



*The Jean Monnet Center for
International and Regional
Economic Law & Justice*

THE NYU INSTITUTES ON THE PARK

THE JEAN MONNET PROGRAM

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Jean Monnet Working Paper 25/14

Ester Herlin-Karnell

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How the battle of sanctions has shaped EU criminal law**

NYU School of Law • New York, NY 10011
The Jean Monnet Working Paper Series can be found at
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ISSN 2161-0320 (online)
Copy Editor: Danielle Leeds Kim
© Ester Herlin-Karnell 2014
New York University School of Law
New York, NY 10011
USA

Publications in the Series should be cited as:
AUTHOR, TITLE, JEAN MONNET WORKING PAPER NO./YEAR [URL]

**IS ADMINISTRATIVE LAW STILL RELEVANT?
HOW THE BATTLE OF SANCTIONS HAS SHAPED EU CRIMINAL LAW**

By Ester Herlin-Karnell*

1. Introduction

The idea of this chapter is to investigate the extent to which the EU legislator has continued invoking administrative sanctions when dealing with irregularities in the market and to explain why the history of administrative sanctions has shaped contemporary EU criminal law. Administrative sanctions have always formed a crucial part of the EU's enforcement strategy, particularly with regard to competition fines and sanctions in the domain of EU agriculture and fisheries policies.¹ Yet with the entry into force of the Lisbon Treaty, and thereby the legislative competences granted in criminal matters, one would perhaps have thought that there was no further need for administrative law sanctions in the EU. The distinction between administrative law and criminal law used to be the main point of departure for the debate on sanctions back in the days when the EU pillars still determined the realm of competence of the EU's involvement in criminal law proper. In those early days, a lack of legislative competence in criminal law meant that the administrative procedure was the only avenue by which the EU could impose sanctions. However, despite the Treaty reformation and thereby the inclusion of criminal law in the Treaty (as part of the area of freedom, security and justice) , as this contribution will show, that the EU legislator still favours the administrative procedure in certain market related areas. In other words, this chapter contends that the EU legislator still relies on provisions located outside the area of freedom, security and justice (AFSJ) section of the Treaty in situations in which this is beneficial for the effectiveness of the system.

* VU Amsterdam. This chapter was written during my time as an Emile Noel Fellow in the Jean Monnet Centre, NYU fall 2013 with the kind support of a VENI grant from the Dutch Scientific Research Council Foundation (NWO). The paper will appear as a finalized version in M Bergstrom, V Mitsilegas, and T Konstantinides (eds), *Research Handbook on EU Criminal Law* (Edward Elgar 2015).

¹ See, for example, J Frese, *Sanctions in EU Competition Law* (Oxford, Hart Publishing, 2014).

The use of criminal law is a method for expressing values and for indicating the wrongfulness of certain behavior. The criminal law is a regulatory tool for influencing behavior and its central element is its communicative function.² The harm principle has of course become the natural starting point for any understanding of the construction of criminal law, the 'harm to others' yardstick, i.e. that the state should intervene as little as possible in people's lives.³ According to the harm principle, as developed by Mill, the only purpose for which power can rightfully be exercised over any other member of a civilized community against his will is to prevent harm to others.⁴ Feinberg in turn argued that the harm in question should also be wrongful.⁵ The assumption is that that criminalization is aimed at protecting interests from harm. Yet in the EU context it appears as if the question of the wrongfulness or harm in question has not been the central element of the debate but rather the main issue has been what sanctions to impose and this debate on the label of the sanctions has largely shaped the development of EU criminal law.

Accordingly the administrative/criminal law distinction may continue to play a role in the future development of EU criminal law. But can an individual challenge the EU's option to invoke an administrative sanction and thereby claim the right to a criminal law sanction? Such a claim would not seem overly unrealistic, given that Article 49 in the Charter of Fundamental Rights (the Charter) sets out a general prohibition against disproportionate sanctions.

In the following, I set out to explain the history of administrative law in the EU criminal law context and why the classification of sanctions still matters. The chapter begins by setting out the background for understanding the administrative sanctions regime in the EU. It then addresses how the Lisbon Treaty has changed the basic framework for sanctions and investigates whether the EU is continuing to rely on administrative sanctions. The EU's fight against money laundering and market abuse regimes will be

² E.g. A Simester & A von Hirsch, *Crimes, harms and wrongs* (Hart publishing 2011), ch 4.

³ J Mill, *On Liberty* (London, Routledge, 1991).

⁴ Mill, *Ibid.* For an overview see also A Simester & A von Hirsch, *Crimes, harms and wrongs* (Hart publishing 2011), Ch 2.

⁵ J Feinberg, *Harm to Others* (Oxford, Oxford University Press, 1981). See also the introductory chapter to RA Duff et al (eds), *The Boundaries of the Criminal Law* (Oxford, Oxford University Press, 2011).

used as a case study illuminating the use of various different sanctions against the same target, i.e. financial criminality. Subsequently, the chapter looks at the desirability of double regimes; that is, the increasing trend in the EU to rely on both administrative and criminal law sanctions to regulate the same behaviour. Finally the chapter examines the aptness of EU agencies as imposers of sanctions and highlights the accountability deficit.

