Schmidt (ed.), *Mutual recognition as a New Mode of Governance,* London/New York: Routledge 2008. See also Balibar, supra note 69, p. 162: 'This citizenship does not consist in the passive enjoyment of formal rights (...) conferred upon individuals because the 'historical community' to which they belong (...) has been formally integrated into the new European whole, but rather in the fact that European citizens themselves produce, by removing the existing obstacles, the conditions of a new belonging – and no doubt, inevitably, the conditions of a nonexclusive belonging in the new sense of the word.'

76 Beck & Grande, supra note 58, p. 228.

the foundations for the constitution of a European civil society, and to institutionalise the cosmopolitan regime in European politics. In other words, the principle of mutual recognition of difference is to be grounded on a minimum of shared substantive and procedural norms.[77]

3.2.3 EU citizenship and choice of forum

In my opinion, a substantial part of these universally shared norms is already there. They are laid down, *inter alia*, in the Charter of Fundamental Rights, which was introduced as a counterweight to the transfer of powers to the European level,[78] also in the sphere of criminal law. Its Preamble states that the Charter 'places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.' But what does this mean? In my opinion, Beck's and Grande's finding that '[e]ver more individuals are producing internationally, working internationally, loving internationally, marrying internationally, living, travelling, consuming and cooking internationally',[79] implies, first and foremost, that individuals should not merely be 'defined' as legal subjects exclusively by their membership of state of nationality. EU citizens unite multiple memberships in them, which they may form and shape according to their own preferences, in particular by exercising their free movement rights.[80] That implies, for instance, that the state of nationality should, as a rule, not restrict free movement of its nationals. It is this recalibration of personal autonomy, vested in the concept of EU citizenship, which the European Union should facilitate. This is also how I will interpret the goal of Article 3(2) TEU in the following.

We may ask ourselves whether the EU succeeds in achieving the latter goal at this point. Two key concepts of EU citizenship – free movement and democratic representation – are hardly explored, let alone activated, in relation to criminal law.[81] This, in my opinion, is problematic. After all, 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 further 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. Mutual recognition instruments have the potential of widening the reach of these powers far beyond the Member States' borders.[82] This framework was created,

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77 Beck & Grande, supra note 58, p. 228; see also Delanty, supra note 68, p. 416.

78 I. Pernice, 'The Treaty of Lisbon and Fundamental Rights', in: S. Griller and J. Ziller (eds.), *The Treaty of Lisbon. EU Constitutionalism without a Constitutional Treaty?*, Wien; New York: Springer 2008.

79 Beck & Grande, supra note 58, p. 36.

80 Supra note 69.

81 On (the limits to) this 'activation', see also infra section 5.

82 On the practical problems with respect to mutual recognition, see Spencer in this book; Ouwerkerk (2011), in particular p. 241-286 (p. 285: 'pure mutual recognition is a utopia'); E. Van Sliedregt, 'The European Arrest Warrant: Extradition in Transition', *EuConstLR* 2007, p. 244-252.

because the opening of the internal borders made the Member States jointly responsible for fighting crime.[83] 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, who are accountable only for their own authorities.

How does this lead to arbitrary results? Seen from the perspective of the Member States, one may discern nothing arbitrary in this. Yet the picture changes once approached from the perspective of EU citizenship. Free movement as I have defined it in the previous sub-paragraph – i.e., as a goal to be achieved[84] – logically implies that it is, in principle, up to each European citizen to subject himself to the legal system of his own choice. On the one hand, this means that he has to obey the laws of the state of stay (state of residence or host state), but on the other, other Member States should, in principle, refrain from interfering with the affairs of that citizen, *unless* they have good reason to do so. Free movement therefore refers to the fundamental right of each individual to – to put it somewhat provocatively – 'vote with his feet'; it is essential for his recognition as a legal subject, not only *vis-à-vis* any individual EU Member *State*, but also *vis-à-vis* the joint Member *States*.

Although this recalibration of personal autonomy certainly does not mean that every citizen should also be able to 'choose' the place where he commits an offence and may consequently be prosecuted only there,[85] it seems to me that taking the European citizen seriously implies that he must be in the position to access and foresee any limitations, caused by the double burden of multiple prosecutions, on his autonomy. Where this is not possible, that citizen will be caught by surprise. Conflicts of jurisdiction – and choice of forum – could then lead to arbitrary results, at least from the viewpoint of the citizen. That is precisely what the legality principle aims to avoid. I will come back on this in greater detail further on.[86]

In addition to the foregoing, there is one other point. Free movement is traditionally associated with active free movement. It grants rights to those who *move*. Meanwhile, the ECJ has accepted that free movement rights include the freedom to go to another state in order to receive, for instance, services there.[87]

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83 Cf. A-G Bot, Case C-123/08, *Wolzenburg*, [2009] *ECR* I-9621, Opinion, para 104-105.

84 To avoid misunderstandings: when speaking about free movement in this way, I refer to Article 3(2) TEU, not to any of the five Treaty freedoms (free movement of capital, workers, services, goods and citizens).

85 To the contrary, that would constitute an abuse of free movement by that citizen.

86 Infra section 4.1.2.

87 Cf. ECJ 29 April 1999, Case C-224/97, *Erich Ciola v. Land Vorarlberg*, [1999] ECR I-2517, para 11. The Court has also accepted that national laws or practices should not prevent nationals from making use of their freedoms, nor treat them differently from other nationals as a result of free

In the sphere of criminal law, this case law is worth following. If the EU truly wishes to promote free movement, it also has to take into account that those who did not wish to move, may nonetheless be confronted with the results of free movement by others. As such encounters may trigger, for instance, the application of the passive personality principle, free movement should have a negative connotation as well: the right *not* to move, i.e., the right to subject oneself only to the laws of one's state of origin and to be protected against interferences with his legal position by other legal systems (unless the law provides otherwise).

3.3 Interests of the European Union

Before we come to the specific consequences of the foregoing in light of the legality principle, let me first introduce another category of interests that is easily overlooked under the current system. Here too, we can not automatically assume that these interests will be taken care of by the Member States. Already overloaded national criminal justice systems, may set priorities differently than the European Union wishes. Yet the latter is dependent on the Member States for effective law enforcement, and will continue to be so, even when the European Public Prosecutor comes into existence. There are at least three categories of autonomous EU-interest worth mentioning, including, first of all, the financial interests of the EU; second, the fight against cross-border crime, which is closely related to the opening of the internal borders; and, third, those interests concerned with the rule of law to which the EU has committed itself (cf. art. 6 TEU).

The link between these categories and the legality principle is indirect. The legality principle as such does not define a particular legislative agenda. Still, the aforementioned interests deserve attention. This follows directly from the Treaties. The European Union has after all dedicated itself to offering its citizens an area of freedom, security and justice without internal frontiers (art. 3(2) TEU: 'The European Union *shall* offer ...' [my italics]). The Treaty on the Functioning of the European Union moreover holds that the EU *shall* constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States (art. 67 TFEU); that it *shall* adopt measures to prevent and settle conflicts of jurisdiction between Member States (art. 82 (1)(b) TFEU); and that the EU and the Member States *shall*, in accordance with Article 325, counter fraud and any other illegal activities affecting the financial interests of the Union (art. 310(6) TFEU). All these provisions leave little room for doubt: the EU is not at liberty to dismiss itself of any of these tasks.

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movement; supra note 83.

Of course, a far more difficult question is how these tasks are to be achieved and who is the final arbiter on this. For instance, with the coming into existence of the Framework Decision prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, the EU has already adopted measures, as referred to in Article 82(1)(b) TFEU. But are these enough? Recent studies, policy documents and legislative initiatives show that there is reason for doubt.[88] First of all, national criminal justice systems do not always seem to be aware of their European tasks. National legislators are sometimes even downright protective.[89] But also in cases where national legislation does not pose problems like these, practice is not at ease with 'European cases'. The EuroNEEDS-study has shown that national prosecutors face difficulties with recognising and dealing with cases with a European dimension.[90] National prosecutors frequently report being unable to deal with aspects reaching beyond their jurisdictions.[91] Defence lawyers on the other hand indicate that they feel themselves in a disadvantaged position in European cases, in comparison to those involving national criminal justice institutions.[92] In its communication on the protection of the financial interests by criminal law and administrative investigations, the Commission comes to similar conclusions, mentioning, *inter alia*, the adverse consequences of forum shopping by criminals as a result of the absence of a level playing field, insufficient transnational cooperation and lack of investigation resources.[93]

The fact that national criminal law systems do not always cope well with transnational cases leads to positive and negative conflicts of jurisdiction. In PIF-cases, judicial follow-ups to OLAF-reports are not self-evident. Positive conflicts, particularly when occurring without coordination, easily result in dilusion of mutual responsibilities, losses or inefficient use of investigative resources, problems related to the operation of mutual recognition instruments, and/or double burdens on the suspect. One may therefore question whether the European Union lives up to the tasks and goals it has set for itself. This is why the recent proposal for a directive on the fight against fraud to the Union's financial interests by means of criminal law also seeks to further harmonize the jurisdictional bases of the Member States in PIF-cases.[94] Yet this proposal by itself will not be enough, of course.

As soon as the European legislator intervenes with conflicts of jurisdiction, *then* the legality principle becomes relevant. It will confront the legislator with two

88 Cf., for instance, Sinn (ed.), supra note 17; Böse & Meyer, supra note 52, p. 336-344.
89 Supra section 2.3; infra section 4.2.2.
90 Wade, supra note 35, p. 14-23; see also Herrnfeld, p. 157, in: Sinn (ed.), supra note 17; Groenleer, supa note 14, p. 327.
91 Wade, supra note 35, p. 23.
92 Ibid., p. 106-107.
93 COM(2011) 293.
94 COM(2012) 363; supra section 2.1.

types of questions: he will have to ask himself, first of all, whether choice of forum interferes with the fundamental rights of EU citizens and, second, which limitations follow from that for the available options.[95] Obviously, there is a clear organisational dimension to this. This far, we have held this debate from a predominantly negative point of view; we have focussed on the *ne bis in idem*-principle of the Article 54-58 CISA. In order to avoid case allocation on the basis of 'first come, first served', the Member States developed a mechanism to deal with (*only* positive) conflicts of jurisdiction.[96] We must now also face the positive angle to it: how to achieve a mechanism that allows the European Union to live up to its institutional (constitutional?) tasks and deal with positive and negative conflicts of jurisdiction through the criminal justice systems of the Member States, while simultaneously guaranteeing the accessibility and foreseeability of the obligations following from it for European citizens? To that extent, the interests of the European citizen and those of the European Union are two sides of the same coin.

