THE EXTRATERRITORIAL REACH OF EU SUBSTANTIVE CRIMINAL LAW: HOW EU HARMONISATION MEASURES STRETCH THE MEMBER STATES' CRIMINAL JURISDICTION

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1. INTRODUCTION: SCOPE AND AIM OF THE RESEARCH

In the aftermath of the latest Treaty reforms, the European Union now has well-defined legislative competence on substantive criminal law. In fact, Article 83 TFEU confers on the Union's legislature the power to harmonise the definition of criminal offences and sanctions in some 'areas of particularly serious crime with a cross-border dimension',[1] as well as where such approximation is 'essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation'.[2]

In addition, the same Treaty provision confers on the EU the implicit power to lay down minimum rules on Member States' criminal jurisdiction for the prosecution of harmonised offences. This aspect is likely to raise a number of issues concerning extraterritoriality, defined herein as the extension of Member States' criminal jurisdiction to offences committed in third states. This concept does not include situations where national authorities exert jurisdiction over offences committed in another Member State, which involve a separate form of extraterritoriality, confined within the Union's external borders. The theorisation and scope of extraterritorial criminal jurisdiction established under EU secondary law provisions are elusive to define. Furthermore, the peculiar relationship between the Union and the Member States in this domain is largely unexplored in literature. In fact, academic research on the extraterritorial application of EU law has mainly concentrated on the externalisation of EU internal policies and on the reach of the Union's regulatory power,[3] whereas the extraterritorial reach of Member States' criminal jurisdiction harmonised by the Union's legislature has been neglected by doctrine for some time.[4]

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[1] Art. 83(1) TFEU.

[2] Ibid., Art. 83(2).

[3] For some references: A. Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford: Oxford University Press 2020); M. Cremona and J. Scott (eds.), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford: Oxford University Press 2019); L. Prete, 'On Implementation and Effects: The Recent Case-Law on the Territorial (or Extraterritorial?) Application of EU Competition Rules', 9 *Journal of European Competition Law & Practice* 2018, 487-495.

[4] J. Vervaele, 'European Criminal Justice in the European and Global Context', 10 *New Journal of European Criminal Law* 2019, at 13.

In aiming to bridge this gap, this paper demonstrates how EU harmonisation measures stretch Member States' criminal jurisdiction beyond the Union's external borders. With this aim, the article concentrates on the provisions enshrined in all AFSJ substantive criminal law directives and framework decisions currently in force. These cover a wide range of crimes, including, for instance, terrorism,[5] human trafficking,[6] sexual abuse and exploitation of minors,[7] money-laundering,[8] market abuse,[9] fraud against the Union's financial interests[10] and organised crime.[11] Against this background, the analysis addresses two main research objectives. Firstly, the paper offers a conceptual reconstruction of the phenomenon in question, with a view to providing a comprehensive theorisation of extraterritoriality in EU substantive criminal law (section 2). In this respect, it is suggested that EU law entails prescriptive assertions of extraterritorial jurisdiction (section 2.1), thus leading Member States to act both in the name of the Union and in their own interest when exerting extraterritorial enforcement and adjudicative jurisdiction (section 2.2). The paper then analyses the criteria used by the EU legislature to stretch Member States' criminal jurisdiction beyond the EU's external borders (section 2.3) in light of Scott's taxonomy, with a view to highlighting the emerging trends (section 2.4).

Secondly, the paper assesses the actual reach of extraterritorial jurisdiction under EU substantive criminal law instruments. In this regard, it is suggested that post-Lisbon penal directives have expanded the scope of extraterritorial prosecution compared to both international crime control treaties (section 3.1) and pre-Lisbon framework decisions (section 3.2). Nevertheless, the paper argues that conflicts of jurisdiction between Member States and third states could curtail the actual reach of extraterritorial criminal jurisdiction, thus suggesting a requirement for further research on this topic (section 4). The final section of this paper (section 5) provides some concluding remarks.

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[5] Directive 2017/541/EU of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, *OJ* [2017] L 88/6, 31.3.2017.

[6] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, *OJ* [2011] L 101/1, 15.4.2011.

[7] Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, *OJ* [2011] L 335/1, 19.12.2001.

[8] Directive 2018/1673/EU of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law, *OJ* [2018] L 284/22, 12.11.2018.

[9] Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (Market Abuse Directive), *OJ* [2014] L 173/179, 12.6.2014.