2. Sanctions in context⁶

Before the entry into force of the Lisbon Treaty, as indicated above, the question of what kind of sanctions the EU could impose on the Member States was subject to fierce debate and closely related to the development of the EU project in general with regard to the general division of competences in the EU. The debate on sanctions in EU law has tended to focus on the controversial EU administrative sanctions system and on the question of whether these sanctions, contrary to their ‘administrative’ label, should properly be viewed as falling under the umbrella of criminal law. Such an interpretation would, in accordance with the criteria laid down by the European Court of Human Rights (ECtHR) in the case law on Article 6 of the European Convention on Human Rights (ECHR), ensure the right to a fair trial and a subjective fault element.⁷ In this regard, it is worth mentioning that, in the early 1990s, it was still unclear as to whether the EU had the competence to prescribe ‘non-criminal’ sanctions at all.⁸ The issue of whether the EU was entitled to create its own ‘quasi penal system’ was raised in Case C-240/90, *Germany v Commission*,⁹ where the Court held that the measures were needed to secure the internal market and were therefore within the EU’s competence.¹⁰ This approach has been frequently reinstated, most recently in the *Bonda* judgment.¹¹ Prior to the competences granted in criminal law, the advantage of

⁶ Section 2 is largely based on chapter 2 in Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (Oxford, Hart Publishing, 2012).

⁷ See, for example, *Engel and others v Netherlands* Series A, No 22 [1979-1980];

⁸ N Hækkerup, *Controls and Sanctions in the EU Law* (Copenhagen, Djøef Publishing, 2001) 161.

⁹ Case C-240/90 *Germany v Commission* [1992] ECR I-05383.

¹⁰ AG Jacobs stated in his opinion of 3 June 1992 that “certainly EC law in its present state does not confer on the Commission, the CFI or the ECJ the function of a criminal tribunal. It should however be noted that that would in itself not preclude the EC from harmonizing the criminal laws of the Member States if that were necessary to attain one of the objectives of the Community.”

¹¹ For a strict interpretation of the ‘Engel test’, see criminal proceedings against *Bonda* (C-489/10),

administrative sanctions was obviously that the fact these sanctions were not criminal sanctions meant that measures could be taken despite the EU's lack of an explicit criminal law competence. Nevertheless, administrative sanctions have been severely criticized for giving rise to a kind of 'competence creep' into the sphere of penal law and in this way creating a supranational system of sanctions through the EU legal back door and for breaching the general right of a fair trial.¹² Nevertheless, in line with mainstream EU law influence, the administrative sanctions regime has resulted in considerable harmonization of national criminal laws, with norms either being set aside by EU law or given extended scope in pursuit of European goals. Accordingly, while there was a presumption that criminal law was a matter for the Member States, this presumption could be rebutted – as in all other areas of EU law – if its operation affected the pursuit of Union policies such as the smooth operation of the market. Clearly, competence boundaries have been easily blurred in this area and sanctions have played an important role in this process.

2.1 How the principle of loyalty dictated sanctions: brief history

The principle of loyalty Article 4(3) TEU) in interaction with the general principles of EU law traditionally constituted the corollary of the classic relationship between national criminal law and the EU. Likewise, this principle has been the main driver for the enforcement of administrative sanctions as it obliged Member States to ensure compliance with EU law. Thus it could be said that the principle of loyalty identified a constitutional dynamic which indirectly provided what the former EC Treaty lacked.¹³ An early example of sanctions in the EU context in the form of a tangible 'EU law/criminal law principle' authored by the Court is what is commonly referred to as the *Greek Maize* judgment.¹⁴ Briefly, this case concerned fraud against the EU where the Court held that even though the choice of penalties remained within the discretion of the Member States, the Member States had to ensure that infringements of

5 June 2012, confirming previous case law, including *Käserei Champignon Hofmeister v Hauptzollamt Hamburg-Jonas* (C-210/00) [2002] ECR I-6453.

¹² in Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (Oxford, Hart Publishing, 2012), Ch 2.

¹³ JT Lang, 'The Duties of Cooperation of National Authorities and Courts under Article 10 EC' (2001) 26 *EL Rev* 84.

¹⁴ Case C-68/88 *Commission v Greece* [1989] ECR I-2965, §24.

Community law were penalized under conditions, both procedural and substantive, which were analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, made the penalty effective, proportionate and dissuasive. These requirements have since been confirmed in numerous cases (for example, *Nunes and de Matos*,¹⁵ *Commission v France*¹⁶ and *Nisselli*),¹⁷ in which the demands for effective, proportionate and dissuasive sanctions and the principle of assimilation were frequently repeated as a kind of Community mantra. It could be argued that ‘dissuasive and proportionate’ are oxymoronic concepts. After all, it is far from clear what the Court means when it refers to these requirements. Nonetheless, according to one commentator, the notion of an EU sanction should be understood as follows:

In penal practice (as distinct from theorizing), proportionality and dissuasion may be importantly linked: a measure may not be dissuasive unless it is proportionate, since excessive severity or leniency may both undermine future compliance ... it may be argued that proportionality and dissuasion merely enlarge upon what is inherent in the concept of an effective sanction.¹⁸

Yet the exact contours of an EU law sanction arguably remain unclear. Although it is true that this may be regarded as one of the characteristics, or indeed the result, of the principle of loyalty (in other words, contours that are flexible but imprecise),¹⁹ this presupposes that we have an accepted definition of ‘dissuasiveness’ and ‘effectiveness’ in the first place. Thus the crucial question was whether, in practice, Member States had a real choice in refraining from harmonizing their criminal laws, while still providing for ‘dissuasive and effective’ sanctions.²⁰ It should also be noted that the Court explicitly stated that there was no obstacle to strict liability in EU law as long as there were genuine and sufficient safeguards for the individual in accordance with the

¹⁵ Case C-186/98 *Nunes and de Matos* [1999] ECR I-4883.

