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Chapter 12

Criminal Law Enforcement of EU Harmonised Financial Policies: The Need for a Shared Criminal Policy

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1 Introduction[1]

Utrecht criminal scholars have paid a lot of attention to the criminal enforcement of economic and financial regulations. Already in the 1950s, Prof. Röling published important contributions on the criminal liability of legal persons and on the attribution of criminal liability to them, based on forms of the vicarious liability of natural persons.[2] In 1963, Prof. van Binsbergen dedicated his inaugural lecture to the interaction between EC integraton and domestic criminal justice.[3] Prof. Wladimiroff was appointed in 1986 to hold the first chair in economic criminal law in the Netherlands. However, nobody could imagine at that time the reach and intensity of the impact of European integration and globalisation on domestic criminal justice.

In the last decade companies have become a main target of financial criminal investigations and prosecutions for their role in the financial crises since 2008, for global money laundering operations, for speculative and fraudulent behaviour with Libor, Euribor and currency rates, for violations of embargos against states, for bribery practices worldwide, for trading in illegal goods (species, wood, pharmaceutical products, etc.) and for illegal tax constructions. Dutch(-based) companies and business managers increasingly faced criminal investigations for their European and international activities. The large financial sector with global operations, the favourable tax regime for corporations under the bilateral treaties for tax avoidance, the tax rulings for multinationals, all result in a high nexus with Dutch territory, be it by the seat of the companies or their financial subsidiaries or their financial transactions through the Dutch clearing houses. It is equally clear, though, that the financial operations of these companies have a European transnational and/or global reach.

The investigations and prosecutions of the suspected illegal behaviour in the financial sector are to a large extent triggered by regulatory and enforcement

1 All websites last checked on 19 February 2015.
2 Röling, 1957, p. 4.
3 Van Binsbergen, 1963.

agencies and/or classic judicial authorities (prosecutors and investigating magistrates) within the national jurisdictions, based on the seat of the corporate body, the place of the illegal conduct or the damage. In some countries, there is a real shift to criminal law enforcement against large companies. The US Attorney General Eric Holder repeatedly declared that no banks are too big to be prosecuted if they engage in criminal activity. The maxim of 'too big to fail and too big to jail' has been clearly set aside.[4] Some countries also use extended criteria of jurisdiction to investigate and prosecute their interests on a global scale and this is the reason why so many Dutch and other European (-based) companies face criminal prosecutions in the US. Yet in other countries we see no substantive enforcement activity at all or at a very low level, mostly ending up in modest administrative fines being imposed by the regulators and not triggering criminal enforcement against the managers and their companies, as we will illustrate in Section 2.

The response of the enforcement communities therefore clearly depends largely on the regulatory policies, tools and practices of the national jurisdictions. However, their illicit behaviour does not only affect the interests and values of Nation States, but also the interests and values of regional institutions and policies such as those of the EU and, in some cases like corruption and UN embargos, global values. Most Nation States, partially under international and regional obligations, have decided to define some of these activities, like violations of UN embargos, not only as illicit but as illegal criminal behaviour. Yet even in those areas, the applicable criminal laws still remain a patchwork of diverging national provisions. In the broad field of economic and financial offences, there are few, if any, international obligations or standards, with the exception of the related money laundering offences (which do not apply to all economic and financial predicate offences). This means that the extent to which enforcement authorities can investigate and prosecute illicit behaviour depends upon the legislative policies and designs in the national jurisdictions (the definition of the offences, investigative tools and jurisdiction rules). A common or equivalent playing field is lacking. Enforcement practice shows many examples of concurring and overlapping investigations and prosecutions in several jurisdictions, but also of an unilaterally extensive use of extra-territorial investigations and prosecutions by some powerful states such as the US.

Diverging standards and the lack of a level playing field may have all sorts of effects, such as races to the bottom, races to the top, double burdens, cost inefficiency, et cetera.[5] It has also been asserted that unilateralism may occasionally have positive effects, such as to trigger the development of new legislative standards.[6] This article nonetheless starts from the assumption that

4 Cf. Golumbic & Lichy, 2014.

5 Described in many economic and governance studies, but also in law. Cf. Radaelli, 2004; Sun & Pelkmans, 1995; Vogel & Kagan, 2004; Ogus, 1999.

6 Cf. Hakimi, 2014.

a certain level playing field will ultimately be necessary, not only to increase effectiveness or cost-efficiency, but also because it is directly related to the protection of the individual. A level playing field is necessary not only with respect to the legal framework as such (a common definition of offences, rules on jurisdiction, procedural law, laws on cooperation), but also with regard to the law in action (carrying out investigations, prosecution, coordination of actions, settlement of conflicts of jurisdiction). Such a level playing field will define who is investigating and prosecuting what, whom and why. It also needs to be able to answer the question of how companies and individuals can predict by whom and in which jurisdiction(s) they risk investigation and prosecution, based on the law or based on criminal policy priorities. Preferably, we submit, a level playing field is able to tackle the adverse consequences of double or multiple prosecutions for the individual.

This article focuses on if and how these ideals, though clearly not yet belonging to the range of the law in action, are part of the legislative policies of the European Union and its Member States. It will focus on the EU's harmonization policies in relation to substantive criminal law (offences, general part), the rules on jurisdiction and the accompanying measures with respect to the prevention and settlement of conflicts of jurisdiction. The new, post-Lisbon institutional context urges the need for a debate on how criminal law should serve to protect the harmonized EU policies. Taking into account the common interests at stake, have the member States and the EU in the meantime elaborated a criminal legislative policy on which violations of financial regulations need to be criminally sanctioned? What would the communalities of this enforcement harmonisation be? To what extent have the member states and the EU elaborated a criminal jurisdiction policy that addresses problems of overlapping investigations and prosecutions, of a lack of jurisdiction in some States, or of the extraterritorial use of investigative and prosecutorial power by the US in relation to EU companies?

In order to tackle these questions, in Section 2 we will map the problems under the body of law that exists today through a couple of appealing and representative cases of the transnational enforcement of financial regulations. In Section 3 we will address the question of whether EU Member States, like the Netherlands, have in place criminal legislative policies and jurisdictional policies that are related to the internal market and the Area of Freedom, Security and Justice/AFSJ. In Section 4 we will address the same questions at the EU level. Section 5 answers the questions raised and addresses the need for a shared criminal justice policy in the EU in the area of harmonised economic and financial regulations.

2 Enforcing financial regulations: the law in action

The financial markets are at the absolute core of the European integration process. Financial integration is closely related to the internal market, and many

other common EU policies. EU directives and regulations show high levels of the harmonization of the applicable norms, often even excluding any national leeway or possibilities for goldplating. We are interested in how this high level prescriptive framework for citizens and other economic actors works out when it comes to its enforcement dimension (common offences; jurisdiction). Obviously, national authorities do have responsibility for the enforcement of obligations under EU law. This responsibility not only covers 'internal', purely national situations, the abolishment has made them to a certain extent jointly responsible for the enforcement of the EU framework. Member States are under an obligation to cooperate loyally, with each other, but also with EU bodies. The enforcement side of EU financial market integration moreover has a clear internal EU side, but also an external one to the extent that EU-based companies may be faced with investigative and prosecutorial measures from, mostly the US, or *vice versa*. Despite the close links between standard setting, on the one hand, and law enforcement, on the other, enforcement practice shows that we are currently far away from an integrated EU enforcement model.

Fortis Bank: market abuse

In 2007 Banco Santander, Fortis Bank and the Royal Bank of Scotland obtained control over ABN AMRO bank through a hostile takeover. Fortis Bank had problems in financing its part of the takeover and decided to go to the capital market for fresh capital and thus to offer new shares. The operation was widely advertised. Due to the financial meltdown, the nationalisation and dismantling of Fortis Bank, doubts were very soon raised about the financial integrity of the company and of the information given to existing and new shareholders at the time of the capital extension. The rules on market abuse, a part of hard-core European law on the financial markets,[7] apply in all EU Member States. Those rules have been given wide extraterritorial effects.[8] In case of overlapping competences, Article 16(3) MAD 2003 requires that the competent authorities of the various Member States that are competent for the purposes of Article 10 shall consult each other on the proposed follow-up to their action.

Nonetheless, the enforcement of these rules in the Fortis case was almost completely driven by the national enforcement design and national enforcement agendas, as the European rules leave much discretion to the Member States. Infringements of the EU market abuse rules are administrative irregularities and criminal offences, both in Belgium and Luxembourg, as well as in the Netherlands. Moreover, legal persons can be criminally liable in the three countries for these

7 At that time Directive 6/2003/EC of 28 January 2003 on insider dealing and market manipulation (market abuse), *OJ EU* L 96/16.