4 The principle of legality as a tool for analysis

After having identified two sets of interests which do not necessarily coincide with the interests of the Member States, let us now focus on choice of forum in light of the legality principle. In order to demonstrate how forum choice could fail to do justice to the interests of the European Union and leads to arbitrary results from a citizen's perspective, I will distinguish between state responsibilities with respect to the jurisdiction to prescribe, to adjudicate and to enforce. For each type of jurisdiction, I will try to identify their key issues in light of the legality principle and to consequently use these findings in order to analyse choice of forum at European level, as described in section 2.

4.1 Jurisdiction to prescribe

4.1.1 The law on jurisdiction and the principle nullum crimen sine lege

A state's jurisdiction to prescribe is its jurisdiction to establish in general the contents and scope of application of certain national norms and prescriptive rules, which includes the establishment or creation of jurisdiction.[97] The guarantees of Article 7 ECHR and Article 49 CFR hold that these norms, once enforced through punitive sanctions, must have a decent basis in the law, and so should the sanctions (*nullum crimen, nulla poena sine lege*). There is a wide variety of *rationales* behind this cornerstone of every European criminal law

95 This task exceeds the issues put forward by the Commission in its 'Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union', COM(2010) 573 final. The protection of fundamental rights in the horizontal relationships between the Member States or the vertical relations with the European Union are a serious concern.

96 Supra section 2.3.

97 European Committee on Crime Problems, *Extraterritorial criminal jurisdiction,* Strasbourg: Council of Europe 1990, p. 18.

system, but the ECtHR has identified one overarching *ratio*: '[the guarantee of Article 7 ECHR] should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment'.[98] It 'alludes to the very same concept [of 'law'] as that to which the Convention refers elsewhere when using that term, a concept which comprises statute law as well as case-law and implies qualitative requirements, including those of accessibility and foreseeability.' This implies that 'the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case.' In addition, 'a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct.'[99] The latter also depends on the content of the law concerned, the field it is designed to cover and the number and status of those to whom it is addressed.[100]

The question of how this guarantee relates to criminal law jurisdiction is complicated. Extraterritorial jurisdiction in particular may confront the citizen with the application of criminal law provisions of another jurisdiction, possibly in addition to the ones of the *lex loci*.[101] That may cause problems in terms of accessibility of the law, as well as its foreseeability. The passive personality, for instance, is known to cause problems, because the perpetrator will not always know the nationality of its victim. Subsidiary jurisdiction, for instance on the basis of Article 2 of the 1972 Convention on Transfer of Criminal Proceedings, may also cause problems, because jurisdiction then rests on factors that were not known to the perpetrator at the time of the commission of the offence.[102] And even the territoriality principle may be considered problematic, where the territory is defined by the place where the consequences of an offence were felt. Very few offences include in their definition a demarcation of their territorial scope. This seems to be common ground for most criminal law systems. The territorial scope of a state's *ius puniendi* is usually defined in the general provisions of criminal law (or sometimes procedure) on jurisdiction, which apply to all offences or to categories of offences.[103] This is done, not only because the rules on jurisdiction need to clarify and define the competence of the authorities to investigate, prosecute and try *alleged* offences,[104] but also because the territorial scope of a norm is in the vast majority of cases not

98 Standard case law, cf. ECtHR 17 September 2009, *Scoppola v. Italy* (*No. 2)*, appl.no. 10249/03, para 92.

99 Cf. ECtHR 26 April 1979, *Sunday Times v. United Kingdom*, appl.no. 6538/74, para. 49.

100 ECtHR 17 September 2009, *Scoppola v. Italy* (*No. 2)*, appl.no. 10249/03, para 102.

101 See, from an international law perspective, also C. Ryngaert, *Jurisdiction in International Law,* Oxford: OUP 2008, p. 127-133.

102 Cf. D. Oehler, *Internationales Strafrecht: Geltungsbereich des Strafrechts, internationales Rechtshilferecht, Recht der Gemeinschaften, Völkerstrafrecht*, Köln [etc.]: Heymanns 1983, p. 434-435.

103 For a comparative overview, see Sinn (ed.), supra note 17, p. 501-530.

104 Cf. G.A.M. Strijards, *Internationaal strafrecht, strafrechtsmacht - Algemeen deel,* Arnhem: Gouda Quint 1984, p. 48-49, 194-197; H.D. Wolswijk, *Locus delicti en rechtsmacht,* Deventer: Gouda Quint 1998, p. 71-72, 73-76; Böse in this book.

considered to be a constituent part of the offence; it is not 'unrechts-begründend'.[105]

Be this as it may, these arguments by themselves provide no answer as to if and how the rules of the legality principle apply to the law on criminal jurisdiction.[106] That issue is controversial. Some authors seem to completely deny the link between offences and jurisdiction, stating that the latter deals primarily with a state's relationship with other states.[107] Others consider the law on criminal jurisdiction to be part of the body of procedural rules and not a matter of substantive criminal law.[108] Yet in still other (civil) law jurisdictions, jurisdictional rules, although generally not considered to be a constituent part of the offence, are qualified as 'nicht-tatbestandgebundene objektive Bedingungen der Strafbarkeit'.[109] These rules are not a constituent factor for the *unlawfulness* of behaviour, but they certainly define its *criminality*.[110] Although this implies that the safeguards of the legality principle – referring to *offences* – are not directly applicable, the rules on jurisdiction nevertheless have a preliminary function, which is very closely related to the *ratio* behind the legality principle: without a clear and accessible link to a criminal law system, one does not have a chance to become acquainted with its offences and sanctions.[111]

Particularly in cases of conflicts of jurisdiction, the next question is which criminal law system should be the point of reference. Here, most authors are not very strict.[112] They are satisfied once the individual could have known that his actions are *criminal* (*somewhere*) and deny the application of the requirement of accessibility (German: 'Erkennbarkeit'; Dutch: 'kenbaarheid') with respect to the question of *which particular state* ultimately prosecutes the offender.[113]

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105 Cf. H. Scholten, *Das Erfordernis der Tatortstrafbarkeit in § 7 StGB,* Freiburg im Breisgau: Max-Planck-Institut 1995, p. 98. Of course, this is a generalization. Nuances may exist depending for instance on the type of crime and the jurisdictional principles used. For further discussion, see *in extenso,* Wolswijk, supra note 104, p. 66-70, 70-78.

106 On this, see *inter alia*, Lagodny, supra note 32, p. 85 *et seq*.; Luchtman, supra note 4, p. 347-380.

107 Cf. H.-H. Jescheck & Th. Weigend, *Lehrbuch des Strafrechts*, Berlin: Duncker & Humblot 1996, p. 163-167. Earlier editions of the *Lehrbuch* are discussed by Scholten, supra note 105, p. 66; Strijards, supra note 104, p. 197; Wolswijk, supra note 104, p. 73.

108 See for instance Böse, section 3, in this book.

109 Cf. K. Ambos, *Internationales Strafrecht,* München: C.H. Beck 2006, p. 4-5; B. Hecker, *Europäisches Strafrecht,* Berlin; Heidelberg; New York: Springer 2005, p. 28; Wörner & Wörner, p. 209, in: Sinn (ed.), supra note 17, with further references.

110 Of course, there are as may positions as there are authors. This simplification is for the sake of the argument. A different position is taken, for instance, by Wolswijk, supra note 104, p. 66-70. He is of the opinion that without jurisdiction, it is impossible to speak of unlawful ('wederrechtelijk') behaviour. Yet the reverse is not necessarily true: (only) some jurisdictional principles define the unlawfulness of behaviour.

111 Most notably by Strijards, supra note 104, p. 43-47; see also Ambos, supra note 109, p. 5-6.

112 See for instance Ambos, supra note 109, p. 5-6; C. Pappas, *Stellvertretende Strafrechtspflege. Zugleich ein Beitrag zur Ausdehnung deutscher Strafgewalt nach § 7 Abs. 2 Nr.2 StGB*, Freiburg im Breisgau: Max-Planck-Institut für ausländisches und internationales Strafrecht 1996, p. 137; Scholten, supra note 105, p. 65-71.

113 Minority positions are taken by Strijards, supra note 104, and Oehler, supra note 102.

This also implies that where criminal offences are harmonised, where extraterritorial jurisdiction has been made dependent on the condition that the actions are criminal *de lege loci*, or where there can otherwise be no reasonable doubt as to the criminality of one's actions,[114] the legality principle, nor any of its specific guarantees, is in danger. Rather, the reverse seems to be true: if one were to defend that the individual must be able to foresee the applicability of the criminal law system of a *particular* state at the time of action, the legality principle would at its best facilitate forum shopping, as it would allow individuals to assess where offences and sanctions are most lenient to him.[115]

I assume that this majority position is borne out of several reasons. Not only are offences not defined by their territorial scope, because that is generally not considered to be 'unrechtsbegründend', but also should we keep in mind that the context of public international law brings along certain limitations to (the application of) principles of criminal law.[116] The interests of the individual then need to be balanced against those of effective crime control in an international setting, i.e., a setting where consensus among states is often hard to achieve, where mutual trust is not self-evident and where, as a result, unilateral measures to fight crime are unavoidable. Finally, the application of the jurisdictional principles that I qualified as problematic above, may not be so problematic after all if we consider that they tend to be used specifically in cases of transnational crime. For instance, is the jurisdiction of the state of the victim really that problematic, considering that most human traffickers know the nationality of their victims all too well? The same goes for many cases of, for instance, VAT-fraud or drug trafficking.

