The Development of EU Precautionary Criminalisation

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Abstract

In this paper, I will investigate three concepts which currently play a significant constitutional role in the development of EU criminal law. In doing so, this paper seeks to demonstrate that the driving notions behind the EU's agenda in this area are risk, security and effectiveness concerns. The paper will thereafter try to give a systematic account of how these concepts are illustrated in EU law and in criminal law respectively. It will be argued that the EU's approach in this area leads to precautionary criminalisation at the EU level.

I. Introduction

The idea of risk regulation in the EU context is far from new in EU law. After all, the area of EU environmental law and the debate on GMO's are perhaps the most evident examples of risk regulation at the EU level.[1] However, risk regulation is often seen as part of the more general ambition of 'better' regulation in EU law. More recently, there is an increased focus on risk regulation, broadly interpreted, within the Area of Freedom, Security and Justice (AFSJ), and EU criminal law in particular, a relatively novel area of EU action for which the Lisbon Treaty sets a legal framework.[2] The recent Stockholm programme[3] is an example of such focus by frequently emphasizing the need for more effective policies and better regulation, implying, in context, a need to better address certain risks.

In what follows, I will focus on three concepts which currently play a dominant role in EU criminal law and which all are connected to the idea of risk regulation in a broad sense: risk, security, and effectiveness. I will try to provide an account of each of these notions by firstly looking at their meaning in EU law and thereafter investigating their implication in criminal law. Subsequently, I will try to discuss the intersection of these principles within the area of European criminal law and argue that there is a danger that risk, security and effectiveness, when read together, will lead to precautionary criminalisation at the EU level. This is dangerous as it might undermine other values that the EU is seeking to protect, namely the guarantee of due process and the adequate protection of human rights.

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[1] See e. g. *L. Fisher*, Riskregulation and administrative constitutionalism, (Hart Publishing, Oxford 2007).

[2] See the Commission's recent communication COM (2010) 171, Delivering an area of freedom, security and justice for Europe's citizens. Action plan implementing the Stockholm programme.

[3] The Stockholm programme – An open and secure Europe serving and protecting the citizen (Council of the European Union Brussels, 2 December 2009), available at http://www.se2009.eu/polopoly_fs/1.26419!menu/standard/file/Klar_Stockholmsprogram.pdf (last accessed 20 June 2010).

I will begin this exercise by briefly setting out the basics of risk and just explaining why it is difficult to use the same template of 'risk' in EU law and criminal law respectively. And yet, this might seem obvious. After all, as pointed out by Zedner, it seems impossible to equate risk as developed within the science field with the unpredictable business of human behaviour.[4] Therefore, it is not so meaningful to speak about a single concept of risk as the present area is far too complex for any simplification. However, the aim of this paper is more ambitious than the simple assertion that 'risk' is fundamentally different in criminal law policy where risk is often seen as culpability or the degree of dangerousness of an individual.[5] The point is that it is necessary to take a step back, when reflecting on the meaning of risk regulation in a transnational setting when one deals with EU criminal law.

This paper is structured as follows: It begins by briefly explaining the development of EU criminal law as such by setting the scene; thereafter, the paper seeks to outline three concepts – risk, effectiveness and security – which currently play an important role in EU criminal law at the EU level. Subsequently, the third section looks at the intersection of these concepts and thereby the development of precautionary criminal law. Finally, the paper scrutinizes the future of the AFSJ and EU criminal law in particular in the light of the Lisbon Treaty and the Stockholm programme and to what extent the aforementioned concepts of risk, security and effectiveness are reflected here.

II. EU criminal law – setting the scene

The notion of EU criminal law needs to be placed in context. It is therefore fitting to begin with a short reiteration of the development of it as such. Certainly, until recently, i. e. the entry into force of the Lisbon Treaty, underlying the debate on the development of the phenomenon of European criminal law at the supranational level has been the division of powers between the first and the third EU pillars. After all, the criminal law was in principle a matter for the third pillar and otherwise for the Member States.[6] However, the Treaty of Lisbon changes the EU constitutional framework dramatically by not only abolishing the pillar structure but also supranationalising new areas. Criminal law is dealt with in title V of the Treaty of the Functioning of the European Union (TFEU). Clearly, the Lisbon Treaty opens up a new chapter in the history of the Europeanisation of EU criminal law where Articles 82 and 83 TFEU set the agenda of EU criminalisation. Moreover,

[4] *L. Zedner*, Fixing the Future? The pre-emptive turn in criminal justice, in B. McSherry et al (eds), Regulating deviance (Hart publishing 2009), Ch 3. As pointed out by Zedner, 'the level of uncertainty that pertains with respect to terrorism for example is of a different order entirely than that which exists in areas such as environmental harm or the nuclear industry', see *L. Zedner*, 'Neither Safe Nor Sound? The Perils and Possibilities of Risk', Canadian Journal of Criminology and Criminal Justice 48 (2006) 423. see also H. Jung, 'Uses and Abuses of Criminal Law Responses to Terrorism' in K. Nuotio (ed) Festschrift in honour of Ramio Lathi, (Helsinki University Press 2007) 95 at 104.

[5] Ibid.

[6] See however, Case C-176/03 *Commission v. Council*, [2005] ECR I-7879, for the application of EC criminal law before the entry into force of the Lisbon Treaty.

the abolition of the third pillar means that the Court of Justice has jurisdiction over the former third pillar sphere.[7] Nonetheless, despite the extended jurisdiction of the Court of Justice it should be noted that the transitional protocol as attached to the Lisbon Treaty, stipulates a five-year transitional period before existing third pillar instruments will be treated in the same way as Community acts unless they are amended.[8] Conceivably, however, such a transitional protocol will not restrain the EU's legislative action in this area, as we are dealing with the legislative arena and the EU has, for a very long time, shown an interest to criminalise at the EU level. After all, this was the background in Case C-176/03, Commission v Council[9], concerning environmental criminal law and the competence question in EU criminal law where the Commission was eagerly proposing criminalisation at the supranational level even in the absence of an explicit legal mandate in the Treaty.

Moreover, in connection with the entry into force of the Lisbon Treaty, a new Justice and Home Affairs (JHA) programme was crafted – the Stockholm programme – to replace the previous Hague programme.[10] The programme sets out a very ambitious agenda for the EU to achieve within the next few years. It is the latest development for the creation of an AFSJ sphere. It takes the conclusions and the Hague programme one step further by stipulating a number of goals to be achieved in the AFSJ field. The Commission's communication COM (2009) 262/4 and its title, 'An area of freedom, security and justice serving the citizen,' regarding the Stockholm programme is worthy of mention here. This communication points at the current success with EU involvement in the present area. Nonetheless, it is also pointed out that the desired progress has been comparatively slow in the criminal law area because of the limited jurisdiction of the Court of Justice – in addition to the Commission having been unable to bring about infringement proceedings – which has led to considerable delays in the transposition of EU legislation at the national level. Therefore, the aim of this communication is to make EU policies more effective in the AFSJ field, by in particular looking at and creating an agenda for security issues. In addition to this JHA agenda, the Commission has recently published a communication, 'An internal security strategy in action: five steps towards a more secure Europe'.[11] This communication proposes a more effective crime prevention agenda and points out that four out of five Europeans want more action at EU level to fight organised crime and terrorism.[12] Although this communication as well as the Commission in general in its action plan on the Stockholm programme[13] points out that there will be a zero tolerance approach as

[7] See e. g. *D. Leczykiewicz*, '"Effective Judicial Protection" of Human Rights After Lisbon: Should National Courts be Empowered to Review EU Secondary Law?' (2010) 35 EL Rev 326 and *A. Hinarejos*, *Judicial control in the European Union* (OUP, 2009).