8 See Articles 9 and 10 of the current Market Abuse Directive 2003/6/EC, discussed by Botter & Van Rossum, 2008, p. 429-441. Put briefly, Article 9 defines the territorial scope of the directive, whereas Article 10 defines the rules on which Member State (authority) is responsible for implementation and enforcement.

types of offences. However, in Luxembourg no action was undertaken at all by the administrative or judicial authorities, although Luxembourg was involved in the later (partial) nationalization of Fortis. In the Netherlands, administrative enforcement authorities opened investigations against the former Fortis Bank concerning suspicions of market abuse. In Belgium, both administrative as well as judicial authorities opened investigations against the former Fortis Bank and against the CEOs. This led to concurring and parallel investigations and proceedings in Belgium and the Netherlands, but to no investigations at all in Luxembourg. In 2012, the Dutch Financial Services Authority (*Autoriteit Financiële Markten*/AFM), the administrative enforcement agency, was the first to conclude proceedings and imposed four fines[9] of € 144,000 each on the two legal persons that constituted the Fortis Bank corporation/holding, They were found guilty of market abuse.

The imposition of the administrative fines by the AFM on the two legal persons constituting the holding of Fortis Bank had undoubtedly been coordinated together with the Dutch judicial authorities. In the Netherlands, the legal framework imposes a duty upon the administrative and judicial enforcement authorities to choose, at a certain stage, one of the two enforcement regimes, in other words to opt either for administrative sanctions or criminal prosecution (the so-called *una via* principle).[10] However, this does not preclude criminal proceedings against the former CEOs. The Dutch Public Prosecution Service has not given formal notice of any ongoing judicial investigation in that sphere.[11]

It is not known and difficult to guess if the authorities took into account the transnational dimension of the case when deciding to opt for administrative enforcement, rather than the criminal law route. However, what is clear is that we can talk about unilateral action by the Dutch authorities, without coordinating with the Belgian administrative and judicial authorities, despite Article 16(3) MAD 2003. In 2012 the Belgian administrative enforcement agency, the Financial Services and Markets Authority (FSMA), found evidence that the company had distributed misleading information and imposed fines of € 500,000 on the former Fortis Bank and fines of up to € 400,000 against the CEOs. Finally, in 2013 the Belgian judicial authorities decided to prosecute seven former CEOs for misleading information, market abuse, the forgery of documents and deception, but decided not to prosecute the former Fortis Bank or BNP Paribas Fortis (the new owner of the bank).

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9 See www.afm.nl/~/media/files/boete/2010/fortis-besluit-nv.ashx and www.afm.nl/~/media/files/boete/2010/fortis-besluit-sanv.ashx.

10 This means that the administrative and criminal enforcement authorities have to decide at a certain stage in the investigation to opt for either administrative sanctioning or criminal prosecution.

11 The Dutch Public Prosecution Service does not, in general, publish communications on the opening or not opening of financial judicial investigations or on ongoing financial judicial investigations. In Belgium, however, this is current practice.

Libor/Euribor: interest rate rigging scandal

In 2012 it came to light that the Libor[12] and Euribor[13] panels had been deliberately manipulating the interest rates since 1991, in order to increase bank profits. Both Libor rates and Euribor rates are the daily reference rates for mortgages, consumer lending products, futures, options, swaps and other derivative financial instruments and thus have significant effects on consumers and the financial markets worldwide. Several European banks faced cumulative investigations and proceedings, both in the US and in European countries. Banks had not only to deal with civil damages claims (mostly in the US) but also with proceedings by administrative enforcement agencies (financial regulators and competition authorities[14]) and judicial authorities. One of the banks that was active in both Libor and Euribor panels is Rabobank, a financial services corporation with its headquarters being located in the Netherlands. Most of the alleged conduct by bank employees took place in London and New York.

In the period 2005-2010, certain Rabobank swaps traders requested Rabobank's Libor and Euribor panel members to submit higher, lower or unchanged rates for particular tenors and currencies, which would benefit the traders' trading positions.The swaps traders made these requests via electronic messages, telephone conversations, and in-person conversations.

The Libor and Euribor submitters agreed to accommodate, and did indeed accommodate, the swaps traders' requests for favourable Libor and Euribor submissions on numerous occasions.

In 2012, the Dutch Central Bank (*De Nederlandsche Bank/*DNB) and the Dutch AFM started administrative investigations.[15] At that time, however, the US Department of Justice had already openened criminal investigations against Rabobank, which were concluded in 2013 with a deferred prosecution agreement between the Fraud Section of the Criminal Division and the Antitrust Division of the US Department of Justice and Rabobank for the amount of $ 325 million as a criminal penalty.[16] Together with approximately $ 740 million in criminal and regulatory penalties imposed by other agencies in actions arising out of the same conduct – $ 475 million by the Commodity Futures Trading Commission (CFTC) action, $ 170 million by the UK Financial Conduct Authority (FCA)

12 The London Interbank Offered Rate (Libor) is the average interest rate estimated by leading banks in London that they would be charged if borrowing from other banks. It is calculated for ten currencies, including the USD and the Euro. Almost 20 world leading banks participate in the Libor panels.

13 Euribor is short for Euro Interbank Offered Rate. The Euribor rates are based on the interest rates fixed by panels of around 40 to 50 European banks.

14 The European Competition Authority and the Swiss Competition Authority commenced proceedings for cartel behaviour.

15 See www.rtlnieuws.nl/economie/dnb-en-afm-onderzoeken-manipulatie-libor-rente.

16 See www.justice.gov/opa/pr/rabobank-admits-wrongdoing-libor-investigation-agrees-pay-325-million-criminal-penalty for the press release, the text of the DPA and the statement of facts.

and approximately $ 96 million by the Dutch Public Prosecution Service, the total amount to be paid by Rabobank is more than $1 billion.

The Libor case thus triggered the jurisdictions of three States, including the US, the UK and the Netherlands. In his comments on the case, the Dutch Minister of Security and Justice indicated that he was very satisfied with this so-called 'global settlement'.[17] Nonetheless, these laudable comments do not do away with the fact that no insights were given on the division of labour between all of the authorities involved. The Minister stressed that coordination with foreign authorities took place, but that all authorities determined the level of their sanctions autonomously and independently.[18] The agreement with the Dutch Public Prosecution Service was not made public. Therefore, important questions arise, such as why the Dutch authorities left the matter in the first instance to the US,[19] and how prosecutorial overreach and excessive sanctioning were avoided, if at all, in this case. By contrast, many Dutch parliamentians seem to have been concerned mainly with the questions of whether Rabobank was indeed sufficiently punished, whether the fines that were paid should be tax deductable, whether a total financial sanction of this amount would not ultimately lead to another bail out of a Dutch bank, at the cost of Dutch tax payers, and why the US treasury obtained the most (financial) gain from the penalties.[20]

BNP Paribas Bank: violations of state embargos

BNP Paribas, a global financial institution with its headquarters in Paris, agreed in 2014 to enter a guilty plea with the US Attorney of New York for conspiring to violate the US International Emergency Economic Powers Act and the US Trading with the Enemy Act by processing billions of dollars of transactions through the US financial system on behalf of Sudanese, Iranian, and Cuban entities subject to US economic sanctions. The agreement by the French bank to plead guilty is the first time a global bank has agreed to plead guilty to large-scale, systematic violations of US economic sanctions. The plea agreement[21] provides that BNPP will pay total financial penalties of $ 8.9736 billion, including the forfeiture of $ 8.8336 billion and a fine of $ 140 million. According to the plea, BNP Paribas knowingly and wilfully moved more than $ 8.8 billion through the US financial system on behalf of sanctioned entities in the period 2004-2012. The bank engaged in this criminal conduct through

17 *Kamerstukken II* 2013/14, 33 803, no. 6, p. 26. In the deferred prosecution agreement the US authorities explicitly thanked the Dutch Prosecuction Office for its cooperation.

18 *Kamerstukken II* 2013/14, 33 803, no. 6, p. 30.

19 As stressed by a number of Dutch parliamentarians in *Kamerstukken II* 2013/14, 33 803, no. 6.

20 See the debate in *Kamerstukken II* 2013/14, 33 803, nr. 6, p. 26; *Handelingen II* 2013/14, 36, p. 1-6.

21 See www.justice.gov/opa/documents-and-resources-june-30-2104-bnp-paribas-press-conference, for press release, guilty plea agreement and statement of the facts.

various sophisticated schemes, not mentioning the names of sanctioned entities or envolving third parties, designed to conceal from the US regulators the true nature of the illicit transactions. The Cuban embargo is a unilateral US decision, but the Iranian and Sudanese embargos are also linked with UN embargos by the Security Council. Moreoever, in the case of Sudan, the clients of BNP Paribus are also under investigation at the ICC for international crimes against humanity and war crimes. Therefore, those sanctions partly enforce common global standards. Nonetheless, the tough approach of the US criminal enforcement authorities differs strongly from the inactivity of the French administrative and judicial enforcement agencies.