¹⁶ Case C-333/99 *Commission v France* [2001] ECR I-1025.

¹⁷ Case C-457/02 *Antonio Nisselli* [2004] ECR I-10853.

¹⁸ C Harding, ‘European Regimes of Crime Control: Objectives, Legal Bases and Accountability’ (2000) 7 *Maastricht Journal of European and Comparative Law* 224.

¹⁹ AG Kokott appears more certain; see Case C-403/02 *Berlusconi and others* [2005] ECR I-3565, opinion delivered on 14 October 2004, § 88-90.

²⁰ T Elhom, *EU Sviæg* (Copenhagen, Jurist, 2002) ch 9.

principle of proportionality.²¹ However, the main significance of loyalty was always that a Member State did not have the option of choosing to do nothing about a certain situation just because its national law was toothless. After all, the classic loyalty principle required Member States to amend any conflicting legislation in accordance with the *Greek Maize*²² formula outlined above, taking measures “which in any event make the penalty dissuasive, effective and proportionate”. The most common and plausible view of an effective sanction is thus that, in practice, these principles need to be considered in conjunction with the non-discrimination principle, but must in any event be ‘effective’ (which, as will be shown in chapter three, is a relative matter).²³ Therefore, the coexistence of effective sanctions and increased legislative harmonization has tended to push criminal law in the direction of more severe sanctions. As seen above, the principle of loyalty can have the effect of requiring Member States to provide sanctions ‘positively’, although it can also prevent them from imposing sanctions if such sanctions would hinder the smooth running of the internal market. More specifically, the negative effect or influence refers to the obligation on Member States to set aside provisions incompatible with EU law and, moreover, to repeal any such provision in order to preserve legal certainty. The case law of the Court in this area is well known and fairly consistent.²⁴ Already in the *Cowan* case the Court concluded that:

[A]lthough in principle criminal legislation and the rules of criminal procedure are matters for which the Member States are responsible, Community law sets certain limits to their power and such legislation may not restrict the fundamental freedoms guaranteed by the Community.²⁵

This is basic information and not particularly controversial from an EU law perspective since national regimes should not render the freedoms recognized by the Treaty illusory, and no discrimination on the grounds of nationality may apply.²⁶ This is the

²¹ Case C-326/88 *Hansen & Son* [1990] ECR I-2911.

²² Case C-68/88 *Commission v Greece* [1989] ECR I-2965.

²³ C Harding, ‘Member State Enforcement of European Community Measures: The Chimera of Effective Enforcement’ (1997) 4 *Maastricht Journal of European and Comparative Law* 5.

²⁴ See, for example, Case 203/80 *Casati* [1981] ECR 2595, Case C-163/94 *Sanz de Lera* [1995] ECR I-04821 and Case C-348/96 *Donatella Calfa* [1999] ECR I-11.

²⁵ Case C-186/87 *Cowan v Le Trésor Public* [1986] ECR 195.

²⁶ See, P Craig & G de Burca *EU Law* (Oxford, Oxford University Press, 2013).

EU law requirement of non-discrimination and it is still the most fundamental principle of Union law for it accounts for the very authority of the supranational legal project.

3. The Lisbon Treaty in place: the epic mantra of effective, proportionate and dissuasive sanctions

As shown above, the administrative sanctions grid played an important role in expanding the competences of the EU and thereby, prior to the Lisbon Treaty, made possible a quasi criminal law system at the expense of the due process safeguards traditionally associated with criminal law (such as the right to a fair trial under Article 6 ECHR). More recently, these administrative sanctions have also played a predominant role with regard to financial law regulation and the aim of ensuring increased compliance in the Member States. Interestingly, in the case of financial sanctions, the UK, which otherwise enjoys an opt-out with regard to criminal cooperation (Protocol No. 22), has stated that it will always participate in any adoption of administrative sanctions under the framework of Article 75 TFEU.²⁷

Ever since the beginning of sanctions in EU law, as noted above, the mantra of effective, proportionate and dissuasive sanctions has dictated the EU's competence to impose restrictions on Member States and – most importantly – has restricted the Member States' freedom. The sanctions field has been closely associated with the EU law on remedies, as well as the different stages of EU intrusiveness into the national legal order.²⁸ This section discusses the impact and function of administrative sanctions adopted through the framework of the AFSJ, Title V of the TFEU, and examines the extent to which such sanctions are still relevant when discussing EU criminal law.

²⁷ Declaration by the United Kingdom of Great Britain and Northern Ireland on Article 75 of the Treaty on the Functioning of the European Union.

²⁸ On EU legal remedies, see, for example, M Dougan, *National Remedies before the Court of Justice* (Oxford, Hart Publishing, 2004) and S Prechal, *Directives in EC Law* (Oxford, Oxford University Press, 2005).