[8] Protocol on transitional provisions attached to the Lisbon Treaty, Articles 9-10.

[9] Case C-176/03, *Commission v Council* [2005] ECR I-7879

[10] *S. Peers*, 'The EU's JHA agenda for 2009,' available at http://www.statewatch.org/analyses/eu-sw-analysis-2009-jha-agenda.pdf (accessed 20 June 2010). The Stockholm programme – An open and secure Europe serving and protecting the citizen (Council of the European Union Brussels, 2 December 2009).

[11] COM (2010) 673 final, 22. 11. 2010.

[12] Standard Eurobarometer 71.

regards any violations to the Charter, the underlying message of this communication appears to be that action is needed before it is too late. As such, this is risk-regulation in the AFSJ context.

Nevertheless, the idea of a precautionary crime fighting agenda highlights the bigger issue of what kind of criminal law policy the EU should aim to achieve. There are at least two reasons for this. First, the question of a preventive system has dangers of its own as it could lead to a more repressive criminal law system which undermines the guarantee of due process and respect for fundamental rights. Secondly, the facilitation of penal populism at the EU level by relying on uncontextualised public opinion is unwise.[14] Expressed differently, there are some fundamental rights and some crucial axioms in criminal law theory such as, in short, the imperative of legality and the right to fair trial which are absolute rights and hence not negotiable. Sound empirical research plays an important function here, but such data needs to be collected in a careful manner. This is all work-in-progress and the Commission deserves 'credit' for being active and for doing something.[15] But there is a need when one deals with criminal law and human rights protection to adopt a critical stance and ask what concepts we are really dealing with and what it means for the development of an EU criminal law policy to rely on them.

Therefore, the contention of this paper is that risk, security and effectiveness are all concepts which play an important role in AFSJ law and policy. It will be shown that the question of more effective and securer EU criminal law – and the AFSJ – agenda is related to risk regulation in a broader context. EU anti-money laundering and terrorism financing legislation will be used as an example of where there are possible clashes with such an approach. The problem is that the application of 'risk' in the criminal law transnational setting poses difficulties.

III. Risk as a general principle of EU law

The idea of 'risk' regulation in EU law has of course developed within the framework of environmental law and the question of scientific uncertainty.[16] It is equally well known that the starting point when discussing 'risk' at the EU level is the precautionary principle, although the birth of such a principle and the evolution of the EU's risk regulation regime have occurred in tandem.[17] Of course, the precautionary principle in the EU context was developed into a general principle by the CFI in the cases of Pfizer and Artegodan.[18] These cases are crucial and made clear – among other things – that the burden of proof regarding the need to take

[13] See the programme.

[14] *M. Nolan*, 'Law Reform, Beyond mere opinion polling and penal populism', *in Regulating Device* (Alan Norrie, et. al., Hart Publishing, Oxford 2009).

[15] In other areas of law such as EU private law, see for similar comments on the Commission's legislative activity, *S. Weatherill*, 'European Contract Law: Taking the Heat Out of Questions of Competence', 16 EBLR,(2004), 23

[16] E.g. *M. Lee*, EU Environmental Law, (Hart Publishing, Oxford 2005).

[17] *L. Fisher*, Risk regulation and administrative constitutionalism, (Hart Publishing, Oxford 2007) Ch 6.

[18] Case T-13/99, *Pfizer* [2002] ECR II-3305., T-141/00, *Artegodan* [2002] ECR II-4945.

precautionary measures was on the EU institutions. Nevertheless, the Commission in its famous communication on risk regulation stated that a revised burden of proof might be necessary if substances were deemed a priori hazardous.[19] Nonetheless, there seems to be very little examination of the interrelationship between notions of risk regulation and the precautionary principle and the latter is being applied in many different but interrelated contexts.[20] More to the point, there seems to be no fixed understanding of 'risk' in EU law.[21]

In what follows, I will try to show how the notion of 'risk' has been translated to the EU criminal law context. The starting point for the elaboration of a risk-based approach in this area is the Third Money Laundering Directive.[22]

1. Laundering the EU risk regulation regime

Within EU criminal law the use of risk as a legal concept has its longest history in the context of anti-money laundering legislation. For this reason it is worth examining, to see how risk has been used and understood in this particular context. It could be argued that risk in this context has been used as a way of not only justifying EU action in the field but also as a way of imposing a harsher criminal law regime.

To make the long EU anti-money laundering story short, the first EU Directive on anti-money laundering was adopted in 1991.[23] Subsequently, this Directive was amended in 2001[24] and then superseded by a third Directive in 2005 (hereafter the Third Money Laundering Directive).[25] A particularly significant actor in the global war against money laundering and an important trendsetter for the EU in these matters is of course the Financial Action Task Force (FATF) and its 40 Recommendations on Money Laundering.[26] Briefly, the FATF was set up by the 1989 G7 summit. Its original mandate concerned the war against chiefly drug-related money laundering but was, in the aftermath of 9/11, expanded to also cover the financing of terrorism. This is the approach taken by the EU too.

Yet the term 'money laundering' has always been rather misleading as it not only concerns money, but also 'grey' property of virtually any kind, which is covered and embraces a continuum of economic activity. Conversely, the terrorist-related laun-

[19] COM(2000)1 final, Communication on the precautionary principle.

[20] *J. Torriti*, 'Impact Assessment in the EU: A Tool for Better Regulation, Less Regulation or Less Bad Regulation', (2007) 10 JRR 239.

[21] E.g. *G. Majone*, 'What price safety?', (2002) 40 JCMS 89.

[22] Directive 2005/60/EC OJ L309, 25 Nov 2005

[23] Directive 91/308/EEC OJ 1991 L 166/77.

[24] Directive 2001/97/EC of the EP and of the Council amending Directive 91/308/EEC on the prevention of the use of the financial system for the purpose of money laundering OJ L344, 28 Dec 2004.

[25] It should perhaps be clarified that money laundering is by definition based on another crime termed a predicate offence, which gives rise to the laundering in question. Directive 2005/60/EC OJ L309, 25 Nov 2005. The Commission's own website is instructive: http://ec.europa.eu/internal_market/company/financial-crime/index_en.htm (last accessed 1 June 2010).