What can we conclude from these enforcement examples in a policy area where the EU substantive law on financial markets and products is said to be highly harmonised?[22] First of all, we must point to the many apparent instances of a lack of coordination. In the Fortis case, although we have, exceptionally, the harmonisation of administrative enforcement and comparable criminal offences in the three states, this did not lead to a coordinated use of administrative and criminal jurisdiction in the internal market and the AFSJ. In the Netherlands and Belgium there have been concurring enforcement activities; in Luxembourg no enforcement jurisdiction has been triggered at all. From the point of view of the overall AFSJ, the result is a patchwork with some overactivity and some underactivity, or indeed no activity at all. Much is left to chance. The result is: poor cost efficiency, legal problems with, for instance,[23] double jeopardy, weak criminal enforcement protection for the legal interest, and very little protection for the victims. In the Libor and Euribor cases, there was initially no EU enforcement at all and the Member States left most matters to self-regulation and enforcement by the financial sector.[24] There were difficulties and doubts in several EU countries as to the existence, at that time, of specific offences for this type of behaviour.

In the second place, we see that in most cases national authorities are pursuing mainly national interests. Consecutive proceedings, conflicts of jurisdiction or double punishment are not perceived as a problem for which they are responsible. Instead, it is often maintained that by crossing borders, companies and individuals subject themselves to the risk of multiple excessive punishment, contradictions in their legal position, et cetera. The existence of a level playing field therefore seems to stop once common norms are in place, and does not (yet) influence the law in action. In light of the creation of common

22 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:096:0016:0016:EN:pdf.

23 The cross-border dimension is not limited to double jeopardy, but extends to the transnational protection of fundamental rights, such as the principle of legality, fair trial standards, including the right to silence, the privilege against self-incrimination, etc., as well as in relation to the combination of punitive administrative and criminal enforcement.

24 See Gomez-Jara Diez, 2013, p. 82.

EU policies, this is a surprising approach. There is a clear contradiction in the position that while promoting the free movement of goods, services, capital, workers, citizens, the adverse concequences of such free movement are not a concern for national authorities, but for the citizens and companies themselves. In the third place, we must note that the EU in many cases takes a backseat to the US authorities. We see that several regulators, mostly under the lead of US regulators or the US Departement of Justice/Attorney General, conclude Non- or Deferred Prosecution Agreements (NPAs or DPAs) with the companies in question. These US out of court settlements are in reality the result of US-led criminal investigations, based on extended territoriality claims, with the ad-hoc assistance of regulators in EU countries. In many cases European judicial authorities, responsible for criminal prosecutions, do not seem to be involved. There seems to be no or very little coherent enforcement strategy between the enforcement authorities in the EU, something that does contrast with the policy in the US.[25] The triggering of enforcement jurisdiction and adjudicative jurisdiction is to a large extent dependent upon a fragmented patchwork of prescriptive jurisdiction in every single jurisdiction of every Member State. Enforcement models have lagged behind financial globalisation and the reality of integrated financial markets, both within and outside the EU, despite the coordination obligations under the EU directives. We consider this to be astonishing, certainly now that enforcement policies and strategies play a very important role in achieving the goals of the AFSJ and the internal market.

The foregoing cases therefore illustrate that the creation of a level playing field has two dimensions. There is an EU dimension, and also a national dimension, as the main enforcement actors are national. Both the EU and the Member States will have to put in place policies that will ultimately create a level playing field and in which EU authorities and national enforcement agencies, including judicial authorities, act from an EU-wide perspective and interest. In the following two sections we will analyse legislative policies in the Netherlands and the EU in light of their (mutual) capacities to facilitate the enforcement of harmonized EU policies (on offences, jurisdiction, the prevention of conflicts of jurisdiction) through criminal law.

3 An EU-orientated criminal justice policy in the Netherlands?

3.1 Integration of common EU interests in the national legal framework

The Netherlands can be characterized as an open economy, with a strong focus on trade, transport, industry and financial services. Also due to its network of tax treaties the Netherlands is an attractive financial centre for many international companies. It also makes the Netherlands susceptible to, for instance, money

25 For a critical assessment of the results of that policy, see Borden & Reiss, 2013.

laundering operations as repeatedly stated by the IMF.[26] Nonetheless, the need to fight economic-financial crime in a broader sense – as opposed to the fight against fraud – has only quite recently become a focal area of law enforcement. Although the Netherlands already created a special legislative regime for economic crime in the 1950s, specific expertise within the Dutch police and the prosecution service for the financial sector was absent for a long time. In addition, there was no effective system of administrative law enforcement either. Only in the (late) 1980s did the regulation of the financial sector shift from private law enforcement/self-regulation towards public law forms of law enforcement, mainly due to concerns about the image of the Netherlands as the backstreet of financial services.[27] The establishment of the – then – *Stichting Toezicht Effectenverkeer*/STE (the Securities Board), in the late 1980s, was a first major step in this development.

Over the last two decades, the picture has changed considerably. First of all, administrative law enforcement has made very significant steps, also due to the influence of the EU. The AFM (the Financial Markets Authority, the successor of the STE) is now a powerful body, with intrusive powers of punitive administrative law enforcement.[28] But also the organization of criminal law enforcement has made significant steps. It is worthwhile to mention, in particular, the establishement of the so-called *Functioneel Parket*/FP (the National Public Prosecutor's Office for Financial, Economic and Environmental Offences), which is a specialized unit of the Dutch Public Prosecution Service, entrusted with highly complex cases of economic and environmental crime. In addition, the late 1990s and the early 2000s saw a significant restructuring of the Dutch investigative authorities. Cases of financial-economic crime are typically not investigated by the regular police force, but by the so-called *Belastingdienst*/FIOD-ECD (the Fiscal Information and Investigation Service and Economic Investigation Service),[29] which is a part of the revenue service and has specialized knowledge in the area of tax fraud and financial-economic crime.[30] For its criminal law tasks, it answers directly to the FP. Thus, the Dutch legislature opted for a dual regime in which some of the offences are exclusively attributed to either the administrative or criminal law authorities, but in many other cases both types of authorities are competent to deal with such cases, thereby urging the need for close cooperation.

A major advantage of this organizational scheme is that it allocates a significant part of financial and specialized resources to a highly complex area of

26 See the IMF Country Report on the Netherlands No. 11/92 of April 2011.

27 Cf. *Kamerstukken II* 1984/85, 18 750, no. 3, p. 8.

28 Certainly after the STE/AFM was entrusted with the power to impose, *inter alia*, administrative (punitive) fines by the so-called Wet tot invoering van de last onder dwangsom en de bestuurlijke boete in de financiële wetgeving, *Staatsblad* 1999, 509.

29 Abbreviation for Fiscale Inlichtingen en Opsporingsdienst/Economische Controle Dienst.

30 This was done via the Wet op de Bijzondere Opsporingsdiensten, *Staatsblad* 2006, 285 (the Special (Criminal) Investigation Services Act).

crime. To that extent, the Netherlands does take this form of crime very seriously. Yet as regards its transnational competences, including the EU dimension of financial-economic crime, the picture that emerges is not so easy to grasp. On the one hand, we see that EU directives have left almost no national discretion as to the scope *ratione materiae* and *ratione territoriae* of the obligations and prohibitions in such directives as the market abuse directive, or the markets in financial instruments directive. We have no indications that the Netherlands fails to implement these duties. On the other hand, it is difficult to pinpoint a comprehensive Dutch approach towards the (criminal law) enforcement of harmonized EU policies, where specific duties of implementation do not exist. In his policy agenda on EU criminal law cooperation of 2011, the Minister of Security and Justice remains somewhat ambiguous as to the identification of the relevant Dutch interests and the development of a Dutch perspective on how to proceed with the development of the criminal law dimension of EU policies.[31] In that document, a great deal of emphasis is put on the safety of Dutch citizens, more specifically on the protection of the interests of Dutch victims and defendants abroad. In line with that, recent proposals concerning victims and defence rights are, in principle, embraced. Still, while stressing the need for a (proactive) Dutch approach and an active dialogue with partners, the document reads as a summary of pending proposals. It contains a series of benchmarks by which to assess future proposals coming from others (such as necessity, subsidiarity, proportionality), but there are very few, if any, thoughts on what those proposals could be and what aims they ought to achieve.