4.1.2 The potential of European citizenship

It is not necessarily so that the aforementioned arguments are also convincing with respect to the area of freedom, security and justice. I think they are not.[117] From a nation-state's perspective, it makes good sense that the (foreseeability of the) *criminality* of one's behaviour, and not the jurisdiction of a particular state, is the decisive point. Yet seen from the perspective of the EU citizen, a complication in the legal position of the latter occurs which the aforementioned majority position does not address: the problem of the double regulatory burden. By its very definition, this complication occurs at the interface of several criminal law systems, making it difficult to pinpoint individual state responsibility. In order to deal with this problem, the concept of free movement is useful. Free movement, as I have defined it in section 3.2.3, expresses the right of European citizens to subject themselves to a particular legal system through their active movement (or, under its passive heading, their non-

114 For instance, in cases of offences violating the fundamental rights of others.
115 Cf. Eser, p. 566-567, in: Sinn (ed.), supra note 17.
116 Some even deny the applicability of these principles altogether.
117 The analysis below partly deviates from what I wrote earlier in Luchtman, supra note 4. I will come back on that below.

movement); it envisages a recalibrated notion of personal autonomy which now goes beyond the context of the nation *state* and also encompasses the position of the individual *vis-à-vis* the joint EU Member *States*. As a consequence of that, it is the claim of jurisdiction by other Member States rather than the state of stay that causes the double (or multiple) burden. This puts the 'burden of proof' on that state.

I realise that this position may in turn look arbitrary from the perspective of those other states (than the state of stay). After all, they will be forced to accept a legal or factual position on which they may have had no influence whatsoever (mutual recognition). Still, their legal order may be severely affected by the actions of the EU citizen. Those states may also fear abuses of free movement, for instance where another state is (apparently) chosen for the sole reason of escaping justice elsewhere. In that situation, too, it is by no means guaranteed that their interests are looked after.

Certainly, these concerns deserve our attention. Problems like these are also why the Court of Justice, in other areas of law, accepts limitations to free movement, albeit under strict conditions. In a similar fashion, I do not wish to exclude conflicts of jurisdiction *as such* either. To the contrary, in a system based on indirect enforcement, where criminal law in general is not a policy area of the European Union,[118] I think they are inevitable.[119] Yet any state that causes a double burden in order to protect its own legitimate interests, will have to justify this and ensure that limitations on the autonomy of the EU citizen are 'lawful', and, particularly, accessible to the citizen at the time of action. My point, therefore, is not that a recalibrated notion of personal autonomy implies an inherent 'right to forum shopping by defendants',[120] but rather that a genuine concept of European citizenship, fostering free movement and horizontal integration, requires that – certainly in the absence of effective mechanims that prevent double burdens – that citizen be put in the position to asses the potential *joint* consequences of his actions, brought forward by *all* legal systems involved. Those types of jurisdictional criteria which do not allow him to do so may be termed problematic at least.

It seems to me that this approach is in line with the core function of the guarantees of Articles 7 ECHR and 49 CFR. The need for legal certainty is so immanent in criminal law, that these guarantees stipulate that offences and sanctions have, *inter alia*, a decent legal basis, even though it may not at all be certain at the time of the commission of the offence that criminal proceedings will actually be started, that investigative measures which interfere with, for instance, the right to privacy will be used, or that sanctions, i.e., further

118 ECJ 18 April 2011, Case C-61/11 PPU, *Hassen El Dridi*, para 53.
119 Cf. Luchtman, supra note 4, p. 369-371.
120 See also my recommendations in section 6.

interferences with personal liberty or property, will be imposed. The legality principle in criminal law essentially fulfils a 'gate-keeping function'; it ensures that any citizen – by orienting on the law – is in the position to locate the gate to that criminal justice system. It is up to that citizen to determine whether he wishes to pass that gate and risk the unpleasant consequences of being the subject of a criminal investigation. Conversely, however, the actors involved in criminal justice are only allowed to operate within the walls of the criminal justice system; by no means may they become active under a criminal law scheme without a decent legal basis.

Although the guarantees of the legality principle are not directly applicable to the rules of jurisdiction,[121] we also noticed that one cannot know a particular legal order's offences and sanctions if one can not know the link to that order. Yet any orientation on the legal order of the state of stay (for instance the state of residence) will teach him nothing on the *additional* consequences his actions may have under the criminal laws of other Member States. To that extent, the aforementioned gate-keeping function of the legality principle of the state of stay is imperfect. It is precisely this double burden which complicates the legal position of the individual and interferes with the goal of free movement. Particularly where these specific consequences can not 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. In that respect, I think one could certainly speak of a degree of arbitrariness, even though every Member State for itself may have perfectly valid reasons for acting the way it did.

4.1.3 Choice of forum in light of the foregoing

The foregoing analysis draws our attention to a series of issues with respect to the current system of forum choice:

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.[122] 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 that 'are producing internationally, working internationally, loving internationally, marrying internationally, living, travelling, consuming and cooking internationally'[123] are left to the discretion

121 To that extent, this contribution differs from Luchtman, supra note 4.
122 Supra section 2.1.
123 Supra note 79.

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 action. 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 the matter, technically, there is no link with the EU legal order or the Charter (cf. art. 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 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, the foregoing analysis reveals other problems. The network approach of the European Union aims to prevent impunity, yet is not concerned with double burdens and related problems of foreseeability and accessibility. To that extent, the European legislator clearly goes in another direction than advocated here.[124] As soon as the *criminality* of behaviour is foreseeable (which will be so in cases of (minimum) harmonisation),[125] the double burden is apparently not regarded as a problem in terms of substantive legality.

The cogency of this argument 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, than 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 some degree of protection, in cases of consecutive proceedings. Yet there are certainly 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. These solutions are however not explored, let alone enacted into law. That means that

124 See section 2.1.

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

the legal position of the defendant is seriously flawed, compared to domestic criminal proceedings.

3. Court-enforceable standards? The guarantees of Article 49 CFR are not directly applicable to the rules on jurisdiction.[126] That leaves us, first of all, with the question of whether the foregoing produces a directly applicable standard in court proceedings. In addition, and assuming that certain jurisdictional criteria are indeed problematic in terms of their capacity to show the citizen the full range of possible consequences his actions may entail, the question remains as to what results this should lead. 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*.[127] That could indeed be a reasonable solution. Yet it also has a few downfalls. One may expect that the more the legal orders of the European Member States become intertwined and the more the European Union continues to promote 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, particularly because other criteria of jurisdiction – even the territoriality principle – may occasionally cause problems too. 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.[128] 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 enforce and to adjudicate

4.2.1 Tribunals 'established by law'

The foregoing section dealt with the problems resulting from unforeseeable claims of prescriptive jurisdiction. I will now turn to a state's jurisdiction to adjudicate, i.e., its jurisdiction to apply established jurisdiction in a particular litigation or proceedings, as well as its jurisdiction to enforce, i.e., its jurisdiction to actually enforce orders or prescriptive rules emanating from the

126 Cf. Strijards, supra note 104, p. 115-118.

127 Cf. Scholten, supra note 105, p. 97 *et seq*.; Strijards, supra note 104, p. 47-49; Ambos, supra note 109, 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,* Berlin: Duncker & Humblot 2009.

128 This is why Böse in this book and Böse & Meyer, supra note 52, p. 336-344, suggest, with reference to the principle of non-discrimination, that the latter state should protect those interests.

judiciary or the legislature.[129] For this, we first need to clarify that in criminal law a state's jurisdiction to adjudicate is usually dependent on a state's jurisdiction to prescribe.[130] The same goes for the jurisdiction to enforce.[131] This means that the national laws on jurisdiction not only have a substantive law, but also a procedural law dimension.[132] 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 judicium 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 has counterparts in many national constitutions, some of which go beyond those of Article 6. That article therefore reflects a common minimum standard.[133] The requirement of a 'tribunal established by law' (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.'[134] Its ratio lies in the separation of powers, as well as the rule of law.[135] It is worthwhile to stress that the concept of law here refers to statutory law, which is a narrower concept than used elsewhere in the Convention.

The requirement of 'a tribunal established by law' envisages 'the whole organizational set-up of the courts',[136] including the overall organisation of the judiciary, the establishment of the various courts and their territorial and material jurisdiction.[137] This does not mean that executive discretion is completely

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129 European Committee on Crime Problems, supra note 97, p. 18. Another definition is used by Eser, p. 560-562, in: Sinn (ed.), supra note 17.

130 Cf. European Committee on Crime Problems, supra note 97, p. 20.

131 Contrary to the jurisdiction to prescribe and jurisdiction to adjudicate, enforcement jurisdiction is limited to national territory by international law. The EU's mutual recognition project has the potential of changing this, because European warrants – in theory at least – must be recognized *ipso iure;* see, however, *supra* note 82.

132 Cf. Böse in this book. Obviously, this is the situation *de lege lata*. In theory, it is conceivable that prescriptive rules defined by one legal order are adjudicated by the courts of another legal order, like for instance in international private law; see M.J.L. Decroos, 'Criminal Juridiction over Transnational Speech Offences - From Unilateralism to the Application of Foreign Public Law by the National Courts', *European Journal of Crime, Criminal Law and Criminal Justice* 2005, p. 365-400; Schmidt-Kessel, in: Sinn (ed.), supra note 17; A. Eser & C. Burchard, 'Interlokales „ne bis in idem" in Europa? Von „westfälischem" Souveränitätspathos zu europäischem Gemeinschaftsdenken', in: H. Derra (ed.), *Freiheit, Sicherheit und Recht: Festschrift für Jürgen Meyer zum 70. Geburtstag,* Baden-Baden: Nomos 2006; Fuchs, p. 114-116, in: B. Schünemann (ed.), *Ein Gesamtkonzept fur die europaische Strafrechtspflege – A programme for European Criminal Justice,* Köln/Berlin: Heymanns 2006.