[26] FATF is an intergovernmental group with a mandate 'to assess the results of co-operation already undertaken in order to prevent the utilisation of the banking system and financial institutions for the purpose of money laundering and to consider additional preventive efforts in this area. *V. Mitsilegas*, Money Laundering Counter-Measures in the EU: A New Paradigm of Security Governance versus Fundamental Legal Principles (Kluwer, The Hague 2003).

dering process is sometimes known as 'reverse money laundering', which refers to the use of 'clean' money for 'dirty' ends.[27] It is therefore much harder for a financial institution to identify terrorist-related money laundering, and it is extremely difficult to trace or prove the proceeds of crime before a crime is committed. Therefore, it could be argued that countering the financing of terrorism presupposes a different risk perception concept than that of classic anti-money laundering.[28]

In other words, it could be questioned whether it is feasible to combine the suppression of money laundering and the financing of terrorism in the same instrument despite the obvious different function of risk here. Nevertheless, there seems to be a heavy reliance on 'risk' in terms of prevention at the EU level, which has resulted in broadly constructed offences, where some Member States, such as the UK, have over-implemented the Money Laundering Directives as an excuse to introduce tougher sanctions and thereby the introduction of broadly defined offences.[29] In other words, the preventive strategy at the EU level has lead to over-criminalisation at the national level.

Indeed, the Lisbon Treaty strengthens the EU's preventive focus. Article 84 TFEU states that the European Parliament and the Council may establish measures to promote and support the action of Member States in the field of crime prevention, excluding any harmonisation of the laws and regulations of the Member States. It is difficult to estimate the importance of this statement though, since Article 83 TFEU provides for a rather sweeping competence for the EU in criminal matters not only for the list of crimes such as money laundering, organised crime and drug trafficking but also for any other crime policy area that would be necessary for the effective implementation of existing Union policies. Surely this has a preventive aspect added to it. Alternatively, Article 84 TFEU simply means that the EU shall have its own crime prevention programme – if such a programme can in fact be distinguished from national laws and regulation.

2. Why is 'risk' important in EU anti-money laundering? Beyond suspicious reporting

The question remains as to why the concept of risk is important here at all, since, as explained above, it is difficult to equate risk in criminal law with 'risk' as developed, for example, in the area of environmental law. Moreover, it seems as if classic concepts such as risk management, risk assessment and risk communication appear somewhat blurred in the framework of the EU's anti-money laundering and crime agendas.

The Third Money Laundering Directive is innovative in its emphasis on a risk-based approach.[30] Within such a risk-based approach to money laundering, private

[27] *A. Kersten*, Financing of Terrorism – A Predicate Offence to Money Laundering?, in *M. Pieth* (ed.) Financing-Terrorism, (Kluwer, The Hague, 2002) 49.

[28] Ibid.

[29] *V. Mitsilegas*, Global standards in Domestic Legal Cultures: The Money Laundering Offences in English Law, in S. Braum (ed) Droit Pénal Européen des Affairs (Berlin 2008).

[30] Directive 2005/60/EC OJ L309, 25 Nov 2005.

actors, such as lawyers and banks, are expected to make risk assessments of their customers and divide them into low and high-risk.[31] The rationale for actively engaging the private sector in the anti- money laundering process is to make them collect the appropriate information.[32] Therefore, this is commonly referred to as a 'risk-based approach' because private actors are required to pass on sensitive information based on a risk assessment of their clients. But the risk-based approach could also be seen in a broader governing context of risk regulation at the EU (criminal law) level. Thus, the question of the governing of risk connects to the justification of EU legislative action in the first place.

It is arguable that in the context of the Third Money Laundering Directive, where risk is central even in the absence of a clear definition, that it is not the meaning of risk which is essential but rather the assessment and management of it.

3. Gauging risk in criminal law: short comment

In any case, the notion of 'risk' in criminal law is perhaps even more difficult than that of scientific uncertainty. In short, it could be said that 'risk' in substantive criminal law theory, in extremely simplified terms, is often a question of culpability or the level of (awareness of) harm when constructing a crime.[33] In this regard, 'risk' is linked to perceptions of seriousness, in addition to being concerned with the predicting of the future, as not every negative consequence is considered, but only such effects that are serious enough to justify planning and prevention.[34] Accordingly, contextualisation is the important factor in criminal law prevention.[35] It could thus be argued that a risk-based approach is reflected in the very idea of crime prevention. The central question seems to be whether it is possible to predict crime problems within a complex set of variables and how crime prevention should be weighed against other legitimate goals. In other words, what does it mean from the perspective of sound EU criminal law justice and the construction of the AFSJ more broadly to justify measures based on 'risk'? It could be argued that risk as such is fundamentally ill-suited as a normative foundation in this area. In conclusion risk as applied in EU law (traditional scientific context) and criminal law do not only illuminate the difficulty of the application of risk but also that there is a danger that it is used as a smokescreen to impose harsher criminal law.

Moreover, there appears to be a connection between the notion of risk and the concept of security in EU criminal law. After all, it seems as if these notions are

[31] This is the so-called customer due diligence requirement (know-your-customer) and forms part of the risk-based confidence and transparency policy. In short, customer due diligence is to be applied in four cases. First, when establishing a 'business relationship'; second, when carrying out larger transactions; third, regardless of any derogation, exemption or threshold, where there is a suspicion of money laundering or terrorist financing; and fourth, where there are doubts about the veracity or adequacy of previously obtained customer identification data.

[32] For an interesting discussion on how these private actors can be held accountable see *M Bergstrom et al*, A new role for profit actors? The case of anti-money laundering and risk management, JCMS (2010) forthcoming paper.

[33] *A. Ashworth*,Principles of Criminal Law (OUP, Oxford 2003).

[34] Ibid.

[35] *H. Albrecht/M. Kilchling*, Crime Risk Assessment, Legislation, and the prevention.of serious crime comparative perspectives, (2002) 12 EJCCLCJ 23.

fused into one concept[36] which makes it difficult to pin down what exactly the EU is referring to when using the language of 'risk'. In other words, although the Third Money Laundering introduces the notion of 'risk-based' approach it could be argued that what really is at stake is an emphasis on security. Hence, the underlying question is the linkage between risk and security in this regard.

IV. Risk is *Security*

Ever since the events of 9/11, there has been a growing securitisation of the AFSJ.[37] After all, it is proclaimed in Article 67 TFEU that the Union shall not only constitute an AFSJ as such (as promised by title V of the TFEU), but that it shall also endeavour to ensure to a high level of security. This shall be done through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.

It would seem natural to begin this section with a definition of 'security'. And yet security, as such, is rarely defined in EU law.[38] It is, of course, true that the question of security in EU law has traditionally been an external relations – CFSP – matter (defence concerns) or an issue of the internal market as a means of derogation from EU law (public policy, public security etc).[39] After all, in EU law there are various provisions allowing Member States to derogate from its rules on public security grounds[40]. More fundamentally, the notion of security in EU law has evolved as part of the peace mission but has expanded far beyond the desire to avoid state violence.[41] Thus 'security' has had a dual dimension here: on the one hand, the external dimension of security under the framework of the CFSP, and on the other hand is the internal dimension of security within the AFSJ.[42] The common question asked is, of course, how the EU could succeed in being an area of freedom and justice while at the same time simultaneously and excessively focussing on the security mission. As frequently pointed out by others[43], the safeguarding of someone's security might constitute a restriction of someone else's freedom.

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[36] L. Zedner, 'The concept of security: an agenda for comparative analysis', (2003) Legal Studies 153..

[37] *E.g. J. Monar*, The Area of Freedom, Security and Justice, in A. von Bogdandy and J. Bast (eds) Principles of European Constitutional Law (Hart Publishing, Oxford, 2nd ed 2010) 551.