As regards the criminal law enforcement of harmonized policies under Article 83(2) TFEU, that topic was passed on to another policy document, i.e. the official position of the Dutch government on the Communication of the European Commission 'Towards an EU Criminal Policy'.[32] In that position,[33] the government does not take a 'substantive' position on the matter, yet stresses the need to asses proposals in light of the Council's general approach towards the approximation of criminal law,[34] and the prior government's policy vision on the choice between criminal law and administrative law enforcement of 2008.[35] The latter document is of particular interest to us, now that it reveals interesting thoughts on what criteria could determine the choice for either criminal or administrative law. Obviously, such considerations as 'ultima ratio', the principle of individual guilt (*nulla poena sine culpa*) and the principle of harm,[36] are relevant. But the document also reveals that, according to the Dutch government, administrative law enforcement should, in principle, be

31 See the Dutch parliamentary records, *Kamerstukken II* 2011/12, 32 317, no. 80.
32 COM(2011) 573.
33 *Kamerstukken II* 2011/12, 22 112, no. 1258.
34 Discussed *infra* Section 4.
35 *Kamerstukken II* 2008/09, 31 700 VI, D.
36 See, among many others, Jareborg, 2004; Asp, 2012; Groenhuijsen & Ouwerkerk, 2013; Vervaele, 2014; Hartmann & Kraaijeveld, 2013.

the starting point in cases involving a 'closed context', i.e. those areas where specialized government bodies have specific relationships with citizens or other economic actors in the course of the implementation or enforcement of government policies (e.g. taxation, but also financial supervision).[37] By contrast, in 'open context' situations,[38] criminal law enforcement is typically indicated. This dividing line not only applies to relatively 'light' financial sanctions, but occasionally also for the more severe types of financial sanctions, depending on the legal expertise and skills of the administrative authority involved. Roughly speaking, there are two nuances to this general outline. First, intrusive interferences with civil liberties (liberty, property, privacy), or the interwoveness with organized crime may call for criminal law enforcement from the start. Second, international obligations or the need for international cooperation may also influence the choice. This is an important explanation for why competition law is for instance enforced (exclusively) through administrative law.[39]

Although not (yet) identified as an explicit focal point at that time, we see that this policy document also influences the Dutch position during EU negotiations, particularly in those legislative dossiers where (mandatory) criminal law enforcement is introduced and administrative law enforcement in the Netherlands already exists.[40] In the negotiations on the new regulation and directive on market abuse, that position was a positive one, stressing the importance of a level playing field in the financial sector, but with the caveat that criminal law enforcement should not come at the expense of its administrative counterpart.[41] The new package indeed explicitly accepts systems of dual enforcement, stressing the need for intense cooperation nationally (between regulators and the police/prosecutors) and, to a limited extent, transnationally (with foreign regulators *and* the police/prosecutors).[42]

The mutual relationship between administrative and criminal law enforcement has even become more important on the Dutch policy agenda in recent years. In its recent policy vision on the post-Stockholm EU criminal justice policy,[43] the Dutch government defined a three-way action plan: respect for the principle of conferral, a consolidation of the state of affairs, and a focus on specific issues, of which the need for effective administrative law enforcement cooperation (particularly in relation to organized crime) and new methods and ways of financial investigations are the most important for the topic of this

37 *Kamerstukken II* 2008/09, 31 700 VI, D, p. 6-7.
38 Defined as the enforcement of general norms without a specific (legal) relationship with citizens, *Kamerstukken II* 2008/09, 31 700 VI, D, p. 15.
39 There have been plans to (re)introduce criminal law enforcement in the area of competition law, but these plans are now stalled.
40 *Kamerstukken II* 2011/12, 22 112, no. 1270.
41 See *Kamerstukken II* 2012/13, 22 112, no. 1478; *Kamerstukken II* 2011/12, 22 112, no. 1269.
42 On that, see Luchtman & Vervaele, 2014.
43 Discussed *infra* Section 4.

article.[44] Although closely related to these topics, the mandatory enforcement of harmonized EU policies, as such, is not one of the Dutch focal points.

We must therefore emphasize, first of all, that the Dutch position over the last few years has been rather 'reactive', assessing mainly the proposals that have been made by others. Though recent years show signs of a more proactive approach, the issue which is dealt with in this article has not been addressed. Where at the national level a fairly advanced policy agenda exists on how to best enforce socio-economic policies, its transnational implications remain vague. Policy documents reveal no indications of the Dutch perspective as to in which dossiers criminal law enforcement is indicated, and where not, not even in light of the Dutch views on this ('open' or 'closed' context). Second, if we were to identify from the policy documents one overarching Dutch interest, it would be that obligatory criminal law enforcement of harmonized EU policies should not do away with existing (Dutch) regimes of administrative law enforcement. Although this approach makes sense in light of Dutch practice, it is nonetheless striking that no further thoughts are developed on, for instance, how such dual systems relate to existing mechanisms for transnational cooperation, or to the protection of fundamental rights, such as the principle of *ne bis in idem* or the privilege against self-incrimination. The Dutch government has indicated that more attention should be given to this issue, but has so far remained silent as to its substance. Both the Fortis case and the Libor case illustrate that there is a clear need for a more coherent approach in this regard.

In addition to a general policy on how to deal with Article 83(2) TFEU (and its related provisions), there is also the issue of how the general provisions of Dutch substantive criminal law, i.e. those provisions that do not explicitly implement EU obligations, aim to facilitate the realisation of the harmonized EU financial and economic policies. Since 1989, the ECJ has consistently held that the enforcement of Union law in general – and this includes the criminal sanctioning thereunder – is bound by the Union requirements of effectivess, dissuasiveness, equivalence and proportionality.[45] The general part of criminal law therefore has an EU dimension. Åkerberg *Fransson* has taught us that in these cases the Charter is applicable.[46]

Recently there have been two developments that are indicative of the Dutch vision on how these provisions also relate to the EU dimension of law enforcement. First, in the recent *Wet verruiming mogelijkheden bestrijding*

44 *Kamerstukken II* 2013/14, 32 317, no. 196 (position paper on the Dutch perspective on the post-Stockholm agenda); *Kamerstukken II* 2013/14, 32 317, no. 227 (appreciation of the Commission's post-Stockholm agenda).

45 Case 68/88 *Greec Maize,* ECLI:EU:C:1989:339. See on these requirements Jans et al., 2007, p. 206-212.

46 Case C-617/10 Åkerberg *Fransson,* ECLI:EU:C:2013:105. See on the substance of the case, Vervaele, 2014b.

financieel-economische criminaliteit,[47] a number of changes were made to the provisions of the Dutch Penal Code, including revised (extended) definitions of the offences of misappropriation of funds, corruption (in the public and private sector), and money laundering. For legal persons, the financial penalties were increased and related to the annual turnover of the legal persons. This was done because, as it turned out, first of all, some of the constitutive elements of the offences were framed too narrowly in light of the relevant EU and international obligations of the Netherlands. More interestingly, the changes were also introduced in order to align Dutch criminal law with (mainly) neighbour (EU) countries, without there being a binding legal obligation to do so. The explanatory report to the bill reads that the scope of the provision on corruption in the public sector, for instance, was widened beyond acts in breach of official duties (*ambtsplicht*) in order to enhance the position of the Netherlands as an attractive and reliable trading partner.[48] A similar argument was made with respect to money laundering, where the maximum penalties were substantially increased after a comparison with the UK, Germany and France.[49] Partly in answer to previous criticisms by the OECD,[50] the maximum fines for legal persons were increased, due to differences with other states such as France.[51]

These changes show that the Dutch legislature is well aware of the international dimension of its criminal law. After comparing its legal system to others, the legislature adjusted its own system and embarked on a sort of 'race to the top'. The official Dutch position is that a 'tough' penal climate will enhance the position of the Netherlands as an open economy and a reliable trading partner.[52] The examples used from other countries serve to show that the Netherlands has relatively low levels of sanctioning. But in order to substantiate those conclusions, some other neighbouring countries – with lower levels of sanctioning – were left out of the comparison.[53] In the second place, harsher penalties as such do not necessarily decrease crime, as long as the possibilities of being caught are small. In the field of foreign bibery, the Netherlands has been critized for a low number of investigations and prosecutions, particularly taking into account the large number of foreign mailbox companies in the Netherlands. The OECD has repeatedly indicated that it is concerned with

47 Literally: the law increasing the possibilities to fight financial-economic crime, *Staatsblad* 2014, 445.

48 *Kamerstukken II* 2012/13, 33 685, no. 3, p. 6.

49 On the (limited) validity of this argument, see Borgers & Kooimans, 2013, p. 603-604; Doorenbos, 2014.

50 See the Phase 3 Report on implementing the OECD Anti-Bribery Convernion in the Netherlands, December 2012, www.oecd.org/daf/anti-bribery/Netherlandsphase3reportEN.pdf..

51 *Kamerstukken II* 2012/13, 33 685, no. 3, p. 9. For a discussion, see, *inter alia*, Doorenbos, 2014.

52 *Kamerstukken II* 2012/13, 33 685, no. 3, p. 6, 9.