133 Cf. Panzavolta, sections 2 and 3 in this book; Luchtman, supra note 28, p. 82-90.

134 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.

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

136 Cf. ECtHR 20 July 2006, *Sokurenko & Strygun v. Ukraine*, appl.nos. 29458/04 and 29465/04, para. 24.

137 M. Kuijer, *The blindfold of Lady Justice - Judicial independence and impartiality in light of the requirements of article 6 ECHR*, Nijmegen: Wolf 2004, p. 184-185.

outlawed; a certain degree may be necessary in order to serve the interests of justice. The exercise of such discretion may however never be 'arbitrary',[138] or, to put it in a positive perspective, it must always be 'reasonable'.

In relation to choice of forum, we must keep in mind that prosecutorial authorities are usually not part of the judiciary. This begs the question of how their activities relate to the requirement of a '*tribunal* established by law'.[139] In my opinion, it would be unjust to exclude forum choice by the executive from court organisation. Particularly in criminal justice, where the prosecution service is an integral part of the criminal justice systems and in essence holds the key to it, a certain degree of control on which entrance it takes to that system is necessary.[140] This seems to be confirmed in the scarce case law available on the matter of the European Court and Commission of Human Rights.[141]

There is a conceptual difference between the principles *nullum crimen sine lege* and *nullum judicium sine lege*.[142] The requirement of Article 6 ECHR and Article 47 CFR is not concerned with providing a suspect the right to be tried by 'his' judge, to the extent that it grants him the right to choose the forum he wishes, or to demand that different criminal cases against him be heard jointly.[143] Whereas Articles 7 ECHR and 49 CFR guarantee that the law (and the law alone) may only address its citizens through 'clearly defined' offences (*lex certa*),[144] its procedural counterpart sets a lower standard in terms of *ex ante* accessibility and foreseeability of court competence for individuals.[145] This is

138 Ibid., p. 185, with reference to the *Crociani* case.

139 Incidentally, Panzavolta, section 6 in this book, rightfully points out that art. 5 ECHR is also concerned with the concept of the 'lawful judge'.

140 Cf. Panzavolta, section 10 in this book. Within the context of Dutch criminal justice, Corstens has argued that the more room there is for prosecutorial discretion in choosing the forum, the greater the need for an institute like the Dutch *ius de non evocando*; see G.J.M. Corstens, *De verhouding rechter – openbaar ministerie. Een lat-relatie in het strafrecht*, 1983, p. 30; see also G.J.M. Corstens, 'Naar een geïnternationaliseerd strafrecht? Enkele inleidende opmerkingen', in: J. Fieselier et al., *Internationalisering van het strafrecht*, 1986, p. 10 (international context); E. Beyeler, *Das Recht auf den verfassungsmässigen Richter als Problem der Gesetzgebung*, 1978, p. 15; D. Oehler, 'Der gesetzliche Richter und die Zuständigkeit in Strafsachen', *ZStW* 1952, p. 292 *et seq*.

141 See Luchtman, supra note 28, p. 87-89, with further references.

142 See also Böse in this book.

143 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*).

144 *Lex certa* means that the law be '*clearly* defined'; cf. ECtHR 17 September 2009, *Scoppola v. Italy* (*No. 2)*, appl.nr. 10249/03. The wording is stricter than the general requirement of foreseeability, i.e., that the law be *sufficiently* precise to enable citizens to regulate their conduct; supra note 99. Although the two concepts may converge in practice (see Kristen, p. 329-330, in: F.G.H. Kristen *et al.* (eds.), *Bijzonder strafrecht - Strafrechtelijke handhaving van sociaal-economisch en fiscaal recht in Nederland,* Den Haag: Boom/Lemma 2011), for analytical purposes they should be distinguished.

145 Although the Court uses a uniform concept of ´law´ for all Convention rights (including art. 6 ECHR; *cf.* ECtHR 28 April 2009, *Savino et al. v. Italy*, appl.nos. 17214/05, 42113/04, 20329/05), the object of what must be regulated by law with sufficient precision depends on its subject matter, the addressees of the law and the ratio of the relevant Convention rights. Whereas the 'law', referred

because the choice of the proper court, being an essential part of the proper administration of justice, is usually dependent on factors which present themselves only after the offence. For example, the fact that proceedings are pending elsewhere too, or the availability of evidence (although we should keep in mind that particularly the latter criterion is susceptible to manipulation).[146]

4.2.2 Towards a proper administration of justice at European level?[147]

With regard to forum choice in the European Union, 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. Once again, this draws our attention to the position of the European citizen, as well as to that of the European Union itself. Three issues concerned with the 'requirement of a tribunal by law' are of particular interest.

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 not so much geared to offering the individual 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. 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)[148] will only apply a marginal test of reasonableness. Yet it

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to in Article 7 ECHR, should allow citizens to steer away from committing crimes (*inter alia*, by being '*clearly* defined'), the concept of 'law', as referred to in Article 6 ECHR, is not there to allow suspects to direct their case towards a particular court. Rather, it aims to avoid manipulations of the administration of justice by any actor (including, in my opinion, the defendant). With respect to forum choices, regulation of conduct of individuals (foreseeability) therefore means that the law should offer individuals an adequate indication of the competence of courts and the applicable procedures; these indications allow individuals to anticipate on further actions by the judiciary and the executive and to adopt their behaviour to it. That way, the law will regulate their conduct.

146 The classic example is of course the case where different national authorities, after mutual consultation, wait with apprehending a suspect until he shows up in a particular Member State; see also Sjöcrona in this book. This, incidentally, will be facilitated by free movement of citizens.

147 See also Panzavolta in this book; A.H.J. Swart, *Goede rechtsbedeling en internationale rechtshulp in strafzaken*, Deventer: Kluwer 1983; Oehler, supra note 102, p. 434-435; Lagodny, supra note 32, p. 84 *et seq*., 114-117; Pappas, supra note 112, p. 136-137; Schünemann (ed.), supra note 132, p. 8, 89, 106-108, 250-253; T. Vander Beken *et al*., *Finding the best place for prosecution - European study on jurisdiction criteria*, Antwerpen: Maklu 2002, p. 20 *et seq*.

148 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, para. 18-21, and CFI 8 March 2007, Cases T-339/04 ad T-340/04, *France Télécom v. Commission*, [2007] ECR II-521, para. 77-91, discussed by M. De Visser, *Network-based governance in EC law - The example of EC competition and EC communications law,* Oxford; Portland, Oregon: Hart 2009, p. 295-301; S. Brammer, *Co-operation Between National Competition Agencies in the Enforcement of EC Competition Law,* Oxford: Hart 2008. See also J.F.H. Inghelram, *Legal and institutional aspects of the European Anti-Fraud Office (OLAF),* Groningen: Europa Law Publishers 2011, p. 203 *et seq*.

is *because* there is a legislative framework in place, that abuses of power may *presumed* to be unlikely and a marginal test of the decision suffices. As 'criminal charges' (defined autonomously by the ECtHR) may only be brought before a properly established court, 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 he is with avoiding and solving (the resulting positive) conflicts of jurisdiction, the stricter his laws will be, and the more solid ground there is for testing the reasonableness of forum choices.[149] 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 also constitute an infringement of the requirement.[150]

The premise that the overall judicial organisation will prevent abuses by the executive or judiciary is put into question where the 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 not encroached in a pyramidal system, which will ultimately – at the latest at the start of the trial – force authorities to settle their conflicts,[151] but stand next to each other, without guarantees of reducing the double burden for citizens (at the least until the first set of proceedings is concluded).[152]

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), 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

149 Incidentally, Lagodny, supra note 32, p. 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.

150 Cf. Kuijer, supra note 137, p. 190-191, with references to the Strasbourg case law.

151 Cf. Lagodny, supra note 32, p. 99-100.

152 Art. 54 CISA. Exceptions are possible, however, see art. 55 CISA.

that supports a workable concept of 'reasonableness'.[153] That system should reduce the double burden as far as possible and avoid arbitrariness in the way forum choices are made, forum shopping in particular. Now, one may provocatively ask how forum choices can ever be arbitrary, now that mutual recognition (of the different legal effects given to actions by different legal systems) is a decisive feature of the European Union's institutional set-up. Aren't the consequences of any forum choice simply the consequences of this system? I don't think so. In the first place, forum choices are not made by economic actors or citizens, but by judicial authorities. The consequences of mutual recognition are not the result of citizens 'voting with their feet', but of the decisions taken by judicial authorities, interfering forcefully with the autonomy of the individual.[154] But second, the interests of the defendant cannot be decisive either.[155] Preventing arbitrariness means that any of the actors involved in criminal justice is able to single out those factors – in a complex interplay between many different factors – that are most beneficial to him as decisive for forum choice, at the expense of other interests. This, therefore, is my first point: 'reasonableness' should be interpreted in light of the goals the EU has set for itself and should ensure the proper administration of justice in light of all interests involved; those of the Member States, those of the EU and those of its citizens.[156]

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 of 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 consultation of their superiors at home;[157] 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 (in stead of their residents) when they travel abroad; or in their reluctance to assume responsibility for EU citizens from other states, for instance in the stage of execution.

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153 Cf. Vander Beken *et al*., supra note 147; T. Vander Beken *et al*., 'Kriterien für die jeweils "beste" Strafgewalt in Europa', *NStZ* 2002, p. 624-628; and Lagodny, supra note 32, who refers to a *Qualitätsprinzip*.

154 Supra section 3.2.3..

155 To that extent, I disagree with Swart, supra note 147, who argues that the defendant be given a right of consent in transfers of proceedings.

156 Cf. my findings in paragraph 3.3.

157 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 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 (cf. my observations in section 2.2).