One of the most clear-cut examples of where sanctions not considered as belonging to criminal law are still being invoked is that of the sanctions being used in the fight against terrorism. The field of restrictive measures (or administrative sanctions) clearly has a significant internal-external dimension to it and been subject to debate on the protection of fundamental rights and the scope of the Court's jurisdiction in the famous *Kadi* saga.²⁹ While in *Kadi* the Court of Justice famously extended the jurisdiction of the EU to review, indirectly, UN measures and while that was a groundbreaking development in the context of sanctions, the adoption of the Lisbon Treaty means that the previous jurisdictional shortcomings have been resolved thanks to a specific legal basis in the Treaty. Accordingly, Article 75 TFEU provides for the competence to adopt restrictive measures in the fight against terrorism. A further question then arises as to which cases concerning the fight against terrorism are to be considered as falling within the scope of Article 75 TFEU, as opposed to Article 83 TFEU (which includes criminal law in its list), and the criminal law grid, and whether these articles are intended to complement each other. It seems as if the dividing line here is between administrative sanctions (freezing of funds) and criminal law, with the former being part of Article 75 TFEU and the latter forming part of Article 83 TFEU. In any case, and to further muddy the water, Article 75 TFEU stipulates "where necessary to achieve the objectives set out in Article 67 TFEU". It also refers to the possible harmonization of "related activities", which begs the question of what "related activities" means.³⁰ This confirms a rather broadly defined competence for the adoption of sanctions under Article 75 TFEU.

The difficulty of distinguishing between the internal and external in the fight against terrorism is reflected in the recent judgment in Case C-130/10.³¹ In this ruling the European Parliament challenged Council Regulation 1286/2009 amending Council

²⁹ Court of First Instance (CFI), Case T-315/01, *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* [2005] ECR II-3649; European Court of Justice (CEJ), Case C-402/05 P, *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* [2008] ECR I-5351; General Court, Case T-85/09, *Yassin Abdullah Kadi v European Commission*, judgment of 30 September 2010, *Kadi II*, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, judgment of 18 July 2013 (not yet reported).

³⁰ See Gazzini & Herlin-Karnell, 'Restrictive measures adopted by the EU against individuals from the standpoint of International and European Law' (2011) 36 *European Law Review*, 798.

³¹ Case C-130/10, *European Parliament v Council*, Opinion of AG Bot delivered on 31 January 2012.

Regulation 881/2002 imposing certain specific restrictive measures directed against targeted persons and entities associated with the Al-Qaida network.³² The Parliament argued that, having regard to the aim and content of the Regulation, the correct legal basis should have been Article 75 TFEU and not Article 215 TFEU. Article 75 TFEU would guarantee a larger role in the legislative process for the Parliament and would also ensure the jurisdiction of the Court of Justice. It confirms a very scattered role of sanctions, which are located not only within the AFSJ, but also within the external relations competences. It is worth recalling parts of this judgment. Advocate General Bot pointed out in paragraph 76 of his opinion, for example, that:

Terrorism does not recognise borders. ... Furthermore, if a terrorist group which usually operates within the European Union decides at a given point in time to collaborate with other terrorist groups pursuing similar objectives located outside the European Union, do the persons and entities associated with the first group then lose their status as 'internal' terrorists and become 'external' terrorists or even 'international' terrorists? These considerations alone are sufficient, in my view, to demonstrate that it is impossible in practice to implement such a distinction.

With regard to the contested regulation, the Court of Justice made it clear that this was based on a Security Council measure and intended to preserve international peace and security, which implies that the measure at stake had a clear Common Foreign and Security Policy (CFSP) character. In addition, the Court stated that the argument that it is impossible to distinguish between the combating of 'internal' terrorism on the one hand and the combating of 'external' terrorism on the other did not matter for the choice of legal basis and for the scope of Article 215(2) TFEU as the legal basis of the contested regulation. The Court therefore stressed the political considerations behind the drafting of the Lisbon Treaty and accepted that, when choosing between legal bases, it is not only the role of the European Parliament and the increased democratic input that are the decisive factors, as was traditionally the case under the classic *Titanium dioxide* case law template.³³

³² Case C-130/10, *European Parliament v Council*, judgment of 19 July 2012 (not yet reported).

³³ Case C-300/89 *Commission v Council* [1991] ECR I-2867.

The area of restrictive measures in the fight against terrorism is not, however, the only area that borders on criminal law and that raises questions as to the exact definition of a sanction. The fights against money laundering and the financing of terrorism, for example, which are listed as crimes in Article 83, are still on the agenda in connection with Article 114 TFEU, just like before the Lisbon Treaty entered into force. This means administrative sanctions, not criminal law, and confirms an interesting hybrid dimension to AFSJ law as adjoining not only external relations law (as in the anti-terrorist laws), but also hard-core internal market law. This is also an area in which the EU's internal security strategy is widely felt to be the reason why the EU is adopting these measures.

4. EU anti-money laundering action and administrative sanctions

The proposal for a fourth Money Laundering Directive offers an interesting example of the EU broadening its mandate further with regard to the imposition of sanctions and thus follows the international trend in the fight against dirty money and terrorist financing.³⁴ It should be remembered that the first EU Directive on anti-money laundering was adopted in 1991.³⁵ This Directive was subsequently amended in 2001³⁶ and then superseded by a third Directive in 2005,³⁷ while the Commission has now introduced a fourth Directive.³⁸

Importantly, money laundering is by definition based on another crime, termed a 'predicate offence' and that gives rise to the laundering in question. There is an ongoing doctrinal debate about the need to have a general definition of 'predicate offences' in order to meet the legality requirement of strict construction in criminal

³⁴ For a more extensive analysis of money laundering, see Bergstrom in this volume and, more generally, Herlin-Karnell, *Constructing Europe's Area of Freedom, Security and Justice through the Framework of Regulation: A Cascade of Market Based Challenges in the EU's Fight against Financial Crime* (forthcoming paper, on file with the author). On the background to the EU's anti-money laundering agenda, see V Mitsilegas, *Money Laundering Counter-Measures in the EU: A New Paradigm of Security Governance versus Fundamental Legal Principles* (The Hague, Kluwer Law Publishing, 2003).