53 The Dutch Council of State mentions the lower sanction in Belgium in relation to money laundering; *Kamerstukken II* 2012/13, 33 685, nr. 4, p. 10. The government left this remark undiscussed.

the lack of jurisdiction over such mailbox offices,[54] as well as with Dutch investigative capacity and prosecutorial practices.[55] In response to parts of this criticism, the Netherlands has changed its policies.[56] The Netherlands did not however rebut the OECD concern that '[t]he Netherlands often explains its lack of action by the fact that other countries Party to the Convention are already investigating and/or prosecuting the case. This tendency not to exercise jurisdiction seems particularly acute where the allegations concern a Dutch company, but where no Dutch natural persons are involved. Proceedings underway in another jurisdiction do not and should not absolve Dutch law enforcement authorities of their duty to investigate foreign bribery allegations involving Dutch natural or legal persons.'[57]

Although these criticisms are limited to foreign corruption, they are indicative of broader lacunae in Dutch policies.[58] As long as the fight against financial-economic crime boils down to a spontaneous increase of sanctions, criminal law will indeed at most serve Dutch economic interests. Those efforts can be used to show that the Netherlands is indeed 'tough on crime'. Yet other issues, related to transnational justice, such as the relationship between these unilateral measures and questions of transnational cooperation and coordination are left completely open. Indeed, what elements of the offences and sanctions need to be harmonized in order to assist international cooperation in the fight against these crimes? How do these offences relate to the rules on jurisdiction, in order to prevent negative conflicts of jurisdiction in cases of, say, foreign bribery? What interests should play a role in allocating cases among multiple states in cases of overlapping jurisdictional reach? How are the interests of other states or the EU integrated into investigative and prosecutorial practice? To what extent may spontaneous adjustments even harm the level playing field? And what about the position of the defendant? How does one ensure that forum choices serve the proper administration of justice?[59]

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54 As indicated by The Hague Court of Appeal in a transnational environmental case (*Trafigura*), The Hague Court of Appeal, 12 April 2011, ECLI:NL:GHSGR:2011:BQ1012. Incidentally, the Dutch government has rightly noted that these problems may very well be non-existent; *Aanhangsel Handelingen*, 2012/13, no. 1365; see also *Kamerstukken II* 2004/05, 29 291, C, p. 2.

55 Phase 3 Report on implementing the OECD Anti-Bribery Convernion in the Netherlands, December 2012, www.oecd.org/daf/anti-bribery/Netherlandsphase3reportEN.pdf; see also the Annex 19 – Netherlands, to the EU Anti-Corruption Report, COM (2014) 38, p. 8-9. On (foreign) bribery in the Netherlands in general, see Smid, 2012, particularly p. 327-388.

56 The Netherlands has changed its prosecutorial guidelines on foreign bribery, after having been critized for including Dutch economic interests in the decision to prosecute. For the most recent version, see the Official Gazette (*Staatscourant*), 2012, 26939.

57 Phase 3 Report, p. 31; see also p. 26.

58 The report *Communicerende grondslagen van extraterritoriale rechtsmacht*, p. 102, indicates that most infringements of the Dutch Penal Code committed abroad seem to be left untouched.

59 See already Swart, 1983.

In answer to this, one may oppose that these issues are tackled by other parts of Dutch legislation, and by operational practice. We however have doubts that this is truly the case. For that we wish to point to another recent act, on the revision of the Dutch rules on extraterritorial jurisdiction in the Penal Code.[60] The explanatory report to the bill indicates that it was warranted for three reasons. First, the bill serves to enhance the protection of Dutch interests abroad, particularly those of Dutch victims. Second, the bill aims to dispense with existing differences between juridisction over Dutch nationals and other residents of the Netherlands. Third, the bill enhances the accessibility of the complicated and overlapping rules on jurisdiction.[61]

Indeed, the act has introduced a regime that is more accessible than its predecessor. It allocates jurisdiction on the basis of the well-known jurisdictional principles like the (active and passive) nationality principle, the protective principle and the principle of universal jurisdiction. Despite this broad extraterritorial basis, the starting point of the legislature is that crimes ought to be prosecuted in the country where they are committed. A lack of Dutch investigative and prosecutorial recources moreover implies, according to the government, that the Netherlands will in most cases not take the lead in the investigation and prosecution of offences committed abroad. Certainly within the EU, mechanisms for cooperation are in place, so that the exercise of extraterritorial jurisdiction will usually not be necessary. This may be different only where Dutch interests are harmed and foreign authorities remain passive.[62]

All of this begs the question whether the common EU policies also fall within the proclaimed area of protected Dutch interests. To a certain extent this is the case, now that EU citizens from other states are put in a equal position as Dutch citizens. But the aspirations do not go further than that. Although the explanatory report indicates that Dutch interests include the 'adequate enforcement of the international legal order' (piracy, counterfeiting, et cetera),[63] the protection of common EU policies are not mentioned at all. In our opinion, this approach is in line with the aforementioned policy initiatives. The Netherlands is certainly aware of the fact that its open economy has implications for criminal justice. But Dutch legislative interventions in this respect mainly serve two goals. First, to make the Netherlands (more) attractive as a trading partner. Second, to keep all options open in order to be able to intervene, also abroad, should new priorities so indicate. Those priorities are likely to be national-driven priorities. The result of this agenda is that it is left to the investigative and prosecutorial services to fill in this extremely wide margin of discretion and to develop their own policies, if any, with limited recources. Thus, all conditions are met to ignore the EU dimension and to prioritize domestic cases for law enforcement.

60 *Staatsblad* 2013, 484.
61 *Kamerstukken II* 2012/13, 33 572, no. 3, p. 2.
62 *Kamerstukken II* 2012/13, 33 572, no. 3.
63 *Kamerstukken II* 2012/13, 33 572, no. 3, p. 17.

3.2 The law in action: prosecutorial policies and operational practice

How does this investigative and prosecutorial discretion turn out in practice? A distinctive trademark of Dutch criminal justice is that the Public Prosecution Service (*Openbaar Ministerie*/OM) enjoys a great deal of discretion in its assessment of whether a criminal prosecution is indicated. Its main criterion is the general interest ('algemeen belang'; Article 167/242 DCCP). The prosecution service, in principle, decides not only on whether or not to commence proceedings, but also on the modalities of those proceedings, including the applicable offences and the methods of prosecution (transactions, i.e. the payment of a fixed sum to settle a criminal case, trial proceedings, deferred prosecution, et cetera). It is possible to commence a prosecution against natural persons for having committed crimes on behalf of a legal person, without prosecuting that legal person. As we have increasingy seen over the last years, it is also possible to engage in settlements with the legal person, while bringing its (former) employees to trial.[64]

The vague notion of the general interest in combination with quite a far-reaching scope *ratione materiae*, *personae* and *territoriae* of the criminal codes obviously calls for organizational measures and the development of prosecutorial policy. The presence of specialized departments like the aforementioned *Functioneel Parket* ensure that financial-economic crime receives a fair amount of recources. Simulteaneously, however, we must also note that Dutch prosecutorial policy also suffers from fragmentation. A general prosecutorial policy for common EU policies is lacking. Relevant policy documents revolve around cooperation with administrative bodies in order to prevent double punishment in violation of the *ne bis in idem* principle;[65] on specific offences, such as foreign bribery;[66] significant transactions (*Aanwijzing hoge transacties*);[67] and on the transfer of proceedings to other states,[68] an instruction which has recently been replaced, in part, by the instructions on the prevention of conflicts of jurisdiction that implement the relevant EU framework decision of 2009.[69]

Consequently, it is difficult to assess what interests play a role in investigative and prosecutorial practice and priorities. Moreover, these policy lines show gaps. Focussing on our examples presented above, the Fortis case for instance

64 For a critical discussion see, *inter alia*, Van Asperen de Boer & Van Duijvenbode, 2014.

65 *Supra* note 10. See also the Convenant ter voorkoming van ongeoorloofde samenloop van bestuurlijke en strafrechtelijke sancties, *Staatscourant* 2009, 9, on cooperation in the area of financial supervision between the Public Prosecution Service/PPS and the financial supervisors in order to avoid 'bis in idem situations'.

66 *Supra* note 56.

67 *Staatscourant* 2008, 209.

68 In Dutch: 'Circulaire overdracht en overname van strafvervolging', *Staatscourant* 2007, 72

69 In Dutch: 'Aanwijzing rechtsmachtgeschillen bij strafprocedures', *Staatscourant* 2012, 11716.

illustrates that the Dutch prosecution service and the AFM without doubt will have coordinated their efforts. But coordination with Belgian or Luxembourg authorities did not take place, as a result of which defence lawyers were quick to claim that the *ne bis in idem* principle (Article 50 CFR) was being violated. The relevant instructions on the transfer of proceedings indeed apply only to judicial authorities in the strict sense of the term, not to administrative authorities, and so does the 2009 Framework decision. At the interface of criminal law and administrative law enforcement, the coordination of efforts is extremely complicated. Nonetheless, as we have seen in the above, it is also a focal point of Dutch legislative polices at the national level.