Clearly, this attitude is not only explained by the desire simply to retain as much power at national level as possible. The German Constitutional Court, for instance, has consistently linked it to considerations of *national* democracy.[158] At the same time, this position seems to take 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*.[159] In light of my findings in sections 3.2.3 and 3.3, I find this difficult to accept.[160] 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.[161] 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 is not openly protecting national 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 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 remain to have insufficient materials to work with.[162]

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

158 Supra note 54. See also Bovens, Curtin & 't Hart, supra note 57, p. 188-191, with respect to that court's Lisbon ruling.

159 The German Constitutional Court's *Darkanzanli* ruling, supra note 54, is a good example of this; see in particular paragraphs 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 Schünemann, supra note 132, p. 95 *et seq*.

160 Cf. Bovens, Curtin & 't Hart, supra note 57, 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 austrich with its head in the sand, choosing to ignore the realities around it that it does not wish to see or engage with'.

161 S. Trechsel, *Human Rights in Criminal Proceedings,* Oxford: Oxford University Press 2005, p. 50-51.

162 Cf. De Visser, supra note 148, p. 293-294.

2009 Framework Decision were mitigated precisely as a result of this.[163] That Framework decision now refers to the 2003 Eurojust Guidelines in its Preamble. These guidelines stress the need for a case-by-case approach, as well as a few general rules. In particular, forum choices should not have the effect of rendering a later trial unfair; second, they should take place as early as possible; third, proceedings should preferably be held in one Member State. That state is, preferably, the jurisdiction where the majority of the criminality occurred or where the majority of the loss was sustained. Finally, where several criminals are allegedly involved, prosecutors should at the very least consider prosecuting all those involved together in one jurisdiction.[164]

These – non-binding – guidelines indeed offer a series of valuable starting points for forum choices. Of course, the most difficult point is how to determine the place where the majority of the crimes occurred. The wording of the offences and the sanctions imposed are not a valuable criterion in this regard (*qualitative approach*).[165] Yet counting the (alleged) offences per Member State will not always be a proper criterion either (*quantitative approach*). Therefore, the guidelines offer a non-cumulative series of indicators, such as the location of the accused, the possibility of extradition/surrender, the attendance of witnesses, possible delays as a consequence of forum choice, the interests of victims and evidential problems.

Although many of these criteria are also found in other instruments,[166] they are not without problems. From the outset, it must be stressed that some of these indicators can be manipulated.[167] What is more, is that they do not always clearly express what interests they aim to protect.[168] For instance, why is the location of the accused relevant? Is that because of his prospects to reintegration; in order to allow him a fair trial; or to serve the interests of the society? What if these different interests lead to opposing results? It may well be, for instance, that the interests of a defendant's prospects with respect to reintegration point to one legal order, whereas his position during trial points to another.

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163 Cf. Herrnfeld in this book, section 2.3. 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 *supra* note 28.

164 See also the contribution by Herrnfeld in this book; and Herrnfeld, p. 157-159, in: Sinn (ed.), supra note 17.

165 The same goes for concepts like complicity, attempt, etc., which can be of help for determining the competent court. Yet in order to be helpful in forum choices, these concepts need to have the same meaning for all actors involved; cf. Luchtman, supra note 28, p. 97-99, where the Swiss system for forum choice is discussed.

166 Overviews of other instruments are given by: Lagodny, supra note 32; Vander Beken *et al*., supra note 147.

167 Supra note 146.

168 Cf. Swart, supra note 147, p. 9-10; Oehler, supra note 102, p. 431 *et seq*.; N. Witschi, *Die Übernahme der Strafverfolgung nach künftigem schweizerischem Recht,* Bern: Stämpfli Verlag 1977, p. 82-83.

Time and time again, it proves exceptionally difficult – particularly in the absence of a common frame of reference – to find a set of criteria that offers enough guidance on the one hand, and flexibility on the other. On another occasion,[169] 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, 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.[170] 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.[171] 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.[172] On the other hand, these criteria also show that these fora 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.[173] 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,[174] as well as those of the European institutions is virtually non-existent at present.[175] 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,[176] forum choices need to be accounted for by the decision makers to a 'forum' (political

169 Luchtman, supra note 28, p. 74-101.

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

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

172 Cf. the proposals by Vander Beken, Vermeulen & Lagodny, supra note 153, p. 626; and particularly Lagodny, supra note 32, p. 106 *et seq*.

173 Cf. Vander Beken *et al,* supra note 147, p. 16-17; Swart, supra note 147, p. 16.

174 Cf. the contributions by Franken and Sjöcrona in this book. 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.

175 Cf. the contribution by Kuhl in this book.

176 I, like Panzavolta in this book, therefore oppose to the idea that 'the allocation of cases is hence not a question of transferring competence but merely one of dividing work', cf. De Visser, supra note 148, p. 298. A similar line of reasoning is found in Recital 4 of the Preamble of the 2009 Framework Decision.

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.[177]

At present, there is no such forum; or rather: there is no coordination between the many fora 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.[178] 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 applicable only where there is secondary EU-legislation in place that needs implementation or – possibly – where national law interferes with the Treaty freedoms (cf. art. 51(1) CFR).[179] 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 limited.[180] 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.[181] Simultaneously, that Court has no competences over the 'operational' activities of the authorities of the Member States (art. 276 TFEU).

All of these factors easily lead to the situation that no one is really responsible for the problems put on 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

177 Cf. Bovens, Curtin & 't Hart, supra note57, p. 176; M. Bovens, *The quest for responsibility - Accountability and citizenship in complex organisations,* Cambridge: Cambridge University Press 1998.

178 See however the example by Vander Beken *et al*. (2002), supra note 147, which seems to be the exception that confirms the rule. Conversely, it is highly questionable – and certainly not a common European standard – that those states who *refrained* from prosecution offer remedies to challenge that (negative) decision. Even where they exist, those remedies will once again take the national perspective as their starting point: they will test the lawfulness and reasonableness of the decisions, made by their national authorities.

179 See Luchtman, supra note 28, p. 74-101.

180 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,* Delft: Eburon 2010; Groenleer, supra note 14, p. 309-342.

181 Cf. art. 263(2) TFEU (annulment action by Member State, which is problematic in light of art. 276 TFEU) and art. 263 (4) TFEU (annulment by individual). In the latter case, we would have to ask ourselves whether these types of decision bring about changes in the legal position of the individual. Cases from the area of competition law are reason for serious doubt in that regard; supra note 148.

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.[182]

4.3 Ne bis in idem

At this moment, the guarantee of Article 50 CFR is without doubt the most effective safeguard against double burdens. It ensures that once a first set of proceedings is concluded, *consecutive* prosecutions or punishment for the same acts are, in principle, prohibited. Particularly the integration of the *Schengen-acquis*, including Articles 54-58 CISA, into the framework of the former third pillar by the Second Protocol to the Amsterdam treaty led to the further development of a *ne bis in idem*-principle beyond the internal legal orders of the Member States, in order to enable 'the European Union to develop more rapidly into an area of freedom, security and justice'.[183] Article 50 CFR has, in theory at least, expanded the territorial scope of the guarantee further.[184] According to that article, *ne bis in idem* comprises the whole European Union. In *Mantello*, the Court of Justice explicitly confirmed its 'Auslegungshoheit' and applied the concept of the 'same acts', which it developed under Article 54 CISA, outside the Schengen-framework.[185] There is, in other words, ample evidence of the genealogy of a principle of European criminal law, that originates from, but now develops beyond the full range of control of the Member States.[186]

In its case law on article 54 CISA, the Court of Justice stressed from the outset the link between the internationalised *ne bis in idem*-rules and their transnational context, i.e., the free movement of persons.[187] Obviously, this reference to free

182 Cf. Groenleer, supra note 14, p. 103-104; Busuioc, supra note 180, p. 8; Bovens, Curtin & 't Hart, supra note 57, p. 44-46, 192-193; C. Harlow & R. Rawlings, 'Promoting Accountability in Multilevel Governance: A Network Approach', *European Law Journal* 2007, p. 542-562; Y. Papadopoulos, 'Problems of democratic accountability in network and multilevel governance', *European Law Journal* 2007, p. 473-476; Bovens, supra note 177, p. 45-52.

183 Cf. Council Decision of 20 May 1999 determining the legal basis for each of the provisions or decisions which constitute the Schengen acquis (1999/436/EG), OJ EU 1999 L 176/17.

184 This is confirmed by the Explanations to the Charter, OJ EU [2007] C 303/31: 'the 'non bis in idem' rule applies not only within the jurisdiction of one State but also between the jurisdictions of several Member States.' It is not entirely clear how this provision relates to Protocol (19) to the Treaty of Lisbon on the Schengen Acquis integrated into the framework of the European Union, which confirms the special position of a few Member States in relation to Schengen.

185 ECJ 16 November 2010, Case C-261/09, *Gaetano Mantello,* para 38-40. Surprisingly, the ECJ does not at all refer to Art. 50 CFR in that case.

186 To that extent, I do not agree with C. Burchard & D. Brodowski, 'The post-Lisbon principle of transnational *ne bis in idem*: on the relationship between Article 50 Charter of Fundamental Rights and Article 54 Convention Implementing the Schengen Agreement', *NYECL* 2010, p. 322, who submit that, at this moment in time, the will of the Member States, as articulated in the Explanations to the Charter, is decisive for the interpretation of Article 50 CFR.