[38] It is rather to be found in political science literature, see e. g. *S. Lavenex/W. Wagner*, Which European Security? Sources of Imbalance in the European Area of Freedom, Security and Justice, *European Security* 16 (2007) 225 and special issue in JournalofEuropeanintegration31 (2009), The External Dimension of Justice and Home Affairs: A Different Security Agenda for the EU? 83.

[39] E.g. Article 45 (3) and (4) TFEU.

[40] For a recent example, Case C-145/09 *Tsakouridis* judgment of 23 November, 2010. In this case, the Court held that an expulsion measure must be based on an individual examination of the specific case and can be justified on imperative grounds of public security within the meaning of Article 28(3) of Directive 2004/38 only if having regard to the exceptional seriousness of the threat.

[41] On the peace mission in relation to security see *A. Williams*, *The Ethos of Europe* (CUP 2010) 60-61.

[42] Ibid.

[43] See generally, e. g. *N. Walker/I. Loader*, CivilizingSecurity (OUP, Oxford 2007).

Nonetheless, the Lisbon Treaty draws somewhat artificial dividing lines between internal and external security, as well as the question of national security. As mentioned, title V of the TFEU sets out the AFSJ mission. It is true that the merging of the pillars has done away with the former Article 47 EU as the master provision of the Treaties and portal provision for the delimitation of powers between the pillars. Yet the legal reality is more complicated than the mere merging of the pillars. After 14th July 2011, Article 47 EU has now been replaced with 40 TEU which constitute the so-called non-affect clause, which states that no activity within the Treaties may affect the other Treaty. Whatever the answer, it seems as though the Lisbon Treaty raises as many questions as it seeks to solve given that the Court has been given no jurisdiction over the TEU but to police Article 40 TFEU.[44] More specifically, the question that needs asking is whether it is possible to distinguish this sharply between internal and external security in light of the fact that there is clearly an external dimension to the AFSJ and vice versa.

Moreover, as regards the internal dimension of security and the AFSJ in particular, Article 71 TFEU, states that a standing committee.[45] shall be established within the Council in order to ensure that operational cooperation on internal security is promoted and strengthened within the Union. Article 72, in turn, stipulates that "it shall be open to Member States to organise between themselves and under their responsibility forms of co-operation and co-ordination as they deem appropriate between the competent departments of their administrations responsible for safeguarding national security". Yet the matter of national security is exempted from the Court's jurisdiction, as stipulated in Article 72 TFEU. This is also reaffirmed by Article 4 (2) TEU which states that national security remains the sole responsibility of the Member States. And yet, also here it appears highly uncertain to distinguish so sharply between internal Member States security and 'internal' EU law security. Indeed, it could be argued that here also 'security' as a concept in EU criminal law is fundamentally ill-suited. More broadly, the point here is that a blind focus on security risks not only rendering the Union's proclamation of humanist values empty promises but also risks undermining the legitimacy of any action taken. It goes without saying that such a security focus, in combination with general effectiveness concerns in EU law, constitutes a particularly dangerous combination as it seemingly points in the direction of more legislation and therefore more criminalisation at the possible expense of adequate human rights protection and due process.

Whatever the case, the recent Stockholm programme[46] is interesting in this regard. In section four of this programme, the security agenda for the next five years

[44] For a recent contribution, *P. van Elsuwege*, EU external relation after the collapse of the pillar structure. In search of a new balance between delimitation and consistency, CML Rev 47 (2010) 987.

[45] Such a committee was established by the Council shortly after the entry into force of the Lisbon Treaty [2010] OJL 52/50.

[46] The Stockholm programme – An open and secure Europe serving and protecting the citizen (Council of the European Union Brussels, 2 December 2009), available at http://www.se2009.eu/polopoly_fs/1.26419!menu/standard/file/Klar_Stockholmsprogram.pdf (last accessed 20 June 2010).

is clearly set out. It is stated that the Union should define a comprehensive EU internal security strategy based on clarity on the division of tasks between the EU and the Member States, reflecting a shared vision of today's challenges. It is also made reassurances that such an agenda shall respect fundamental rights, international protection and the rule of law, as well as solidarity between Member States. Accordingly, the Stockholm programme stipulates that 'developing, monitoring and implementing the internal security strategy should become one of the priority tasks of the Internal Security Committee set up under Article 71 TFEU'. Moreover, it is pointed out that 'security' requires an integrated approach. In this regard the internal security mission is tied to making the AFSJ agenda more effective. Yet it is very difficult to get a true sense of what such a security focus involves. In fact, it could be argued that the Stockholm programme is highly ambiguous in its emphasis on 'security' and whilst claiming to protecting and serving the citizen. Indeed, it is interesting how much the focus on security within AFSJ area of law has increased from the Tampere conclusions to the recent Stockholm programme. The problem is that the security agenda has been pursued at the expense of the freedom and justice notion. In short, this means that the EU concentrates almost exclusively on the prevention aspect. Moreover, there is a clear tendency for an almost in blanco use of 'security' as justifying action per se. This is dangerous as security is a very capacious concept, perilously capable of meaning all things to all mean.[47] Admittedly, this is not unique to the EU, as the global combat on terror has demonstrated security has had very wide ranging and dangerously broad potential of justifying action. The key point for present purposes is that although it is necessary to maintain a secure society, the security agenda is highly manipulable.

Thus, the Commission's communication COM (2009) 262/4 and its title: 'An area of freedom, security and justice serving the citizen' is instructive. An initial question – and against the background of the increased focus on security issues within the Union – is obviously whether it serves the citizen. Regardless, the communication points at the current success with EU involvement in the present area. In particular, the communication states that the main focus for the future is building a citizen's Europe. The citizen is thus claimed to be at the heart of this cooperation. In order to make real such a claim, the Commission highlights the importance of strengthening mutual trust in EU criminal law cooperation. Yet how this is to be achieved appears less clear. According to the Commission, the internal security strategy must be constructed around three complementary and now inseparable fields of activity which are stronger police cooperation, a suitably adapted criminal justice system and more effective management of access to EU territory. Two questions emerge; first, how does 'trust' relate to the security-focus? And secondly, there is an external dimension to the AFSJ here which is striking. It could perhaps be stated that the Commission equates trust with security. Hence, there is a need to fight the unknown. For this reason, it could be argued that the security focus and the thin line between the EU internal agenda as manifested by the AFSJ

[47] *L. Zedner*, The concept of security: an agenda for comparative analysis, (2003) Legal Studies 153.

and the EU's external dimension, is about risk regulation too. 'Risk' is therefore also about security (or vice versa).