In addition, we must note that deviations from these guidelines and instructions are possible. The instructions for transactions amounting to more than € 50,000 (*Aanwijzing hoge tansacties*) explicitly stipulate that a public trial is the main rule in light of the public uproar that will usually be caused by such offences. Also legal persons should, according to the instruction, in principle be brought before the courts. Deviations are possible where there are good reasons for this. The draft settlement is then to be submitted to the Minister of Security and Justice, via the top of the prosecution services (*College van Procureurs-Generaal* (the Board of Procurators General)). The reason for this policy line is obviously that criminal justice is not only about balancing the interests of prosecutors and defendants, but also serves the interests of citizens at large.[70] Nonetheless, in most, if not all, of the high-profile criminal cases of the last few years, transactions were concluded between the legal persons and the Public Prosecution Service. In defence of this obvious departure from the instructions the Minister of Security and Justice responded in the Libor case that the agreement was part of a 'global settlement' and the result of coordinated actions with the US and UK authorities, as well as the Dutch *De Nederlandsche Bank*/DNB, the competent financial supervisory authority.[71] The Minister noted that it would not have been possible to achieve the same results in court, as it would hamper the possibility to react swiftly, to send a stong signal, and possibly to lead to contradictory results in the various countries involved.[72] Nonetheless, the fact remains that these processes took place in a sphere of secrecy, without any real possibilities for the courts and the general public to learn about what precisely has happened, who were responsible and for what, and why an international coherent approach in this particular case (but not in others) was more important than the principles of transparency and public accountability.

70 This, apparently, is not the view of the Minister of Security and Justice, see *Kamerstukken II* 2013/14, 33 803, no. 6, p. 32, explaining that a lack of transparancy with respect to the content of the transaction in the Libor case was warranted in order to protect the interests of the PPS and Rabobank, and that it was checked (marginally) by the Minister himself.

71 *Kamerstukken II* 2013/14, 33 803, no. 6, p. 26.

72 *Kamerstukken II* 2013/14, 33 803, no. 6, p. 26, 28-29.

3.3 A series of observations

The foregoing leads to a series of observations. First and most importantly, there is no (publicly accessible) Dutch policy on the criminal law protection of harmonized EU policies. What we do see is a series of related measures, which include, *inter alia*, a strong focus on law enforcement and law enforcement cooperation in the administrative sphere; on confiscation and financial investigative techniques; and on the protection of what could be defined as direct Dutch interests, particularly the interests of Dutch victims abroad, and trade interests. Still, the scope of these measures remains unclear. For instance, what elements of administrative law enforcement cooperation merit attention specifically? How are they aligned with criminal law enforcement, also from the perspective of the defendant? And what precisely are the Dutch interests, other than those just mentioned? How are they mutually balanced, and do they include the position of the Netherlands in the EU? All policy documents and recent legislation remain unclear in their precise scope and content. The result is that problems of positive and negative conflicts of jurisdiction are *de facto* reduced to a problem of *ne bis in idem* (but only in relation to criminal law sensu stricto)[73] and investigative/prosecutorial cost-efficiency. A more encompassing vision of what might be termed the proper administration of justice in transnational constellations is lacking, and/or is not perceived to be in the interest of the Netherlands, even where EU legislation exists that obliges national authorities to enforce EU law and to cooperate closely in the pursuit of this task.

In the second place, it must be observed that recent legislative changes, quite astonishingly, seem to have no intended direct relevance for the law in action. Although this is rebutted by the government, many have indicated that the increased scope of the offences and sanctions discussed above are without any real practical need.[74] In its explanatory report to the bill on extraterritorial jurisdiction it is even explicitly noted that, despite the numerous sources of extraterritorial jurisdiction, the practical relevance of these rules will probably remain limited. This is not only because of the official position that alleged criminals should be tried where they have committed the offence, but also due to a lack of investigative recources to investigate extraterritorial offences.

Third, the foregoing leads to a wide legislative framework inevitably in terms of the scope of offences and jurisdiction, and, therefore, much depends on the law in action, i.e. on specific prosecutorial policies. Yet here, too, we see significant lacunae. Various policy lines are not integrated, taking into account

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73 This is obviously the result of the implementation of Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, *OJ EU* L 328/42.

74 Cf. the remarks by the Council of State on the bill, *supra* note 53, but also by scholars, such as Borgers & Kooijmans, 2013.

only pieces of the puzzle. The Dutch preference for increased administrative law enforcement remains unclear in its relationship with criminal law at the transnational level (for instance, through the *ne bis in idem* principle). The Fortis case shows ample evidence of this. Our concern is that this interpretation of the expediency principle confuses prosecutorial competences and autonomy with a situation free of prosecutorial engagement and accountability. Cases like Libor have shown, moreover, that where the transnational dimension of the case and the need for coordinated action is explicitly referred to, mechanisms of judicial and political oversight remain focussed on the efforts of individual national authorities. The result is a message that combines prosecutorial resilience and toughness, with fragmented supervision and minimal disclosure on what has been done precisely, and by whom.

4 An EU criminal justice policy?

The AFSJ has an internal dimension (the common single legal area) and an external dimension (relationships with third countries). The selected cases in part 2 clearly reflect that criminal law enforcement is at the same time facing stronger Europeanisation and globalization. In this part we will analyse if and to which extent the EU has elaborated a criminal justice policy for the internal and external AFSJ dimension. We will focus on the EU's harmonization policies in relation to substantive criminal law (offences, general part), the rules on jurisdiction and the accompanying measures with respect to the prevention and settlement of conflicts of jurisdiction.

4.1 Perspectives for a internal criminal justice policy in the EU

With the coming into force of the Amsterdam Treaty in 1999 the policy objectives of the AFSJ, including the fight against criminality, became a priority. Since 1999 the EU has strongly focused on regulatory issues, especially the harmonization of substantive criminal law and the strengthening of judicial cooperation in criminal matters based on mutual recognition.[75] This means that the approach towards criminal justice was mainly limited to a criminal legislative policy[76]. But even then, the main focus was on the so-called Euro offences (organized crime, terrorism, human trafficking, etc.).[77] The criminal law enforcement of the economic and financial policy areas in the internal market was not at all on the radar. The Commission tried several times to build bridges between substantive policy and criminal enforcement, for instance in

75 We will not deal with the shift from mutual legal assistance (MLA) to mutual recognition (MR) in this context.

76 The Manifesto on European Criminal Policy, an academic study, also exclusively tackles, despite its title, legislative points; see www.crimpol.eu/manifesto//.

77 The legal basis for their harmonisation is Article 83(1) TFEU.

the field of the protection of the financial interests of the Union (subsidy fraud, VAT fraud, customs fraud and related money laundering)[78] and in the field of the enforcement of environmental policies.[79]

Since the coming into force of the Lisbon Treaty the European Commission and particularly DG Justice has taken a proactive stance on the topic of criminal legislative policy. In 2011 the Commission published a Communication entitled *Towards an EU Criminal Policy – ensuring the effective implementation of EU policies through criminal law*, dealing specifically with the criminal enforcement of harmonised policies. Contrary to the Euro offences the Lisbon Treaties do not indicate specific fields or interests that need criminal law enforcement. For that reason the Commission elaborates this communication as guidance for the policy choices on whether or not to use criminal law as an enforcement tool, also in relation to other enforcement tools, such as the administrative one. Relevant criteria for the choice are a lack of effective enforcement or significant differences among Member States leading to the inconsistent application of EU rules. The Commission indicates in this Communication three priority fields for criminal law harmonization:

– The financial sector, e.g. concerning market manipulation and insider trading;[80]
– The fight against fraud affecting the financial interest of the EU;
– The protection of the euro against counterfeiting.

The Commission furthermore mentions a set of areas (not an exclusive list) in which criminal law enforcement might play a role:

– Illegal economy and financial criminality;
– Road transport;[81]
– Data protection;[82]
– Customs rules;
– Environmental protection;
– Fisheries policy;
– Internal market policies (counterfeiting, corruption, public procurement).

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78 The acquis in this field dates from the Maastricht Treaty, being Regulation 2988/95 on the protection of the EC's financial interests, OJ L 312, 23 December 1995 and the Convention on the protection of the EC's financial interests of 26 July 1995, OJ C 316, 27 November 1995; First Protocol of 27 September 1996 to the Convention, OJ C 313, 23 October 1996 and Second Protocol to the Convention, OJ C 221, 19 July 1997.

79 See Case C-176/03, Judgment of 15 September 2005 on the draft directive and framework decision.

80 See 'Communication on reinforcing sanctioning regimes in the financial sector', COM, 2010 716 final of 8 December 2010.

81 See Commission Staff Working Paper SEC, 2011 391 of 28 March 2011, accompanying the White Paper. 'Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system', COM, 2011 144 of 28 March 2011.