³⁵ Directive 91/308/EEC OJ 1991 L 166/77.

³⁶ Directive 2001/97/EC of the European Parliament 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 December 2004.

³⁷ Directive 2005/60/EC OJ L309, 25 November 2005.

³⁸ Proposal for a Fourth Money Laundering Directive, COM/2013/045 final, on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

law.³⁹ It has been suggested that one problem with the 1991 and 2001 Money Laundering Directives was that they did not provide a definite list of predicate offences or the definition of a serious crime as the threshold for criminal activity. The proposal for a fourth Directive illustrates an impressive and ambitious attempt by the Commission to address many of the challenges neglected in the third Directive. The fourth Directive claims to follow the international trend by including a specific reference to tax crimes within the serious crimes that can be considered as predicate offences to money laundering. This marks a new development compared to the third Directive.

Nevertheless, the novelties introduced by the fourth Directive, such as the duty of risk assessment extended to the Member States, raise the awkward question of whether the Member States are actually fit for this task. With the third Money Laundering Directive still having difficulties in the national systems, and the implementation of this instrument still lagging behind expectations, the Commission is withdrawing the carrot before it has even been produced. One of the arguments put forward in the fourth Money Laundering Directive is the classic claim that the EU is required to act because national action alone is not enough. Interestingly, the EU legislator has added the caveat that European action is not enough either, thus indicating a desire to go global. The legislator also stresses that tax crimes are now included in the broader definition of money laundering, in line with the recommendations set by the Financial Action Task Force (FATF). The proposed fourth Directive states that money laundering and terrorist financing are international problems and that efforts to combat them should be global. Intriguingly, the Directive also covers those illegal activities if they are committed on the internet.⁴⁰

Like its predecessors, the proposed new Directive is based on Article 114 TFEU, the EU's internal market provision. This might seem odd as the EU now has an explicit competence to fight money laundering and terrorism under Article 83 TFEU.

³⁹ See, for example, J Handoll, *Capital Payments and Money Laundering in the European Union* (London, Richmond, 2006).

⁴⁰ On the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, COM (2013) 45/3.

Moreover, one would have thought, for example, that cyber crime (which now, indirectly, forms a large part of the Directive, with the aim being to ensure a high level of security) would fit the category of cross-border criminality and organized crime as set out in Article 83 TFEU. Article 83(1) TFEU identifies money laundering as one of the crimes with a particular cross-border dimension. According to the Directive, the Commission also intends to propose an instrument based on Article 83 TFEU as a complementary measure to fight money laundering (not yet announced). This follows a similar trend to that seen in the Market Abuse Directive (MAD),⁴¹ where the EU adopted double measures regulating the same areas, but with a different legal basis and that do not sit easily alongside subsidiarity.

In any event, the proposed new Directive has ensured that it meets the requirement for consistency by emphasizing its compliance with wishes set out in the Stockholm programme, as well as the EU's internal security strategy.⁴² In addition, it claims to be in line with other recent initiatives, such as the proposal for a Directive on the freezing and confiscation of proceeds of crime,⁴³ as well as the guidelines set by the Commission's communication on reinforcing sanctioning regimes in the financial service sector.⁴⁴ According to the Commission, the proposal will bring no change with respect to effective judicial protection and the guarantee set by the Charter of Fundamental Rights. The approach adopted by the EU in this respect is not very ambitious as it does not strengthen the protection. Most interestingly, and considering the strong preventive focus of this instrument, the Commission stipulates not only that the Directive complies with data protection rules, but also that it will indirectly protect the right to life. How the Directive can protect the right to life is perhaps somewhat difficult to understand.

⁴¹ Proposal for a Regulation on insider dealing and market manipulation, COM (2011) 651 and Proposal for a Directive on criminal sanctions for insider dealing and market manipulation, COM (2011) 654 final, respectively.

⁴² The EU Internal Security Strategy in action: five steps towards a more secure Europe, COM (2010) 673 final, 22 November 2010.

⁴³ Proposal for a Directive on the freezing and confiscation of the proceeds of crime in the EU, COM (2012) 0036.

⁴⁴ COM (2010) 716 final, 'Reinforcing sanctioning regimes in the financial sector'.

In tandem with the proposed Directive, the Commission has also proposed a Regulation, based on Article 114 TFEU, regulating the transfer of funds. This is linked to the EU's internal security strategy and focuses on ensuring the payer's information is made immediately available to law enforcement and prosecutorial authorities. Remarkably, while largely overlapping with the Directive, the Regulation points out that it may not always be possible in criminal investigations to identify the data in question or the person concerned until long after the original transfer. Consequently a preventive approach should be adopted and information stored to facilitate investigation; in other words, all information will be stored. This raises two immediate questions: firstly, it is difficult to see how this differs from the risk-based approach promoted by the fourth Directive, while, secondly, it confirms a precautionary approach to EU criminal law and appears to further blur the boundaries between administrative sanctions and criminal law sanctions, and thereby also the internal market vis-à-vis the AFSJ. It is also difficult to see how the proposal complies with the provisions on data protection, as indicated by the Commission.