Security is not, however, simply a question of enforcement of EU law. After all, in the context of legislative competences and data retention in particular, it should be recalled that AG Bot has justified reliance on Article 114 TFEU (ex Article 95 EC) for the establishment and functioning of the internal market in this area from the perspective of 'security'. Yet there is a rather tenuous link to such considerations under Article 114 TFEU which refers to the notion of safety rather than security and requires scientific evidence.[48] It is true that there is no clear-cut distinction between security and safety. The Court of Justice did not develop the language of 'security' in this context but ruled that there was a competence to adopt criminal law within the first pillar in this regard. Although such cross pillar conflicts belong to history now, the point is that it is the recognition of such danger that calls for close attention to what is meant when the concept is invoked as a justification for public policy decisions. It appears as if the reliance on security makes it easier to cross the attribution of powers threshold as it is such a slippery concept. Nevertheless, the AFSJ is a shared competence (Article 4 j TFEU which means that subsidiarity concerns need to be taken seriously as also reinstated in Article 69 TFEU). As will be explained below, it appears moreover as if attention to security as part of the justification of the EU's involvement could lead to precautionary criminalisation at the EU level.

Intriguingly, it was recently suggested that engaging with the value of security in criminal law could prove an important instrument in the critique of the phenomenon of over-criminalisation.[49] More specifically, that the problem is not only that the politicians take security more seriously than they should, underplaying the importance of other values, but also the important aspects of security can be eroded through badly and ill research hastily enacted criminal offences.[50] Expressed differently, there is, according to this view, a lack of concern with security itself. After all, the fact that a proposed criminal offence would enhance security if complied with can, of course, be a good reason to enact it. But whilst this rationale is in principle plausible, in practice it is leading to a range of too broadly constructed offences. The problem is that this is in disharmony with the principle of legality (and thereby the principle of strict construction of penal provisions) as also guaranteed by Article 49 of the Charter.

In conclusion, there is a very close relationship between the notion of risk regulation and the aspiration of a high level of security within the AFSJ. It seems as if, when read together, they point in the direction of stricter criminal law and more prevention. As pointed out by Ashworth, a preventive regime is problematic as it

[48] C-301/06 AG Bot opinion delivered on 14 October 2008 and judgment of the Court 10 February 2009. Commented by *Herlin-Karnell* in 46 CML Rev (2009) 1667. On this case see also *M. Dougan*, Legal Developments, JCMS 48 (2010) and *T. Konstadinides*, Wavering between Centres of Gravity: Comment on Ireland v. Parliament and Council. 35 (2010) EL Rev 88.

[49] *V. Tadros*, Crimes and Security, (2008) 71 MLR 940

[50] Ibid.

might lead to an extended use of strict liability to increase the efficiency of the criminal law process, which undermines the fundamental right of due process.[51] More provocatively, and if taking the preventive model one step further, it could perhaps be asked why it is necessary to wait until the crime has already been committed (the why wait for a crime argument)? It has some echoes of the 1960s where general prevention, in terms of incarceration, was seen as the ultimate answer to a successful criminal law policy.[52]

Nevertheless, the notions of risk and security could not be considered in isolation. After all, the famous enforcement principle of EU law has first and foremost throughout the history of European law been 'effectiveness'. The next section will, therefore, try to provide an account of the effectiveness principle. I refer to a 'principle' here as unlike the case of risk and security and without going into the question of what a principle is, 'effectiveness' constitutes a general principle of EU law, while notions of 'risk' and 'security' could be defined as concepts. In any case, 'effectiveness', as referred to by the Court, is an umbrella label which requires, generally speaking, that national remedies and procedural rules must not render the enjoyment of Community rights by their beneficiaries virtually impossible or excessively difficult in practice.

V. Effectiveness is the main concern?

The main argument is that the principle of 'effectiveness' has for a long time constituted a driving principle in EU criminal law.[53] It is clear that 'effectiveness' when interacting with the overarching message of supremacy, is generally considered as one of the EU's imperatives. Indeed, there is no doubt that 'effectiveness' is (still) of crucial importance to the survival of the EU legal system by acting as an extended EU law control mechanism policing the national legal spheres.[54]

Here too, in the setting of the constitutionalisation of EU criminal law, the guiding dictum for the expansion of EU criminal law has been 'effectiveness'. Obviously, this is how much of EU law developed. In short, the principle of the full effectiveness of EU law requires that conflicting national law is set aside.[55] Clearly, the ideas of the full effectiveness of EU law have been one of the most useful instruments in the EU legal tool kit, and thus, from this perspective, so far so good and not particularly controversial (anymore[56]). Furthermore, there is a strong emphasis on the effectiveness principle in the Court's EU criminal law case law as

[51] *A. Ashworth*, Criminal Law, Human Rights and Preventive Justice;Regulating deviance, edited by B. McSherry, A. Norrie and S. Bronitt, Hart Publishing, Oxford 2009.

[52] E.g. *N. Christe*, Crimecontrolasindustry (Routledge 2001).

[53] Case C–176/03, *Commission v. Council*, [2005] ECR I–7879.

[54] *S. Weatherill*, Law and integration in the European Union (Clarendon Press, 1995) 116–121.

[55] See e. g. *P. Craig*, EU Administrative Law(OUP, Oxford) 277.

[56] On the controversial history of effectiveness as an enforcement mechanism see e.g. *M. Dougan*, National Remedies before the Court of Justice: Issues of Harmonisation and Differentiation (Hart Publishing, Oxford 2004) and *T. Tridimas*, GeneralPrinciplesofEUlaw, (OUP, Oxford 2006), Ch 9.

demonstrated not only by cases such as Case C-176/03, Commission v. Council but also in legal instruments such as the Third Money Laundering Directive, as mentioned above. Other important cases here are obviously the Ship-source Pollution case and the Pupino ruling, in which the principle of effectiveness played a significant constitutional function as justifying EU involvement.[57] It should perhaps be recalled that in Pupino the question was possibilities of relying on first pillar reasoning in the third pillar. The Court ruled that it would be very difficult for the Union to carry out its tasks effectively if the principle of loyal cooperation – requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure the fulfilment of their obligations under EU law – were not also binding in the third pillar. Consequently, the measure at issue was accorded, if not direct effect – which would have been overly contrary to Article 34 EU which explicitly excluded it – 'indirect effect' for the sake of the effectiveness of EU law. The Ship-source pollution confirmed Case C-176/03, and clarified that in the view of the Court there was a competence in the first pillar for the full effectiveness on EC law but it left the decision on penalties to the Member States. I have previously argued that the notion of effectiveness poses difficulties in itself, as the notion of effectiveness is a very imprecise threshold for competence. With these observations in mind, a corresponding interest arises in examining this issue at closer quarters.[58]

1. Effectiveness of EU law in a nutshell

It is true that effectiveness since the early days has played a significant role in how the EU has expanded.[59] European law has long been driven by the notion of effective enforcement and has, since the early days of the EU legal order, been a much celebrated principle when used by the Court of Justice. Generally speaking, the principle of 'effectiveness', as referred to by the Court, is an umbrella label which requires that national remedies and procedural rules must not render the activity of Community rights by their beneficiaries virtually impossible or excessively difficult in practice. Effectiveness, therefore, is usually a question of effective enforcement of EU law in national law or effective judicial protection at the EU level. Yet effectiveness can also, as mentioned above, constitute a governing principle for deciding whether Community action in a given area is justified at all.[60] What is perhaps of greater significance for our purposes is that the Court has made recourse to the concept of individual rights under the weight of two imperatives in particular. First, it was the need to provide a justification for legal activity.[61] Secondly, it was called in aid to help to persuade national judges, as mentioned earlier, to adopt and