82 See the Communication 'A comprehensive approach on personal data protection in the European Union', COM, 2010 609 of 04 November 2010.

When considering criminal enforcement the assessment has to take into account a whole set of factors, including the seriousness and character of the breach and the efficiency of the enforcement system. The choice for administrative enforcement and/or criminal enforcement is part of this assessment. The list of topics is not exhaustive, but it is rather surprising that counterfeiting and piracy of products, and feed and food safety are lacking, as already in the past the Commission had submitted criminal law enforcement proposals, albeit in vain.[83]

Besides the criminal policy inititiatives by the European Commission, also the Committee on Civil Liberties, Justice and Home Affairs of the EP published a *Report on an EU approach on Criminal Law* in 2012.[84] The report does not however contain any reference to the choice of policy areas that should deserve criminal law protection. The Council did not come up with any policy document on this topic.

With the deepening of the European integration (an internal market without borders) and the integration of the Schengen policies in the EU, not only did the use of mutual legal assistance instruments increase, but also cases of multi-jurisdiction criminal investigations and concurring prosecutions in several EU jurisdictions. This is not only a problem of cost-efficiency, but can also create legal problems. Nonetheless, the settlement of conflicts of jurisdiction does not seem to occupy a high position on the political agenda, apart from the debates on the reforms of OLAF and Eurojust (Article 85 TFEU) and the establishment of a European prosecution service (Article 86 TFEU). The Framework Decision on the prevention of conflicts of jurisdiction in criminal proceedings only obliges Member States to search for 'effective solutions' in *ne bis in idem* situations, without defining these solutions.[85] The proposal for a Framework Decision on the transfer of proceedings in criminal matters did seek to bring about binding legal consequences.[86] Its goal was '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 AFSJ by establishing common rules facilitating the transfer of criminal proceedings between competent authorities of the Member States' (Article 1 proposal). It was never enacted into law, however.[87]

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83 COM, 2005 276 final, and COM, 2003 52 final.

84 www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2012-0144+0+DOC+XML+V0//EN

85 *OJ EU* 2009 L 328/42.

86 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.

87 See Luchtman, 2011; Ludwiczak, 2010, for further analysis and references.

4.2 Internal criminal justice policy under the Lisbon Treaty in practice

The Commission has implemented its policy plan of 2011 by submitting proposal directives on the criminalisaton of market abuse, fraud affecting the financial interest of the EU and the counterfeiting of the euro. In its assessments, dealing with the need, proportionality and subsidiarity of criminal law enforcement, the following criteria played a role in the choice of criminal law enforcement:

- Some competent authorities do not have at their disposal important types of sanctioning powers for certain violations;
- Levels of administrative pecuniary sanctions vary widely across Member States and are too low in some Member States;
- Some competent authorities cannot impose administrative sanctions on both natural and legal persons;
- A divergence exists in the nature (administrative or criminal) of the sanctions provided for in national legislation.

In 2014 the Directive on the protection of the euro by criminal penalties and sanctions was adopted.[88] Its content was substantially changed during the negotiations at the Council, which did remove any reference to minimum sanctions. Also in 2014 the regulation on market abuse[89] and the directive on criminal sanctions for market abuse[90] were adopted as a common regulatory framework. The regulation contains all the relevant definitions, obligations and prohibitions and also regulates the applicable administrative enforcement regime, including administrative sanctions of a non-punitive and punitive character. It contains very detailed provisions on the definition of illicit behaviour and on the applicable administrative sanctions, including the type and level of sanctions (such as the withdrawal of authorization for legal persons, or pecuniary sanctions of up to 10% of a legal person's total annual turnover in the preceding business year). The Commission proposal for the directive[91] was however surprising from different angles. The Commission found it sufficient to provide for effective, proportionate and dissuasive criminal penalties and to leave it to each Member State to determine the type and level of the penalties. This astonishing legislative choice was however corrected by the EP in the co-decision procedure and resulted in the harmonization of minimum and maximum criminal sanctions.[92]

The third policy field, the criminalisation of fraud against the EU budget, has always been a battlefield of competences between the EU and the Member

88 Directive 2014/62/EU on the protection of the euro and other currencies against counterfeiting by criminal law, *OJ EU* L 151/1.
89 Regulation 596/2014, OJ L 173/1.
90 Directive 596/2014, OJ L 173/1.
91 COM, 2011 654 final.
92 For a more detailed analysis of the file, see Luchtman & Vervaele, 2014.

States and it goes to the very heart of the EU institutions, dealing with the protection of their budget (the income and expenditure side), related corruption of EU officials and related money laundering operations. It is thus not only about money, but also about the integrity of the Union institutions and the Member State institutions and economic operators dealing with EU money. The Commission's reports on the implementation of former EU legislation to harmonise criminal enforcement show a real patchwork of gaps and pieces.[93] Even the anti-fraud unit of the EU (OLAF) had great difficulty in finding its way through the patchwork of applicable law in the Member States.[94] In 2012 the European Commission submitted a new proposal for a directive on the fight against fraud against the Union's financial interests by means of criminal law.[95] The proposal aimed at broadening the material scope of substantive offences to fraud in public procurement, grant procedures and misappropriation. Due to internal discussions within the Commission the criminal liability of legal persons did not survive in the final text of the proposal. The proposal did contain, however, innovative provisons on penalties. Article 8 sets out very innovative imprisonment thresholds, including mandatory minimum penalties. During the negotiations at the Council level, Member States obtained very substantial changes to this proposal. The Member States explicitly excluded revenues arising from VAT from the scope of the directive. This is astonishing, as the Court of Justice has clearly determined that VAT revenues are part of the financial interests of the Union,[96] and many serious EU fraud cases are related to VAT carousel cases. In relation to penalties, Member States deleted from the text any reference to minimum terms of imprisonment. During the co-decision procedure in the European Parliament, minimum sanctions were reintroduced and the scope of offences was again extended to fraud in public procurement and VAT fraud. It remains to be seen what the final outcome of the co-decision procedure will be. It is however clear that the Member States, even in this core area of the criminal law protection of EU interests, want to claw back as much as possible to avoid common standards.

Concerning the other policy areas that were mentioned in the Commission's 2010 communication, such as, for instance, financial criminality, customs enforcement or road protection, neither the Commisson nor groups of Member States have submitted legislative proposals. The Commission has published a communication on 'A Single Market for intellectual property rights. Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe'[97] dealing also with the enhanced

93 COM, 2004 709 final and COM, 2008 77 final.
94 Point 1.2 of the Explanatory Memorandum to the Proposal for a directive on the criminal law protection of the Community's financial interests, COM, 2001 272 final.
95 COM, 2012 363 final; The proposed directive is based on Article 325(4) TFEU.
96 Case C-539/09 *Commission* v. *Germany* [2011] ECR I-11235, §72.
97 COM, 2011 287 final.

fight against counterfeiting and piracy. However, the Commission did not submit a legislative proposal, although it had submitted several proposals under the Maastricht Treaty and the Amsterdam Treaty aimed at ensuring the criminal enforcement of intellectual property rights.[98] Concerning corruption the Commission has published a communication on fighting corruption in the EU.[99] In some of the mentioned policy areas the Commission has tendered a study, like the one on sanctions in the field of commercial road transport. In the area of customs, one of the most harmonised fields of EU regulation (the Community customs code), the harmonisation of enforcement remains completely fragmented. In December 2013 the Commission finally came up with a proposal for a directive on the Union's legal framework for customs infringments and sanctions.[100] Completely contradicting the Commission Communication of 2010 and the impact assessment study, the proposal excludes any criminal harmonisation in this area and limits the harmonisaton to administrative enforcement (customs infringments and sanctions).

Concerning the issue of overlapping and conflicting jurisdiction, Article 82(1b) TFEU provides for a specific legal basis to adopt binding measures to prevent and settle conflicts of jurisdiction between Member States. This legal basis has not been used, neither by the Commission nor by a group of Member States to elaborate a legislative proposal. Article 85(1c) TFEU also contains a legal basis to give Eurojust binding authority to prevent and solve jurisdiction conflicts, but in the reform proposal on Eurojust[101] this has not been included as a new tool either.

Overall, it has become clear that the EU has not yet been able to achieve an EU criminal justice policy. The harmonization of substantive criminal law came to a political standstill and the policy agenda of the European Commission became frozen. In relation to jurisdictional issues, the potential of the TFEU has not been used at all. This is not only due to the lack of political strength of the EU institutions, but also to the attitude of many Member States, as they did not take any legislative initiatives either.