4.1 Market abuse sanctions

The area of market abuse and manipulation represents another sensitive area in which the boundary of sanctions has become blurred. While it is true that the new Market Abuse Directive⁴⁵ is based on Article 83(2) TFEU, which provides a more extensive competence than the areas listed in Article 83 (1) TFEU for the effective implementation of a Union policy and so obviously involves criminal law, it also adds administrative sanctions to the picture. According to the Commission, market abuse can be carried out across borders and this divergence undermines the internal market, thus creating a certain scope for perpetrators of market abuse to carry such abuse into jurisdictions that do not provide for criminal sanctions for a particular offence. The Directive⁴⁶ is seeking to change this by adding criminal law to the discussion in order to fight market abuse more effectively. For this reason, we now face two instruments: one Directive and one Regulation that, in the ideal world, would complement one another.

⁴⁵ Directive 2014/57/EU, Directive on criminal sanctions for insider dealing and market manipulation, OJ L 3/179

⁴⁶ Ibid

The newly adopted Regulation⁴⁷ regulates the same area as the Directive, but its regime is stricter. Interestingly, it appears to bring competition law in through the back door by creating far-reaching surveillance mechanisms and introducing ‘blacklisting’. This Regulation is closely associated with reform of the MiFID (Markets in Financial Instruments Directive) and it has been suggested that it should become effective on the date that the MiFID review enters into application.⁴⁸ Hence the rationale for the instrument follows the Commission Communication on ‘Ensuring efficient, safe and sound derivatives markets: Future policy actions’, where the Commission undertook to extend relevant provisions of the MAD to cover derivatives markets in a comprehensive fashion.⁴⁹

As for the legal basis of the Regulation, the Commission states that “There is a need to establish a uniform framework in order to preserve market integrity and to avoid potential regulatory arbitrage as well as to provide more legal certainty and less regulatory complexity for market participants.”⁵⁰ Hence, the justification for adopting the Regulation is the same as for the Directive, albeit with a different legal basis, namely Article 114 TFEU. The Regulation aims expressly to contribute to the smooth functioning of the internal market. Most importantly, the Regulation establishes a new layer of sanctions: administrative sanctions regulating the same area as the Directive.⁵¹ Why, then, the need for this dual approach, with both a Directive and a Regulation, to fight market abuse? More generally, the Regulation appears to confirm a new trend where ‘less is no longer more’ and where the legislator is putting various back-ups into place.

⁴⁷ Regulation (EU) No 596/2014 OJ L 173, see also COM (2011) 651, proposal for a Regulation on insider dealing and market manipulation.

⁴⁸ Directive 2004/39/EC, Markets in Financial Instruments, OJ L 145, 21 April 2004.

⁴⁹ European Commission Communication: *Ensuring efficient, safe and sound derivatives markets*, COM (2009) 332, 3 July 2009.

⁵⁰ Regulation (EU) No 596/2014 OJ L 173, COM (2011) 651, Proposal for a Regulation on insider dealing and market manipulation. At p 15, paragraph 4.

⁵¹ See Herlin-Karnell, ‘White-Collar Crime and European Financial Crises: Getting Tough on EU Market Abuse’ (2012) 37 *European Law Review* 487.

5. Double regimes? Problems with sanctions

Recent trends in EU legislative drafting procedure appear to confirm a double approach: on the one hand, the Commission relies on provisions within the AFSJ, and more specifically on Articles 82 and 83 TFEU, while, on the other hand, it also legislates by using administrative sanctions located outside the AFSJ section of the Treaty and linked to the EU internal market.

It can seriously be questioned whether dual regulation through criminal law sanctions and administrative sanctions, as proposed in various EU Regulations and the proposed fourth Directive respectively, breaches the principle of *ne bis in idem* or double jeopardy and thereby Article 50 in the Charter of Fundamental Rights. Article 50 states that “No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.”

It is of course true that the notion of *ne bis in idem* applies only to criminal law. Yet, considering the increasing use of administrative sanctions, it could be argued that such an approach leads to a fundamentally unfair system and that the proportionality principle has an important role to play here so as to avoid double procedures. A recent famous example of tensions between *ne bis in idem* and national administrative sanctions regimes was the recent case of *Åkerberg Fransson* concerning the compatibility with the *ne bis in idem* principle of a national system involving two separate sets of proceedings to penalize the same wrongful conduct.⁵² AG Cruz Villalon recently stated in his opinion that Article 50 of the Charter did not preclude the Member States from bringing criminal proceedings relating to facts in respect of which a final penalty had already been imposed in administrative proceedings relating to the same conduct, provided that the national criminal court was in a position to take into account the prior existence of an administrative penalty for the purpose of mitigating the situation.⁵³ Yet it seems as if, here, the AG puts his trust in the hands of a stringent application of proportionality in the national courts. The Court of Justice in turn, in its

⁵² C-617/10, *Åkerberg Fransson*, judgment of 26 February 2013 (not yet reported).