[57] Case C-105/03, *Pupino,* [2005] ECR I-5285 and Case C-440/05, *Commission v. Council*, [2007] ECR I9097.
[58] 'Commission v. Council: Some Reflections on Criminal Law in the First Pillar', 13 EPL (2007) p. 69.
[59] *M. Dougan*, *National Remedies before the Court of Justice* (Hart Publishing, Oxford 2004).
[60] *M. Accetto/S. Zleptnig*, The Principle of Effectiveness: Rethinking its Role in Community Law, EPL, 11 (2005), 375 and *M. Ross*, Effectiveness in the European legal Order(s): Beyond Supremacy to Constitutional Proportionality, (2006) 31 EL Rev 476.
[61] E.g. *Dougan*, (n 54).

develop their roles as Community judges and hence making clear that in particular human rights were adequately protected at the EU level.[62]

Arguably, the most prominent example of effectiveness as a constitutional principle in the context of legislative competences is the aforementioned judgment of Case C-176/03, Commission v. Council.[63] In this judgment, the Court adopted a new approach towards effectiveness by concluding that the EU had the power to impose criminal law in the name of the full effectiveness of EU law in the pursuit of the protection of the environment. As such, the effectiveness principle is used as a constitutional principle, which dictates the attribution of powers. It should once again be recalled that in this case, the Court of Justice stated that 'As a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence…however the last mentioned finding does not prevent the Community legislator, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the member states which it considers necessary in order to ensure that rules which it lays down on environmental protection are fully effective'. The Court concluded that the aim of the Framework Decision in question was the protection of the environment through criminal law sanctions, which was something for the Community, as the protection of the environment is one of the Community's objectives. Added to this, of course, was the previous pillar dispute, where ex Article 47 EU always pointed in the supranational direction.[64]

Nonetheless, it is arguably important to clarify what is meant by referring to effectiveness in EU law and criminal law respectively. Such a clarification is important, as in the case of risk and security, as discussed above, there may be different notions at stake at the EU and the criminal law level, respectively.

2. Effectiveness in criminal law

The principle of effectiveness in criminal law is contested.[65] In short, it encompasses both a restrictive policy that the criminal law should not be used if it cannot be effective in controlling conduct, and an expansive policy that the criminal law should be used if it is the most efficient and cost-effective means of controlling conduct.[66] Nevertheless, the very notion of effectiveness as a template for criminalisation is generally considered to be a difficult parameter when justifying legislation.

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[62] *A. Ward,* The case for uniform remedies, in J Prinssen/A Schrauwen,(eds) Direct effect, Rethinking a Classic of EC Legal Doctrine, (ELP Groningen 2002) Ch 11.

[63] Ibid.

[64] E.g. *N. Neagu*, Entrapment between Two Pillars: The European Court of Justice Rulings in Criminal Law, ELJ 15 (2009) 536.

[65] See *E. Herlin-Karnell*, What Principles Drive (or Should Drive) European Criminal Law?, 11 German Law Journal 1115-1130 (2010), availableat http://www.germanlawjournal.com/index.php?pageID=11&artID=1287.

[66] E.g. On effectiveness in criminal law, see e. g. the classic work of *J. Schonsheck* , OnCriminalisation, (Kluwer, The Hague 1994).

As argued elsewhere, when discussing criminalisation, it is commonly held, however, that the 'burden of proof' of the effectiveness and necessity of a suggested measure should be on those who wish to criminalise the action in question and not on those who wish to be left free of such restrictions.[67] This is an expression of the ultima ratio principle (that criminal law should be the last resort); this principle reflects a minimalist, subsidiarity-like, approach in criminal law. A further issue, closely related to effectiveness is the question of symbolism. Naturally, it opens up the bigger question of what kind of criminal law theory as regards the nature of a crime the above statements are based upon. This question becomes even more pressing in the EU context. After all, the prospects of an EU criminal law policy raise some intriguing issues as to what extent there really should be an EU criminal law policy at all.

3. Effectiveness in the Lisbon Treaty and criminal law

The axiom of effectiveness has not been wiped off the EU agenda, the entry into force of the Lisbon Treaty notwithstanding. On the contrary, 'effectiveness' is now codified in Article 83 TFEU, which grants the EU a competence to harmonise in criminal law if it were to be essential for the effective implementation of a Union policy. Yet arguably the whole of title V (AFSJ) of the TFEU, in particular, Chapter 1 and Chapter 4, is influenced by it by stressing the effective implementation of Union policies. As will be further discussed below, this is where the Stockholm programme adds in emphasis on the need for more effective policies.

To sum up, the notion of 'effectiveness' continues to play an important role for the development of EU law and EU criminal law, in particular. The problem, as explained above, is that 'effectiveness' is a tricky parameter in criminal law. There is a delicate balance to be struck between the general effectiveness of a system and the respect for human rights. And a system which does not recognize such a possible clash risks being ineffective as it will be considered as unfair by its citizen.

VI. The intersection of risk, security and effectiveness

A risk-based approach and effectiveness concerns coupled with security may be problematic as it sheds light on not only the constitutional dimension of what it means to refer to these concepts (their slippery nature) but also that it may harm other interests which the Union seeks to protect – the adequate protection of human rights at the EU level. There is an apparent connection between the concept of 'risk' and the principle of effectiveness in EU criminal law in the way in which these principles are invoked, that is, as axioms that are taken for granted. Moreover, these principles appear to play a significant constitutional function as part of the constitutionalisation process of justifying EU action in the first place.

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[67] *C. Lernestedt*, Kriminalisering: problem och principer (Iustus 2003).

A question worth asking is whether the EU precautionary principle is of any interest to the present area at all. After all, the EU courts have developed this principle into a general principle of EU law.[68] In touching upon this issue, it is important to look a little closer at the Commission's communication on the precautionary principle when trying to understand this issue. Accordingly, this communication states:[69]

"At Community level the only explicit reference to the precautionary principle is to be found in the environment title of the EC Treaty, and more specifically Article 174 [now Article 190 TFEU]. However, one cannot conclude from this that the principle applies only to the environment…In other words, the scope of the precautionary principle also depends on trends in case law, which to some degree are influenced by prevailing social and political values."

The most controversial example of such a possible trend is the possibility of using this principle in the aftermath of 9/11 and the need to combat terrorism on an emergency basis. Obviously, this is an exercise in 'speculation', but taking into consideration the current legislation eagerly pursued by the EC's institutions, it is a rather important albeit somewhat alarming issue. The point is that it is the recognition of such danger that calls for close attention to what is meant when the concept is invoked as a justification for public policy decisions.

More specifically, the General Court (formerly the CFI) in the Pfizer case[70] indicated that the precautionary principle can apply (§ 146) "The precautionary principle can therefore apply only in situations in which there is a risk, notably to human health, which, although it is not founded on mere hypotheses that have not been scientifically confirmed, has not yet been fully demonstrated." The Commission has also stated that the precautionary principle should not be used for arbitrary decision-making.[71] And yet the whole area is imbued with subjective definitions of risk, security and effectiveness and therefore prone for arbitrariness.