187 Article 54 CISA and Article 3(2) FWD EAW share the same objective; ECJ 16 November 2010, Case C-261/09, para 40.

movement is not directly concerned with any of the five Treaty freedoms; it refers to the goal of (what is now) Article 3(2) TEU. This explains why the Court in *Brügge and Gözütok,* despite the absence of a clear link to a specific free movement right in that particular case,[188] nevertheless found that 'Article 54 of the CISA, the objective of which is to ensure that no one is prosecuted on the same facts in several Member States on account of his having exercised his right to freedom of movement, cannot play a useful role in bringing about the full attainment of that objective unless it also applies to [out of court settlements].'[189] In *Gasparini*, the Court added to this that '[Article 54 CISA] ensures that persons who, when prosecuted, have their cases finally disposed of are left undisturbed. They must be able to move freely without having to fear a fresh prosecution for the same acts in another Contracting State.'[190] The message is clear: once the first set of criminal proceedings is concluded, the individual is free to go where he wishes; he is not to be prosecuted again for the same set of facts anywhere in the Schengen area. One might say that he has paid his dues and is now entitled to reintegration into that area.[191]

The *effect* of the Court's case law is that state authorities, in principle, only get one chance to prosecute the offender for his acts/offences. In a multilevel setting like that of the AFSJ, that is a risky step.[192] The Court tackles this argument by pointing to the fact that the scope of Article 54 CISA has not been made dependent on accompanying harmonising measures by the Member States.[193] It considers that the Member States, by introducing Article 54 CISA and integrating it into the former third pillar, have expressed a significant amount of mutual trust in each other, not only in the mutual quality of their legal systems, but apparently also in their mutual willingness to coordinate their efforts. The latter is relevant, because even the highest possible degree of mutual trust in the quality of each others systems will not always prevent several Member States from thinking that they are best placed to prosecute.[194]

Combined with the ratio of free movement, the Court, in my opinion, has effectively introduced, as far as Article 54 CISA is concerned, the individual as a full actor at transnational level: those Member States that come second and feel that their interests have not been taken into account by the first set of

188 Cf. Luchtman, supra note 4, p. 363-367; R. Lööf, '54 CISA and the Principles of *ne bis in idem*', *European Journal of Crime, Criminal Law and Criminal Justice* 2007, p. 324-325.

189 ECJ 11 February 2003, Joined Cases C-187/01 and C-385/01, *Gözütok and Brügge*, [2003] ECR I-1345, para. 38.

190 ECJ 28 September 2006, Case C-467/04 *Gasparini and Others* [2006] ECR I-9199, para. 27.

191 Lööf, supra note 188, p. 325, refers to the AFSJ as a 'single contractual unit'.

192 Cf. Mitsilegas, supra note 17, p. 147-153.

193 ECJ 11 February 2003, Joined Cases C-187/01 and C-385/01, *Gözütok and Brügge*, [2003] ECR I-1345, para 31-33.

194 Cf. J. Vogel, 'Internationales und europäisches ne bis in idem', in: A. Hoyer et al. (eds.), *Festschrift für F.- C. Schroeder zum 70. Geburtstag,* Heidelberg: C. F. Müller 2006, p. 882, who notes: 'Kein Souverän [soll] einem anderen das Recht nehmen können, souverän über den Schutz der in dessen Sicht strafschützigen Interessen entscheiden zu dürfen.'

proceedings, are nevertheless prohibited from starting a second set. It is up to the Member States to decide whether they can live with this *de facto* conflict rule of 'first-come, first-served' and the adverse consequences it may have. This way, the principle has organisational consequences, indeed,[195] and is closely related to the principle of legality. The stricter the limits set by *ne bis in idem*, the more likely the legislator will have to intervene in order to tackle the potential adverse consequences of this indiscriminate conflict rule, in particular forum shopping, either by defendants or authorities. In that respect, the relationship between the Article 54-58 CISA and Article 50 CFR merits a closer examination, in particular with respect to two issues:

1. Exceptions to Article 54 CISA. The Court of Justice has dealt with the interpretation of the exceptions to the general rule of Article 54 CISA only in passing. Article 55 CISA contains a provision which allows states to limit the scope of Article 54, *inter alia,* where the acts to which the foreign judgment relates took place in whole or in part in its own territory or those acts constitute an offence against national security or other equally essential interests of that Contracting Party. In addition, one could think of exceptions to prior trials which have been manifestly unfair.[196]

The Explanations to the Charter indicate that 'the very limited exceptions in those Conventions permitting the Member States to derogate from the 'non bis in idem' rule are covered by the horizontal clause in Article 52(1) of the Charter concerning limitations', which clarification is to be given 'due regard' in the interpretation of that article (art. 6 (1) TEU). Apparently, the drafters of the Charter were of the opinion that the existing exceptions to Article 54 CISA are in line with Article 52(1) CFR. Obviously, interesting questions will have to be answered by those who challenge that those limitations are indeed 'necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.' For instance, Article 55 (1)(a) CISA may be invoked for two categories of cases. Either it serves to 'protect' national investigations, or it deals with those cases where the acts of the individual did not constitute a criminal offence. Particularly with respect to the first type of cases, one may doubt to what extent the protection of national investigations meets the objectives of general interest of the Union.[197] The issue therefore is how to interpret the phrase 'due regard' in Article 6 TEU.[198]

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195 Cf. M. Luchtman, 'Transnational law enforcement in the European Union and the *ne bis in idem* principle', *Realaw* 2011, p. 7-9. I understand this is also what M. Mansdörfer, *Das Prinzip ne bis in idem im europäischen Strafrecht,* Berlin: Duncker & Humblot 2004, p. 32-40, means, where he refers to *ne bis in idem* as a 'Förderung systemorganisierter Freiheit'. Yet where Mansdörfer defines this *Förderung* as a goal of *ne bis in idem*, I am inclined to qualify it as a result of the principle.

196 Cf. the example of the *Boere* case in Burchard & Brodowski, supra note 186, p. 310-327.

197 Sections 3.3 and 4.2.2.

198 On this, see also Burchard & Brodowski, supra note 186. Incidentally, A-G Cruz-Villalón chooses to disregard the Explanation, p. 33, to art. 52(3) CFR in Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, that 'the reference to the ECHR covers both the Convention and the Protocols

2. The relationship between criminal and administrative law enforcement. Articles 54-58 CISA, integrated in the former third pillar, apply to criminal law *sensu stricto*. It is unlikely that they are also applicable to cooperation in administrative matters with respect to punitive sanctions.[199] There is no framework, comparable to that of the Schengen *acquis* for the internal market or administrative law enforcement in general; European provisions for administrative cooperation deal with *ne bis in idem* only in passing. Nor do we know whether Article 50 CFR covers punitive administrative sanctions. The importance of these issues is obvious: if Article 50 were to be applicable (to punitive administrative sanctions and/or law enforcement cooperation in general), it would also force the joint administrative and criminal law enforcement community to coordinate their efforts. This issue is not completely theoretical. The tasks of criminal and administrative law enforcement networks sometimes overlap.[200] To that extent, one might even speak of the quadrature of the double burden, because double burdens will not only occur at the interface of different legal orders, but also at the interface of criminal and administrative law.

On another occasion, I have defended the position that Article 50 CFR should indeed cover these types of situations, after having concluded that the Explanation to the Charter is ambiguous in this regard.[201] The main argument for that was the system of indirect enforcement in European law, which on the one hand allows Member States a certain leeway in choosing the appropriate (criminal, administrative, private law) way of enforcing European norms, but is on the other hand dependent on the loyal cooperation of all these authorities for effective law enforcement. From that perspective, it makes sense to cross the administrative-criminal law divide within national law, particularly because the Strasbourg court has ensured an autonomous definition of what constitutes a *criminal charge*, which is totally lacking with respect to criminal law *sensu stricto.*[202] Obviously, it remains to be seen whether this will also be the opinion of the Court of Justice. Its Advocate-General Cruz-Villalón went in the opposite direction by advising that Court to limit the scope of Article 50 CFR to criminal law *sensu stricto* in national cases.[203]

4.4 Interim conclusions

The preceding sections analysed choice of forum in light of the key questions related to the legality principle, under its substantive, as well as its procedural

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to it', despite the fact that all Member States (including those who did not ratify P7 ECHR) signed the Treaty of Lisbon (including art. 6 TEU and the Charter), see Opinion, para 84-87.

199 See Luchtman, supra note 195, p. 9-10.

200 Cf. the example by Vervaele in this book of the Fortis case.

201 Luchtman, supra note 195.

202 Cf. ECtHR 21 February 1984, *Öztürk v. Germany*, appl.no. 8544/79; see also ECJ 5 June 2012, Case C-489/10, *Łukasz Marcin Bonda*.

203 Supra note 198.

law heading. That approach was warranted by the fact that the increased Europeanisation and intertwinement of national criminal justice systems create problems which are unknown to national criminal justice or, for that matter, public international law. These problems complicate the legal position of two categories of stakeholders who are explicitly recognized by the Treaties.

The position of the defendant is particularly complicated. Official documents often state that criminals should 'not escape justice', 'should not profit from the abolishment of the internal borders', or 'from differences between legal systems', *et cetera*.[204] These references reveal that the drafters of these texts perceive the defendant as – by analogy to Willem Pompe's observations from 1957 – a *bourgeois* or a *homo economicus* (or perhaps, in European law terms, a *market citizen*), i.e., a calculating individual, rationally striving for what satisfies his needs best.[205] Of course, the law should offer that individual an important authoritative source for assessing the consequences of his actions. This is stressed by utilitarian theories in criminal law too. Yet, so the reasoning seems to be, the legality principle is not there to facilitate all kinds of abuses and forum shopping by individuals. Statutory intervention at European level would easily trump the principle of subsidiarity and allow the criminal to profit from the differences between the legal systems of the Member States or difficulties in cooperation.