4.3 Perspectives for an external criminal justice policy in the AFSJ

The external dimension of the AFSJ[102] has mainly been used to negotiate agreements with third countries on the exchange of law enforcement information,

98 COM, 2005 276 final.
99 COM, 2011 308 final 1_EN_ACT_part1_v12[1].pdf.
100 COM, 2013 884 final.
101 Proposal for a regulation on the European Agency for criminal justice cooperation (Eurojust), COM, 2013, 535 final.
102 Based on Article 216(1) TFEU; see Wessel, Marin & Matera, 2011.

the prevention of the financing of terrorism,[103] or on extradition and mutual legal assistance to obtain evidence.[104] The EU has become more active in international fora to promote criminal enforcement to protect legal interests, such as, for instance, in the WHO when it comes to the criminalization of illegal tobacco trading or in the UN in relation to transnational organized crime or its participation in the Kimberley Process Certification Scheme aiming at stemming the transnational flow of conflict diamonds. Concerning the classic global offences, such as counterfeiting, organized crime, trafficking in human beings, etc. we can speak about global criminal standards. However, in the field of the criminal law enforcement of financial regulations global standards are lacking or are much weaker. When it comes to coordinating the use of jurisdiction to investigate or to prosecute, the EU Commission and the US Government were able to sign an agreement that includes obligations not only on the exchange of information and the coordination of enforcement activies, but also on the avoidance of conflicts of enforcement activitites and a related consultation procedure.[105] However, in the field of criminal justice nothing similar has ever been tried, neither by the USA nor by the EU.

5 Conclusions

The preceding analysis presents us with a confusing picture. Bearing in mind the shared competence in the field of criminal law,[106] based on shared sovereignty and common goals between the Member States and the EU, it is logical that both the EU and the Member States elaborate criminal policies in the field of harmonized EU policy areas. Shared competences mean that both European and national criminal policies must and should have a double dimension, a European and a national one. In fact, European criminal policy has to take account of common traditions in the Member States and national criminal policies have to take into account the European dimension of their national criminal law enforcement. What is now needed is to offer EU citizens an AFSJ in which the free movement of persons is ensured in conjunction with the prevention and combating of crime. It is quite clear that we cannot only address serious cross-border crime, but that we also have to deal with the criminal law enforcement of EU policies, if necessary. We could distinguish

103 Agreement between the United States of America and the European Union on the use and transfer of passenger name records to the United States Department of Homeland Security OJ 2012, L 0215; Agreement between EU-US on the processing and transfer of Financial Messaging Data from the EU to the EU for the purposes of the Terrorist Finance Tracking Program, OJ 2010, L 195.

104 See, for instance, the Agreement on extradition between the EU and the US, OJ 2003, L 181.

105 See the Agreement between the Government of the USA and the EU Commission regarding the application of their competition laws, OJ L 95/47 and related sources at: http://ec.europa.eu/competition/international/bilateral/usa.html.

106 Article 2 TFEU.

between three types of legal interests that need and deserve criminal law protection in the AFSJ:

- Legal interests of the EU as such (counterfeiting of the single currency, protection of the financial interests of the EU, corruption of EU officials);
- Common legal interests in the AFSJ (Euro crimes – Article 83(1) TFEU);
- Legal interests linked to harmonised EU policies (annex competence – Article 83(2) TFEU).

Both EU and national criminal policies will have to deal with these three dimensions. Criminal policy must be principle-based, combining the tests of necessity (*ultima ratio*), subsidiarity and proportionality and general principles of criminal law. But that is only a part of the story. Criminal legislative policy is, of course, also about *policy*, meaning that political choices must be made about the interests that deserve and need criminal law protection. This criminal law protection has to be defined in relation to other enforcement regimes, especially punitive administrative enforcement. Criminal policy also includes the elaboration of instruments for the integrated enforcement of Community policies, including prevention, administrative enforcement and criminal enforcement. This means that there should be a clear criminal policy on the use of criminal enforcement as contained in Article 83(2) TFEU, in connection with administrative enforcement.

The Commission Communication of 2011 deals to a certain extent with the policy choices. This is clearly of added value, but it remains unclear on which basis and which criteria policy areas have been selected for criminal law protection and what the substance thereof should be. Is it limited to substantive criminal law or should it also include related aspects of criminal procedure? Is it limited to imposing effective, proportionate and dissuasive criminal sanctions or does it include a harmonization of the types and levels of sanctions, including specific sanctions in the area of economic and financial criminality? Are we in need of EU supervision and coordination of national law enforcement efforts? Do we need a transfer of enforcement juridisction from the national level to the EU level? The Stockholm programme gives us little to no guidance in relation to Articles 82, 83(2), 85 and 86 TFEU. The substantive list of topics in the Commission Communication of 2011 is quite different from the list of EU policies that was selected in the Klaus Tiedemann study on economic criminal law in the EU.[107] The post-Stockholm agenda for the AFSJ, laid down in strategic guidelines,[108] instead of a policy plan, does not reflect on the criminal law enforcement of economic and financial regulatons

107 Tiedemann, 2002. In this study the selection was: EU labour policy, EU foodstuffs policy, EU competition policy, EU environmental policy, EU policy on corporate bodies and insolvency, EU financial services policy, EU intellectual rights policy (especially patents), EU policy on commercial embargos.

108 www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/143478.pdf.

at all, and mainly chooses to consolidate the existing legal instruments through effective implementation.

For the time being the Member States, having a right of initiative under Article 83(2) TFEU, are of not much help either. They do not come up with proposals and have not elaborated criminal policy visions on Article 83(2) TFEU at all. This also means that they do not offer guidance on the matter to their national parliaments. In the documents, discussed above, the Dutch Minister of Security and Justice shines some light on the vision of the Dutch government, but much remains unsaid. Moreover, those documents do not seem to be aligned with one another. At the national level, the Netherlands has quite an advanced policy vision on the choice of enforcement systems, but those documents are silent on their transnational implications. To what extent does this context call for adaptations to this vision? How does this vision, reversely, affect the Dutch needs with respect to transnational cooperation? How can and must parallel systems of administrative and criminal law enforcement be linked and what does it mean for principles like *ne bis in idem* and *una via*? How do we integrate the interests of defendants, victims, and the administration of justice in general in this framework? Those questions are not asked, let alone answered. In general, there is much emphasis on keeping all options open; on keeping foreign interferences with, for instance, minimum sanctions or the expediency principle at bay; and on defending direct Dutch interests. Obviously, there is nothing wrong with the latter. It is even the primary task of the Dutch legislature. Nonetheless, the fact remains that the Member States have also committed themselves to the creation of, for instance, the internal market and AFSJ. Those interests need to be integrated in the balancing exercise, too.

In its Opinion 2/13 on the accession of the European Union to the ECHR, the ECJ characterized the EU as 'a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals.'[109] This wording implies that the EU cannot only be concerned with the interests of states. European citizens – Dutch citizens, too – are an integral part of the EU's legal order and may in many aspects be confronted with the problems that were illustrated in Section 2. They are entitled to a legal regime that ensures their freedom, security *and* justice. The performence of this threefold task rests upon both the EU and the national legal orders. What elements should it entail? In our opinion, we are in need of the following elements:

- An equivalent level playing field for the definition of illegal behaviour, and an equivalent harmonisation of the offences and penalties;
- An equivalent level playing field for the enforcement agencies: regulators and judicial authorities;

109 Opinion 2/13 on the draft agreement concerning the accession of the EU to the ECHR, ECLI:EU:C:2014, para. 157.

- Steering mechanisms to operationalize the networks of regulators and judicial authorities;
- Priority setting for cases that merit investigation and prosecution;
- Priority setting for cases that merit criminal adjudication/settlements/ administrative sanctions;
- Predictable rules on choice of forum jurisdiction;
- Mechanisms to prevent excessive administrative and criminal law sanctioning;
- Financial mechanisms to strengthen horizontal cooperation between regulators and judicial authorities and to strengthen vertical cooperation between European regulators/inspection authorities and national ones;
- Arrangements with third countries, particularly the US, in order to achieve a reasonable exercise of jurisdiction and to avoid excessive santioning.

To conclude, it is the task for academia, and we feel a particular responsibility towards the Willem Pompe Institute in this regard, given the past research on both financial and international/European criminal law, to build up the necessary body of knowledge through teaching and research. Already in the bachelor's degree, students learn that domestic criminal justice is part of the European and international legal order. In the master's degree, they are offered specialised courses in European and international criminal law, in economic and financial criminal law, in organized corporate crime, etc. Through the research programmes in which the Pompe Institute participates, the criminal law enforcement of economic and criminal law is part of UCALL[110] and RENFORCE.[111] The interaction with the European and international dimension, but also the interaction with private and administrative law is thus guaranteed. In 2011 the Willem Pompe Institute published its first teaching book on the criminal law enforcement of social-economic and tax regulations in the Netherlands.[112] It is not too late to envisage an edition in English that takes into account the Europeanisation and globalisation of regulatory and enforcement issues in the field of economics and finance.

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110 http://ucall.rebo.uu.nl/.

111 http://renforce.rebo.uu.nl.

112 Kristen et al., 2011.

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