⁵³ Opinion of AG Cruz Villalon delivered on 12 June 2012.

recent ruling, did not elaborate on this aspect of proportionality as a mitigating principle.⁵⁴ Nonetheless, it is argued that the Court adopted a very broad reading of the Charter, despite the limits set by Article 51. Specifically, the Court held that although the national rules in questions did not *stricto sensu* involve any implementation of EU law as such, it was clear from Article 325 TFEU that the Member States were required to fight fraud against the EU. Moreover, such an obligation could be deduced from the general obligations to punish tax fraud that stem from VAT Directive (2006/112).⁵⁵ From this it followed, in the view of the Court, that Sweden was ‘implementing’ EU law as it was under an established obligation to supply the same level of penalties for EU fraud and domestic fraud respectively. In addition, the Court observed that EU law precludes a judicial practice whereby a national court’s obligation to disapply any provision that is contrary to a fundamental right guaranteed by the Charter is made conditional upon the infringement being clear from the text of the Charter or the related case law. According to the Court, such an interpretation would withhold from the national court the power to assess fully whether the provision in question was compatible with the Charter.⁵⁶

Moreover, the Charter could arguably have an impact in the context of the market abuse regime discussed above. Specifically, the proposed regime for ‘blacklisting’, through the publication of sanctions and the granting to competent authorities of far-reaching powers similar to those in competition law raids and anti-terrorism measures, raises some difficult questions. These questions include more general issues relating to the right to a fair trial in EU law and are closely intertwined with the long-standing debate on competition fines.

The final section in this contribution examines the feasibility of the increasing number of EU agencies set up to impose sanctions in this field.

⁵⁴ Case C-617/10, *Åkerberg Fransson* judgment of 26 February 2013 (not yet reported).

⁵⁵ Paras 27-28 of the judgment.

⁵⁶ Para 48 of the judgment.

6. EU Agencies as imposers of sanctions?

The fourth Directive on anti-money laundering adds an additional layer to the complexity of the EU's web of sanctions by requiring an evidence-based approach and by including European agencies such as the European Supervisory Authorities (ESA) in the anti-money laundering scheme. Furthermore, the Directive introduces an important change compared to the previous framework. The proposal contains several areas where work by the ESA is envisaged as raising crucial issues with respect to the relationship between this agency and AFSJ agencies such as Europol and Eurojust. This complex interaction of AFSJ policies and financial regulation at the heart of the internal market is intensified by the fact that the European Banking Authority has been asked to carry out an assessment of the money laundering and terrorist financing risks facing the EU. Yet the greater emphasis on the risk-based approach requires an enhanced degree of guidance for Member States and financial institutions on the factors to be taken into account when applying simplified and enhanced customer due diligence and when applying a risk-based approach to supervision. In addition, the ESAs have been tasked with providing regulatory technical standards for certain issues, such as those requiring financial institutions to adapt their internal controls to deal with specific situations.

The importance of agencies in EU law-making in general is far from new. They are often said to represent a step in the direction of 'better regulation'.⁵⁷ Yet, as is usually the case with the AFSJ, agencies are new players in the context of EU criminal law. Europol in particular plays an important role in the EU's fight against terrorism and the agreements entered into with the USA.⁵⁸ The exact positioning of these agencies in the legislative context and their place in the AFSJ machinery are, however, unclear. Areas such as medical authorization, electricity regulation and health regulation have all been reformed in recent years and offer examples of hybrid governance in terms of combining traditional EU legal instruments with network models relying on agencies and new

⁵⁷ See F Vibert, 'Better Regulation and the Role of Agencies' in S Weatherill (ed), *Better Regulation* (Oxford, Hart Publishing, 2007) ch 20.

⁵⁸ See, for example, H Carrapico & F Trauner 'Europol and the EU's fight against organized crime: exploring the potential of experimentalist governance', *Perspectives in European Politics and Society* (forthcoming, on file with the author).

forms of governance such as comitology and the open method of coordination. This is all new, however, in the AFSJ. While this paper does not delve into this complex debate, the technocratic approaches clearly pose difficulties from a democratic perspective, given that many issues, including medical regulation, touch upon ethical issues that require democratic legitimation and accountability.⁵⁹ Nevertheless, the prospect of adopting a technocratic model for the AFSJ with regard to criminal law should raise concern.

While the AFSJ agencies of Europol and Eurojust do not have direct regulatory enforcement powers, they are increasingly important players in the AFSJ regulatory machinery. As Monar points out, the Member States themselves have retained law enforcement powers and have not delegated such powers to the AFSJ agencies, with the exception of Frontex in the area of migration law policies.⁶⁰ Yet Europol has been given extended powers to supervise the EU crime-fighting agenda within the AFSJ, and this has resulted in a complex relationship between AFSJ legislation and the role played by Europol in, for example, the financial tracking programme and the proposals, such as the fourth Money Laundering Directive discussed above, which are part of the internal market *acquis*. The European Securities and Market Authority (ESMA) is responsible for supervising relevant instruments adopted within the internal market. The ESMA Regulation contains a review clause that grants the Court of Justice the power to review fines imposed by this agency. It is not clear, however, as to what extent Europol and Eurojust can be called to account for their action.⁶¹ The same holds true for the possible establishment of a European Public Prosecutor with far-reaching powers to investigate

⁵⁹ J Neyer, *The Justification of Europe: A Political Theory of Supranational Integration*, (Oxford, Oxford University Press, 2012), 25-27.

⁶⁰ J Monar, 'Experimentalist Governance in Justice and Home Affairs' in J Zeitlin and CF Sabel (eds), *Experimentalist Governance in the European Union*, (Oxford, Oxford University Press, 2010), ch 10.

⁶¹ On agencies, see M Busuioc, *European Agencies, Law and Practice of Accountability* (Oxford, Oxford University Press 2013); M Busuioc, D Curtin & M Groenleer (2011), '[Agency growth between autonomy and accountability: the European Police Office as a "living institution"](#)', *Journal of European Public Policy*, 18(6), 848-867. See also P Schammo, 'The European Union Securities and Market Authority: Lifting the Veil on the Allocation of Powers', *CML Rev* (2011) 1887.

financial crimes.⁶² There is a clear accountability deficit, therefore, with regard to the role and function of agencies as key agents in the sanction game.