Moreover, as touched upon above, the notions of risk, security and effectiveness connect with the very justification for harmonisation in the first place. In other words, the attention to risk, security and effectiveness concerns often constitutes the main explanation for the adoption of the legislation in question, as most prominently witnessed in the post-9/11 era and the many instruments adopted in its aftermath.[72] It is about knowing the unknown.[73] Nevertheless, the phenomenon of overcriminalisation is not simply an EU problem. It should be stressed that there is currently a debate in national criminal law and criminal law theory more generally where concerns have been expressed about the phenomenon of overcriminalisation, in particular with regard to money laundering and terrorist financing offences.[74] It

[68] E.g. Case T-141/00, *Artegodan* [2002] ECR II-4945.
[69] COM (2000) 1 final.
[70] Case T-13/99, *Pfizer* [2002] ECR II-3305.
[71] Ibid.
[72] See the interesting discussion in *K. Nuotio*, Terrorism as a catalyst for the emergence, harmonisation and reform of criminal law, (2006) 4 JICJ 998.
[73] Ibid.

is therefore reason to believe that a better exchange of knowledge and interaction with criminal law scholarship here would contribute to a more successful EU law policy in the present area.

VII. Recent legislative initiatives

Apart from the Third Money Laundering Directive as discussed above, where the intersection of risk, security and effectiveness appears to play an important function in the direction of precautionary criminalisation and eventual overcriminalisation at the EU level, there are more recent examples that deserve attention here. The initiative for a Directive on a European Investigation Order[75] offers – if not substantive criminal law so procedural – an interesting account in this regard. Moreover, the recent Communication from the Commission on 'EU Counter-Terrorism Policy: main achievements and future challenges', is relevant in the present context.[76]

The recent initiative for a European Investigation Order would repeal (the politically sensitive and therefore long debated[77]) European Evidence Warrant (EEW)[78] framework decision by proposing an initiative for a new Directive on the basis of Article 82 (2) TFEU. Accordingly, this means that first, the Directive is subject for mutual recognition. Secondly, it means that the so-called emergency brake, under which the Member States could pull the brake if the legislation in issue were to affect fundamental principles of its criminal justice system, would not apply to general issues concerning the operation of the mutual recognition rule under the Directive as stipulated in Article 82 (1) TFEU. The reason for this is that the emergency brake applies to Article 82 (2) TFEU only, but not to very application of mutual recognition as such. The proposed Directive stresses in its preamble that in order to ensure the effectiveness of criminal cooperation, the possibilities to recognize or execute an investigation order, as well as grounds for postponing such an order, should be limited. Indeed, this instrument is influenced by efficiency thinking. Thus, the concept of 'deadlines' is introduced where serious offences have a shorter deadline (Article 11) and should take place as soon as possible and otherwise within 30 days. Briefly, this means that the executing authority must reject the request in question within 30 days, or take possession of the evidence requested within 60 days after receipt.[79]

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[74] *A. Ashworth,* Criminal Law, Human Rights and Preventative Justice, in B. McSherry et al (eds), RegulatingDeviance*: t*he Redirection of Criminalisation and the Futures of Criminal Law (Hart Publishing, Oxford 2009). See also *Husak*, Overcriminalisation(OUP, Oxford 2007).

[75] Initiative for a Directive of the European parliament and of the Council regarding the European regarding the European Investigation Order in criminal matters, 2010/0817 (COD) Brussels 29 April 2010.

[76] COM (2010) 386 final Communication from the Commission to the European Parliament and the Council.

[77] For a detailed account, *V. Mitsilegas*, The third wave of third pillar law. Which direction for EU criminal justice?, EL Rev 34 (2009) 523.

[78] Framework Decision 2008/978 on the European evidence warrant.

[79] For an overview of this instrument, *A. Ferris*, The European Investigation Order: stepping forward with care, New journal of European Criminal law '(2011) 426.

Furthermore, somewhat interestingly, the sacred notion of ne bis in idem is abolished, as is the role of territoriality, where the Member States have had the option to investigate and punish crimes committed on its territory. Moreover, in the initial proposal to the investigation order, the dual criminality rule was completely abolished. It should perhaps be recalled that the European Arrest Warrant framework decision already infamously abolished this requirement for a list of 32 crimes, but the proposed investigation order went further than that by suggesting a complete abolishment. Even though this was changed in the latest draft[80] to now cover only the 32 crimes as previously listed in the EAW, it tells us something about the general willingness for action at the EU level. Although the Directive ensures in Article 1 that it complies with fundamental rights and that it would not require the Member States to breach fundamental rights, there is a risk that the general efficiency focus will have a negative impact in this regard and undermine rights without necessary serving effectiveness and security. As pointed out by Peers, these reassurances are too vague to be taken adequately seriously.[81]

The other recent example worth mentioning in the present context is the recent Communication on the EU Counter-Terrorism Policy.[82] This communication is to be read in conjunction with a Commission staff working paper, 'Taking stock of EU Counter-Terrorism Measures' and the Stockholm programme. The Commission staff working paper includes a table with concrete achievements and future challenges to be achieved by focussing on four prestigious words, 'prevent, protect, pursue and respond'. This Communication points at the success with the current instrument, such as the European Arrest Warrant[83] and the Third Money Laundering Directive[84] as well as a whole range of legislative measures for the prevention of the use of internet for terrorist purposes[85], all of which have, however, been criticised from human rights perspective.[86] For this reason, the Commission points out that the relationship between the many interacting instruments and the mechanism for information exchange needs to be evaluated. The argument is centred on effectiveness concerns coupled with the need to prevent, pursue and protect. Admittedly, there are also good aspects of this communication such as the explicit recognition of the need to respect fundamental rights and it is also highlighted that it is a priority to ensure that any measure complies with the Charter of fundamental rights. Yet in the light of the EU history on the fight against terrorism since 9/11, it is easy to get the impression that such a reassurance appears fluffy and vague.[87] At least it remains to be seen in practice. The problem, as discussed above, is that the

[80] http://www.statewatch.org/analyses/no-112-eu-eio-update.pdf.

[81] Analysis by *Steve Peers*, The proposed European Investigation Order: Assault on human rights and national sovereignty, available at http://www.statewatch.org/analyses/no-96-european-investigation-order.pdf (accessed 30 August 2010).

[82] COM (2010) 386 final.

[83] [2002] OJ L 190/1, on the EAW.

[84] Directive 2005/60/EC OJ L309, 25 Nov 2005.

[85] Such as Council FD 2008/919/JHA.

[86] *Peers*, ibid n 75.

[87] See e. g. *C. Eckes*, EUCounterterrorism (OUP, Oxford 2009).

preventive emphasises easily lead to measures that are too precautionary. After all, it remains the case that both Article 67 TFEU and Article 75 TFEU provide for a legal basis for the prevention and fight against terrorism and related activities, and none of these provisions entail the emergency brake provision[88], which is otherwise granted in Article 83 TFEU regarding substantive criminal law.

VIII. Future challenges in the AFSJ: balancing exercise

So far this paper has been occupied with the meaning of risk, security and effectiveness in EU law and EU criminal law. The intention has been to provide an account of these notions as constituting important parameters in the development of EU criminal law. Likewise, the intention was to stress the danger of the combination of these notions as it might lead to an over-preventive approach to EU criminal law. This paper has also addressed the question of whether there is room for the precautionary principle in this area and concluded that this is dangerous as it may lead to precautionary criminal law. There is a clear lack of the use of impact assessments in this area. In this regard, the Stockholm programme represents an attempt, at least, of more sophisticated lawmaking.