As I hoped to have demonstrated, this type of 'framing' is only one side of the story. In the first place, the amount of discretion resulting from forum choice also harms the protection of European interests, as negative conflicts of jurisdiction show time and time again. In the second place, there is enough evidence in legal sources that European citizens are perceived by the Treaties not only as *bourgeois*, but also as *citoyens* (or *Union citizens*).[206] Here, we touch upon the constitutional dimension of the legality principle. The law is not only there to influence the behaviour of its subordinates, it also guarantees them the rule of law and legal protection. The status of citizenship implies a membership to a political entity which grants the individual political rights of representation and guarantees against *arbitrary* interferences with his position. Individual national laws are unable to guarantee European citizens the full effects of these rights. Ongoing Europeanisation, also in the field of criminal justice, has not only led to a transfer of powers to the European level, but also to the increased

204 Cf. supra note 36.

205 W.P.J. Pompe, 'De Mens in het strafrecht', *Rechtsgeleerd Magazijn Themis* 1957, p. 91 *et seq;* see also Willem Pompe Instituut, *Gedachten van Willem Pompe over de mens in het strafrecht,* Den Haag: Boom 2008, p. 12 *et seq*. Pompe's observations - of 1957 - only refer to the Dutch Penal Code. He traces the concept of the individual as a *bourgeois* back to Jeremy Bentham, whereas the concept of the *citoyen* is highly influenced by Cesare Beccaria.

206 On the various positions an individual may have in the European policy areas, see C. McCrudden, 'The Future of the EU Charter of Fundamental Rights', *NYU School of Law, Jean Monnet Working Paper Series, no. 10/01* , p. 20 *et seq*, and the opinion of AG Sharpston in Case C-34/09, *Gerardo Ruiz Zambrano*, Opinion, para 3.

intertwinement of the legal orders of the Member States. That makes it increasingly difficult to pinpoint state responsibility. The preceding sections therefore analysed, first and foremost, the complications for individuals as well as the European Union, in light of the principles *nullum crimen, nulla poena sine lege*, *nullum judicium sine lege* and *ne bis in idem*. Double regulatory burdens, although unavoidable in a system of indirect law enforcement, are problematic, particularly where (the origins of) these burdens are unforeseeable or remain unresolved.

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

Obviously, 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*. 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. Applying a similar approach with respect to other Charter rights is by no means a certain thing. It would for instance mean that in cases of negative integration, interferences with the Treaty freedoms are assessed in light of these redefined Charter rights.[207] That, in turn, could lead to the inapplicability of national law. The interpretation of secondary legislation in light of these redefined guarantees could cause similar problems to 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 at the European level.

It is at this point where free movement and political representation at European level interlock. Where Charter guarantees become '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,[208] and to ensure free movement '*in conjunction with* appropriate measures with respect to (...) the prevention and combating of crime' (art. 3(2) TEU). Those guarantees could after all lead to the inapplicability of existing national or European regulations and would therefore force the European (and national legal) order(s) to deal with problems (negative conflicts in particular) that do currently not exist. The recalibration of personal autonomy *vis-à-vis* the cooperating Member *States* (the right to 'vote with your feet') would then lead to intervention at European level and thus be supplemented by political

207 Following the rule of reason-approach by the ECJ, national law may limit the freedoms, but only for a legitimate purpose, subject to a test of proportionality and with full respect for the (redefined) fundamental rights; see Muir and Van der Mei in this book, section 4.

208 See section 3.3.

representation at the European level. That is what I meant in the above with the activation of European citizenship.[209]

The question then is when measures are '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 the 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 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 solutions,[210] had the Member States themselves not agreed to an ambitious internationalised *ne bis in idem*-guarantee.[211]

What we don't know 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 (arts. 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.[212] It would imply a normative yardstick for assessing the current legislative affairs, which is also binding to the European legislator.

Obviously, that approach creates also new problems. It leads to a series of interesting questions. For instance, is the scope of Articles 54-58 CISA in line with Article 50 CFR?[213] Does the latter article also regulate administrative cooperation or cooperation at the interface of criminal and administrative law

209 Supra section 3.2.3.
210 Cf. Luchtman, supra note 195, p. 15-17, 20-22.
211 Cf. the reverse situation in ECJ 21 September 1999, Case C-378/97, *Wijsenbeek*, ECR 1999, I-6207, para. 40, 44, where the Court refused to disconnect free movement rights from accompanying legislative measures.
212 In a similar fashion, A-G Sharpston in her opinion to ECJ 8 March 2011, Case C-34/ 09, *Ruiz Zambrano*, Opinion, para 166-170; see also Muir and Van der Mei in this book, section 3.1.
213 Burchard & Brodowski, supra note 186, p. 310-327.

enforcement? Most importantly, 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 of 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 [italics added, ML],' without defining what these adverse consequences may be. 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.[214] In a system based on 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.[215] 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 counter-arguments 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? 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 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.[216] 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, 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 these provisions, which, incidentally, also has to take into account another principle of

214 Cf. the analysis in section 3.2.2.
215 Cf. S. Gless & J.A.E. Vervaele, 'Law should govern: aspiring General Principles for Transnational Criminal Law', *Utrecht Law Review,* special issue, forthcoming 2013.
216 ECJ 18 April 2011, Case C-61/11 PPU, *Hassen El Dridi*, para 53.

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 of 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) to move backwards, but do not push any of those actors forward. Ultimately,[217] I think this is also how we should interpret the case law of the Court with respect to Articles 54-58 CISA. With references to subsequent legislative developments, the Court prohibited in *Brügge and Gözütok* the Member States to fall back on their original intentions, with respect to the scope of Article 54 CISA. *Noblesse oblige*.

3. Methodological considerations. We also have to take account of what may be called methodological considerations.[218] First and foremost, there is uncertainty on a series of questions with respect to the legality principle in the internal legal orders. For instance, we don't know what the Strasbourg Court thinks of the relationship between the laws on jurisdiction and the substantive legality principle of Article 7 ECHR or Article 49 CFR. Is that principle directly applicable to jurisdictional rules? Or does it merely casts forward 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 on 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 no sign of convergence yet, for instance through the case law of the Strasbourg or Luxembourg Courts.[219] Indeed, one could then conclude that the fundamental rights discussed here are simply not designed for transnational

217 In Luchtman, supra note 195, p. 20-24, I adopted a more 'ambitious' approach.

218 See also T.P. Marguery, 'The protection of fundamental rights in European criminal law after Lisbon: What role for the Charter of Fundamental Rights?', *European Law Review* 2012, p. 449, who discusses the relevance of Article 52(5) Charter, which differentiates between rights and principles.

219 Cf. the opinion of A-G Villálon-Cruz in Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, supra note 198, with respect to Article 50 CFR in national proceedings.

application, and therefore need positive confirmation by the legislator at least in order 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.[220] 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 'hard law' fundamental rights guarantees.
With respect to Articles 47 and 50 CFR the problem is somewhat different in my opinion. In light of their *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 involved Member States.

This finding does however not 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.[221] 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 interests concerned (those of the Member States, EU and EU citizens) 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 paragraph.

220 See section 4.1.3.

221 Cf. Lagodny, supra note 32, p. 62 *et seq*., with respect to German law. This is implicitly confirmed in numerous legislative instruments that often declare that those instruments respect and uphold the fundamental rights.

6 The EU framework for choice of forum *de lege ferenda* – Recommendations[222]

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 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.[223] 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',[224] problems of foreseeability and double burdens remain unsolved. They are considered a matter for national law (cf. art. 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.[225]

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,[226] 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

222 See also Sinn (ed.), supra note 17, p. 597-616; Biehler *et al*., supra note 52; Schünemann (ed.), supra note 132; Vander Beken *et al.*, supra note 147; Lagodny, supra note 32.
223 Supra note 26.
224 Supra note 79.
225 Section 3.2.2.
226 Cf. Herrnfeld, p. 159, in: Sinn, supra note 17.

regulation. Deviations are possible where the circumstances so require, for instance in case of the establishment of the European prosecutor.[227]

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 State '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.[228]

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 of sharing of 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 European Union or the European citizen.[229]

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 burden put on them by the joint Member States and ultimately achieve the elimination of that burden,[230] as well as exclude the possibility of any actor being able to supersede its own interests above the proper administration of justice. I would 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;[231] and the same goes for consequences put on the European citizen by a legal system other than the one he subjected himself to.[232]

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227 On this, see for instance the contributions by Kuhl, Vervaele and Herrnfeld in this book; see also the relevant provisions in the Model rules for the procedure of the EPPO, < http://www.eppo-project.eu/ >, in particular rule 64.

228 Section 3.2.2; section 3.3; section 4.2.2.

229 Cf. Luchtman, supra note 195, p. 18-20.

230 Cf. the Green paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings, COM(2005) 696, p. 2, 7; Lagodny, supra note 32.

231 Cf. Sinn (ed.), supra note 17, p. 598, 600; Lagodny, supra note 32, p. 99 *et seq*.; Schünemann (ed.), supra note 132, p. 5 *et seq*., referring to a concept of *transnationale Verfahrenskonzentration*.

232 Section 3.2; section 4.1.3; section 4.2.2.

In addition, it follows from the foregoing that any system for forum choice in criminal matters should coordinate with administrative law enforcement networks. Forum shopping – either by defendants or authorities – is a real possibility here too. Yet whether this recommendation will also become a necessity depends largely on the scope of Article 50 CFR. As I stated above,[233] in a system of indirect enforcement it is difficult to accept that European law forces the Member States to implement norms to create a level playing field – for instance in PIF-cases or market abuse[234] –, yet simultaneously allows those states to refuse cooperation on account of different choices made as regards their implementation.[235] Reversely – from a national perspective – and as far as the implementation of European norms is concerned, the weight of the differences between criminal law and punitive administrative law needs to be challenged, particularly in light of both the case law of the Strasbourg Court and the results of this dichotomy: the existence of yet another double burden for the individual, i.e., cumulative criminal and administrative sanctions *and* proceedings.

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.[236] 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 of 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),[237] the integrity of any statutory criterion (or set of criteria) is easily put into question in a specific case.[238] A system like that 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*.

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233 Section 4.3.

234 See Vervaele in this book; De Sousa Mendes, supra note 34, p. 55-58.

235 Cf. M.J.J.P. Luchtman, *European cooperation between financial supervisory authorities, tax authorities and judicial authorities*, Antwerpen/Oxford: Intersentia 2008, p. 142-151, 187-218; Luchtman, supra note 195.