7. You (don't) have the right to remain silent: procedural issues

The issue of due process rights in EU criminal law is a slowly emerging, albeit extremely important area. Most recently, the recent Directive on access to a lawyer in criminal law proceedings was adopted with regard to European arrest warrant cases in particular.⁶³ How could the EU become a successful actor with regard to criminal liability for legal persons? Most EU legislative instruments in the area of sanctions now require legal persons to be punished. This is evident, for example, in the new Cybercrime Directive.⁶⁴ The effect of this is that the EU is clearly changing the landscape of national criminal law. But should administrative sanctions be allowed to live a life of their own outside the AFSJ chapter? Most importantly, the question arises as to what extent criminal law safeguards will be applied to administrative law cases, or whether the proportionality test is the only safeguard (outside the quasi criminal law competition rules) in this field?

7.1 Importance of the Charter

It is clear that the Charter will have an impact on the future scope of the AFSJ.⁶⁵ Specifically, the Charter is likely to have bearings on the emerging EU criminal law principles of procedural law. The extent to which this also applies to administrative sanctions is, however, largely unclear. In respect of due process rights, Article 49 provides a requirement of legality and proportionality in a more extensive way than the ECHR. In addition, Article 47 of the Charter guarantees the right to an effective remedy,

⁶² G Conway, 'The European Public Prosecutor - Holding to Account a Possible European Public Prosecutor', (2013), *Criminal Law Forum* 1.

⁶³ Directive 2013/48/EU on the right of access to a lawyer, adopted 19 September 2013, OJ C 43, 15 February 2012.

⁶⁴ Directive 2013/40/EU, L 218/8 on attacks against information systems and repealing Council Framework Decision 2005/222/JHA. See also the Proposal for a Cybercrime Directive, COM (2010) 517 on attacks against information systems and repealing Council Framework Decision 2005/222/JHA.

⁶⁵ On the Charter, see, for example, F Jacobs, 'The Lisbon Treaty and the Court of Justice' and D Anderson & C Murphy 'The Charter of Fundamental Rights' chapters in A Biondi et al (eds) *EU Law After Lisbon* (Oxford, Oxford University Press, 2012), ch 7 and 9.

while Articles 48-49 stipulate the presumption of innocence and the right of defence.⁶⁶ The latter provision also makes it clear that the severity of penalties must not be disproportionate to the criminal offence. Nevertheless, Article 52(1) of the Charter sets out some important exceptions to the application of the Charter as a whole:

Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.

Yet the Charter refers to the ECHR in Article 52(3) in pointing out that the ECHR is always the minimum standard of protection. The reading and interpretation of a sanction must, therefore, remain in line with ECtHR case law and the autonomous interpretation of a sanction, as mentioned above. A proportionality assessment of a sanction will, therefore, be crucial in the national courts. In the previously mentioned *Åkerberg Fransson* case regarding the feasibility of a double sanctions regime, the Court of Justice did not elaborate on this aspect of proportionality, but instead adopted a very broad reading of the Charter with regard to the notion of implementation.⁶⁷ It held that although the national rules in questions did not *stricto sensu* involve any implementation, it was clear from Article 325 TFEU that the Member States were required to fight fraud against the EU and thereby to provide the same level of penalties for EU fraud and domestic fraud respectively. Moreover, the Court observed that EU law precluded a judicial practice which made the obligation for a national court to disapply any provision that is contrary to a fundamental right guaranteed by the Charter conditional upon the infringement being clear from the text of the Charter or the related case law. According to the Court, such an interpretation would withhold from the

⁶⁶ In her recent opinion delivered on 18 October in *Radu* C-396/11 (para 103), AG Sharpston discusses the boundaries of Article 49 of the Charter by stipulating that it would be interesting to explore the boundaries of these provisions in the context of Article 3 ECHR, where the ECtHR has held that a sentence that is grossly disproportionate could amount to ill-treatment contrary to Article 3 ECHR. The Court did not elaborate on this issue.

⁶⁷ Case C-617/10, *Åkerberg Fransson* judgment of 26 February 2013 (not yet reported).

national court the power to assess fully whether the provision in question was compatible with the Charter.⁶⁸

The crucial point here is that the proper application of proportionality functions as a rebuttal of the previous assumption that there were no or very few limits on mutual recognition in this area. Non-discrimination and proportionality in the context of EU sanctions law should at least, therefore, be seen as intertwined principles.

8. Conclusion

As shown above, the characterization of sanctions, whether criminal or administrative in nature, still matters after the Lisbon Treaty. Administrative sanctions matter not only because of the question of the legal basis, but also because proper categorization of them dictates the level of legal safeguards that will be applicable in each individual case. They also matter at the political level. Hence, these sanctions have not been wiped off the EU agenda and still play an important function, closely associated with the functioning and establishment of the EU system (partly decentralized) in general and market building in particular. Accordingly, the complicated relationship between criminal law and administrative sanctions is still highly relevant and raises difficult questions about the feasibility of a dual sanctions regime. The Charter of Fundamental Rights has an interesting role to play here as a yardstick for measuring fairness and should not, therefore, be confined to criminal law, but should instead cover all sanctions. This area is a work in progress, and the issue of accountability of AFSJ agencies as key players on the sanction stage – and specifically how they can be improved and sufficiently monitored – is pertinent for the future.

⁶⁸ Para 48 of the judgment.