In any event, we still need to address the future of the AFSJ in the light of the Lisbon Treaty and the Stockholm programme. As regards the impact of the Lisbon Treaty and the aspiration of better regulation in this area, the central question is perhaps whether the new subsidiarity system with the national parliament's participation will change the 'impact assessment' mechanisms at all and the need for it. Surely, such impact assessments must become more politically structured now, as one of their functions will now be to persuade parliaments. This is the protocol on national parliaments and the reasoned opinion machinery as well as the Commission's obligation to forward all legislative acts upon publication, as stated in this protocol.[89] As I have tried to argue elsewhere[90], the need for delegation away from centralization appears particularly important in the sensitive area of criminal law. After all, apart from the protocols on subsidiarity and proportionality, Article 69 TFEU makes it clear that national parliaments shall ensure that proposals and legislative initiatives in Chapter 4 and 5 of title V of the TFEU comply with the protocol on the principles of subsidiarity and proportionality. In this regard, it appears to constitute something of a balancing exercise between the Union and the Member States.

Thus, the topicality of the EU's strong focus on risk, security and effectiveness is evident. The aforementioned Stockholm programme is interesting in the way it seeks to constitute an exercise in better regulation, almost exclusively focussing on

[88] Art 83 TFEU provides for the possibility for the Member States to pull a so-called emergency brake if a proposed legislation would be considered as particularly sensitive from the perspective of a Member States criminal justice system.

[89] Protocol (No 1) on the National Parliaments in the European Union.

[90] *E. Herlin-Karnell*, Subsidiarity in the Area of EU Justice and Home Affairs – A Lost Cause?, (2009) 15 ELJ 351. See also the Manifesto on European criminal law policy available at the https://sites.google.com/site/eucrimpol/manifest/manifesto (last accessed 20 January 2011).

security aspects whilst claiming to be serving the citizen. Indeed, and perhaps somewhat ironically, it appears that what is truly new with the Stockholm programme is that it is aimed at better regulation of the existing, somewhat messy, European patchwork of justice and home affairs. Expressed provocatively, it could also be argued that the novelty of the Stockholm programme is that it uses the language of better regulation in the context of the former third pillar. Although it is true that the Commission ensures us in its Communication on the Stockholm programme that the Charter of fundamental rights will be its compass in this area, such a reassurance, however, seems too open-ended to already be taken as a conclusive guarantee for a sufficient human rights system in EU criminal law. Nonetheless, even though the Charter according to Article 51 of this document is addressed to the Member States only when they are impending Union law, as for the criminal law Articles 47-49 of the Charter (fair trial and proportionality) have a huge influence as they guide the Union's action in this area and set the scene. It is therefore likely that the binding status of the Charter will have a significant symbolic status and therefore have a real impact on the criminal law. As pointed out by Dougan[91], it is possible that the Court would continue its old case law based on general principles and then have a separate agenda for the EU's institutions and the Member States when implementing EU law. It could therefore be argued that the Charter of Fundamental Rights, consequently, not only underlines and clarifies the legal status and freedoms of the Union's citizens facing the institutions of the Union, but also gives the Union and, in particular, the policies regarding the AFSJ a new explicit normative foundation.[92]

IX. Concluding remarks

This paper has investigated three concepts: risk, security and effectiveness. I have tried to provide an account of these notions by conceptualising them in EU law and criminal law respectively. This paper has shown that there is an apparent overlap between these principles and that such indistinctiveness leads to discrepancy in decision-making. It has been argued that the effectiveness principle and the notions of 'risk' and 'security' demonstrate some of the same features and consequently that there is a tendency to lead to the assumption that 'more' means better regulation and hence criminalisation at the EU level. We are concerned not only by the criminological dimension as to why it is dangerous to place over-reliance on risk but also the constitutional concern about what the EU is and is about to become. Moreover, it is a matter of the effectiveness and meaningfulness of the emergent phenomenon of EU crime control in a broad sense.

More specifically, the paper has tried to first unfold the concept of a risk-based approach by discussing the Third Money Laundering Directive and pointing out

[91] *M. Dougan*, The Treaty of Lisbon 2007: Winning Minds, Not Hearts, (2008) 45 CML Rev 613.

[92] *I. Pernice*, The Treaty of Lisbon and Fundamental Rights, in S. Griller and Z. Ziller (eds), The Lisbon Treaty EU Constitutionalism without a ConstitutionalTreaty? (Springer, New York 2008) 235.

the various meanings of risk here. The conclusion is that the concept of 'risk' does not tell us much unless the methodology for its evaluation – taking into consideration the potential conflict as to the meaning of risk in EU law and criminal law respectively – is carefully examined and monitored. The point is that 'risk talk' should not just be seen as a short cut to justify EU action in this area but should be based on solid criteria. Thereafter, the paper sets out to look at the security concept and examined the connection between the notion of risk and the security concept. The third concept investigated in this paper was the principle of effectiveness, which has played a crucial role not only in the development of EU law in general terms, but in particular with regard to the concept of EU criminal law. The paper has pointed at the slippery nature of effectiveness and that it therefore reveals the same characters as risk and security. It has also been pointed out that effectiveness has driven the EU's constitutional agenda in this area and that it has changed its contours from an enforcement mechanism to a constitutional principle in this area.

Furthermore, the paper has attempted to discuss the Stockholm programme in this regard. In particular, the ambition for more effective regulation seems open-ended. It has been argued that the true innovation of the Stockholm programme appears to be that it seeks to be an exercise in better regulation by using such language in the former third pillar. Thus, the strong focus on effectiveness and security appears contradictory in the light of the values and the Charter of fundamental rights, as proclaimed in the Lisbon Treaty (Article 2 and 6 TEU).

The argument of this paper is that the interrelationship between risk, security and effectiveness is complex. Admittedly, this is not a very radical conclusion. What is of greater interest, however, is the seeming tendency in the Lisbon Treaty and the Stockholm programme, as well as in current legislative practice, to promote precautionary criminal law at the EU level. Why is this dangerous then? And why would it be worse at EU level rather than nation level? Whilst it may not be 'worse' from a short-term perspective, it is undoubtedly outrageous in the long term from a constitutional and human rights protection point of view. If the Union wants to achieve an AFSJ which offers something more than state models then the chosen path must surely be carefully chosen and monitored. As such, emergency legislation in the name of security, risk and effectiveness does not appear to be a successful model. If nothing else, it should not claim to be serving the citizen.[93]

The point is that there may be other values, such as the safeguards of the individual and respect for the axioms of subsidiarity and legality, which are lost in such a transition to the supranational level.[94] Consequently, unless this complexity is recognised, the very aspiration of 'risk regulation' appears counter-productive in this area.

[93] As claimed by the Stockholm programme, discussed above.

[94] On possible 'losses' due to EU law involvement see Amtenbrink/Van den Bergh (eds),The Constitutional Integrity of the European Union. Assessing theIntegrative Function of National Constitutions for the European Constitutional Legal Order (TMC Asser Press 2010).