236 Cf. Herrnfeld in this book, section 4.

237 One can think of questions related to preparation and attempt, *concursus idealis* and *realis*, complicity, *et cetera*; see Luchtman, supra note 28, p. 100.

238 To that extent, I agree with Schünemann (ed.), supra note 132, p. 107. Their proposal, too, admits that any statutory system will continue to need room for deviations; see art. 2(3) and the explanations to it, p. 8.

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.[239] What is more, is that even sophisticated systems like the Swiss are still in need for deviations from statutory criteria, although substantive criminal law and procedure are fully harmonised.

In stead, 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.[240] That system does not designate *ex ante* the 'best placed' Member State by fixed statutory criteria, but instead aims to achieve that:

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* (*infra* section 6.2, no. 2);[241]
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 (*infra* section 6.4, no. 2);
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.[242] Although forum choice as such remains a matter for 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 not certain whether EU courts are competent to exert control on (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

239 Cf. section 5.
240 Cf. Deboyser, section 4, in this book; Herrnfeld, p. 147-148, in: Sinn (ed.), supra note 17; Mitsilegas, supra note 17, p. 155-156.
241 The state of stay means the state where the person was present at the time of the offence.
242 Cf. Deboyser in this book, section 5.

direct and individual concern to them (cf. art. 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.[243] 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 involved actors.[244]

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.[245] An important argument for this is that, ultimately, it will be the national authorities that decide on prosecution (art. 85 (1)(a) TFEU).[246] 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.[247] The obvious question is how this test relates to the decision of Eurojust, which is a European agency.[248] 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 to 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 double burdens for the defendant would then be the result. Forum choices under court

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243 Cf. Herrnfeld in this book, section 6.2; Sinn (ed.), supra note 17, p. 613-614. The situation in criminal law seems to differ from competition law to the extent that in competition law, supra note 148, case allocation takes place in a single European (albeit largely decentralised) system of competition law.

244 Lagodny, supra note 32, p. 34-40, 64-100, has argued that the opening of 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 for a common European standard in this regard; see however Inghelram, supra note 148, p. 208-214.

245 Incidentally, art. 263 (5) TFEU seems to be a basis for a further reduction of judicial review in case of agencies Cf. Schwarze, p. 194, in: J. Schwarze et al. (eds.), *EU-Kommentar,* Baden-Baden: Nomos 2009. On this provision also Herrnfeld in this book, section 6.2.

246 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.

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

248 Cf. Inghelram, supra note 148, p. 226-230, 265-267.

supervision at the European level are therefore to be preferred above the national level.[249]

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.[250] 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.[251] 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.[252] This is not only because the substantive legality principle as it was redefined in section 4.1.2 is insufficiently authoritative with respect to criminal law jurisdiction,[253] 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 with 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 to Member States on the basis of Articles 83 or 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 on a range of

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249 This, incidentally, seems to be the *communis opinio*; see *inter alia* Sinn (ed.), supra note 17; Biehler *et al*., supra note 52; Schünemann (ed.), supra note 132; Vander Beken *et al*., supra note 147.

250 Cf. Herrnfeld, p. 160, in: Sinn (ed.), supra note 17.

251 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 182, p. 542-562.

252 Cf. Panzavolta, section 11 in this book. Böse, section 3.1 in this book, proceeds in a different direction, by proposing to restrict primary (prescriptive) jurisdiction as much as possible. Jurisdictional criteria, according to him, remain relevant with respect to the determination of the competent Member State.

253 See section 5.

areas – euthanasia, (soft) drugs, *et cetera* – remain a real possibility.[254] Member States still disagree thoroughly on the criminality of such behaviour, but 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.

In line with my findings in section 3.2, 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.[255] 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.[256]

Obviously, there is a danger of abuse of free movement, particularly where a particular Member States 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 and try offences is therefore lifted, where 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, ask the Luxembourg Court preliminary questions).

6.3 Jurisdiction to enforce

1. Jurisdiction to enforce and the investigative stage. 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

254 See also Ryngaert, supra note 101, p. 160 *et seq*., with respect to international law.
255 Section 4.1.3.
256 See also the discussion by Fuchs, p. 113-114, of the model proposed in Schünemann (ed.), supra note 132.

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.[257]

2. Transnational cooperation and forum choice. Instruments for cooperation should facilitate the process of finding the best forum, not *vice versa*.[258] Instead of constituting limitations to a forum choice,[259] 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 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.[260] 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.[261]

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

257 Panzavolta, section 10 in this book, proceeds in a different direction, stipulating a forum choice – at the latest – at the start of the investigations.
258 Cf. Lagodny, supra note 32, p. 112-113.
259 Section 2.
260 On this, see also Groenleer, supra note 14, p. 318-319.
261 The question of whether European institutions should be given the possibility of appeal to a negative decision of Eurojust will remain undiscussed here.

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).[262] The case law of the European Court of Human Rights with respect to the right to be tried within a reasonable time (art. 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 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.[263] 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);[264]
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 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

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

263 See however also the reservations with respect to such a list of criteria by Herrnfeld in this book, section 4.

264 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 17, p. 604, 611. Obviously, there is a need for control by the Court of Justice, who may be asked to provide guidance on such a provision.

ne bis in idem-guarantees, but will not always prevent forum shopping by the authorities (or the defendant).[265] 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);
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.[266]

These 'principle-based' criteria apply to both types of legal rules introduced above. They will force the authorities, when so asked, to motivate 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 motivated in light of the absence of credible 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.[267] It is the task of the national prosecutors (or Eurojust) to search for the best forum, during the early stages of investigation, and to motivate 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

265 Where there is no criminal offence in the state of stay, supra note 241, there is no power for other Member States to prosecute and try the case (except in cases of abuse); section 6.2.
266 Section 4.2.2. 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. In addition, I am not sure whether anticipating to the 'best forum for execution' prior to conviction is in line with the presumption of innocence (Article 47 CFR).
267 It is thinkable to grant the victim a similar position like the defendant. I will leave that issue open here.

merits of the case.[268] 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.[269] 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.[270] 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

Criminal law is not only about the protection of fundamental rights of citizens *by* the state, but also about the protection of citizens *against* the state. EU Member States have transferred a significant part of their powers to the European level in order to deal with a series of common problems. The question is what this shift in powers means for the interpretation of fundamental rights, also in the horizontal relationships between the Member States. This issue is pertinent in cases of choice of forum, an area of law which is still left largely untouched by European law.

The Treaty of Lisbon formulates ambitious goals for the European Union. Among other things, the EU must offer its citizens an area of freedom, security and justice, in which free movement of citizens is guaranteed in combination with appropriate measures with respect to crime control (art. 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. Both types of interests are explicitly protected by the Treaties.[271]

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, unilateral action by individual states may hamper the goal put forward in Article 3(2) TEU. I therefore suggested to interpret the Charter rights in light of this goal, in order

268 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.
269 See section 6.1, consideration 4.
270 Cf. ECJ 11 November 1981, Case 60/81, *IBM v. Commission*, [1981] ECR 2639, para 20.
271 Section 3.

to activate the concept of European citizenship.[272] 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.[273]

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.[274] 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 deal of fine things by the EU, without being in the position to decide over them autonomously.[275] Balibar has discussed what could be the added value of democracy at European level, in addition to the national level. He proposes that the EU identify 'work sites of democracy' in order to add substance to abstract deliberations on European democracy in general.[276] One of those worksites, according to him, is the 'question of justice'.[277] To that extent, the efforts of the European Union in the field of procedural safeguards certainly are a true test case.[278]

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. As early as 1983, Alphons Orie attracted attention to a phenomenon in international criminal law, called the systemic flaw (*systeembreuk*).[279] He meant that the suspect often falls between two stools in cases of international cooperation, due to the differences between the legal systems of the Member States. Safeguards that protect his position at the national level cease to function properly at the international level. Harmonisation of procedural safeguards at European level will only offer limited protection against this problem. Still, negotiations on, for instance, the European investigation order largely exclude the – what may be termed – 'transnational organisation of legal protection' from the design of the

272 Section 3.2.3; section 5.
273 Section 4.4.
274 Section 5.
275 Supra note 43.
276 Balibar, supra note 69.
277 Ibid., 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.'
278 Section 2.
279 A.M.M. Orie, 'De verdachte tussen wal en schip òf de systeem-breuk in de kleine rechtshulp', in: André de la Porte, E. (ed.), *Bij deze stand van zaken (Melaibundel),* Arnhem: Gouda Quint 1983; see also Luchtman, supra note 235, p. 162-169, with further references.

instrument.[280] Of course, the suspect could rely on the executing state for an effective remedy, but in many cases such a remedy will not offer an adequate redress for violations of Convention rights (partly because the trial takes place in another state), and it may take years to get it. In this area, legislative intervention by the EU certainly has clear added value.

It will come as no surprise by now that I consider regulation of choice of forum to be a matter of the urgent category too. 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.[281] The European Council seems satisfied with the *status quo*. The European Commission originally had ambitious plans for choice of forum, but seems to have suspended its ambitions and is now focussing on the establishment of the European Public Prosecutor. European parliament has no right of initiative. Finally, and obviously, courts too will have great difficulties in guiding executive discretion in the absence of a coherent statutory framework. All one can expect is that the Court of Justice will shine a light on some of the issues by answering preliminary questions.

The main point for now, and with that I will conclude, is that the European legislator can not discharge itself of 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.[282] Charter rights that are interpreted in light of Article 3(2) TEU offer an important source of inspiration and guidance in this respect, which 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.[283] 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.

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280 Cf. the note of the Standing Committee of Experts on International Immigration, Refugee and Criminal law on '[T]he initiative for a Directive regarding the European Investigation Order in criminal matters, 09.06.2011 (CM1106), to be found on < http://www.commissie-meijers.nl >.

281 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 Article 86 TFEU.

282 Section 5.

283 Supra note 95.