[10] Directive 2017/1371/EU of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, *OJ* [2017] L 198/29, 28.7.2017.

[11] Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, *OJ* [2008] L 300/42, 11.11.2008.

2. A THEORETICAL SYSTEMATISATION OF EXTRATERRITORIALITY IN EU SUBSTANTIVE CRIMINAL LAW

The theoretical assessment of extraterritoriality in EU substantive criminal law proposed here focuses on three different profiles. Firstly, the classical distinction between prescriptive, adjudicative and enforcement jurisdiction derived from international law will be considered, thus allowing for the concept of extraterritorial criminal jurisdiction in the EU context to be defined (section 2.1). Secondly, the relationship between the EU legislature and the Member States in asserting extraterritorial jurisdiction will be investigated (section 2.2). Using an overview of all EU secondary law provisions compelling Member States to establish extraterritorial criminal jurisdiction (section 2.3), the issue will be then discussed from the perspective of the general discourse on the extraterritorial application of EU law, with particular reference to Scott's taxonomy (section 2.4).

2.1. **What is extraterritorial criminal jurisdiction in EU substantive criminal law?**

From the outset, the first question to be addressed is: what do we mean by 'extraterritorial jurisdiction' in EU substantive criminal matters? The analysed notion is closely linked to the definition of jurisdiction,[12] which is not a monolithic concept. Indeed, the latter is traditionally conceived as a three-fold phenomenon, entailing prescriptive, adjudicative and enforcement aspects.[13] The first consists of the sovereign power to 'state the law', thus defining criminal offences and making them apply to a defined group of persons. This concept can be linked to the legislative power of the State, which is precisely why it is also known as 'legislative jurisdiction'.[14] Secondly, adjudicative jurisdiction enshrines the power of national judicial authorities to rule upon and resolve disputes.[15] Finally, enforcement jurisdiction deals with the capability of State authorities to demand compliance with their laws.[16]

This distinction is crucially important in understanding the tripartite notion of jurisdiction and the relationship between the EU and the Member States in the criminal domain. In fact, the harmonisation of national criminal jurisdiction is essentially regarded as an exercise in prescriptive jurisdiction. In that respect, the EU legislature represents the main player, having the power to define the offences and, most importantly, to make them enforceable upon a defined range

[12] A. J. Colangelo, 'What is Extraterritorial Jurisdiction?', 99 *Cornell Law Review* 2014, at 1305.

[13] Ibid., at 1310. See also: C. Ryngaert, 'The Concept of Jurisdiction in International Law', in A. Orakhelashvili (ed.), *Research Handbook on Jurisdiction and Immunities in International Law* (Cheltenham: Edward Elgar Publishing 2015), 50-75; C. Ryngaert, *Jurisdiction in International Law* (Oxford: Oxford University Press 2015).

[14] A. J. Colangelo, *supra* note 12.

[15] D. Ireland-Piper, 'Extraterritorial Criminal Jurisdiction: Does the Long Arm of the Law Undermine the Rule of Law?', 13 *Melbourne Journal of International Law* 2012, at 125.

[16] A. J. Colangelo, *supra* note 12.

of individuals by harmonising national criminal jurisdiction.[17] Enforcement and adjudication are based on EU prescriptive assertions of jurisdiction but come into play at a later stage, in which only the Member States' authorities are involved.

With this relationship in mind, the boundaries of 'extraterritoriality' are still to be assessed. This notion is generally viewed negatively: jurisdiction is extraterritorial when it is asserted by a nation State over actions that did not occur within its borders.[18] From this perspective, the very extent of extraterritorial prosecution depends largely on the opposite – and highly debated – concept of territoriality.[19] While EU substantive criminal law provisions define territoriality as the exercise of jurisdiction over offences committed wholly or partly in a Member State's territory, there is currently no common understanding of the scope of territoriality in criminal law in States' practice. This uncertainty is due to the lack of a common understanding between States of the criteria governing the exercise of criminal jurisdiction. In fact, even in the EU context, fundamental penal concepts belonging to the so-called 'general part' of criminal law remain in the domain of national legislation and traditions.[20] As a result, some Member States – such as France – consider the prosecution of offences committed outside their territory, whose detrimental effects impact their domestic sphere, to be a form of territorial jurisdiction.[21] In view of these varying concepts, this paper will use the constituent elements approach to define territorial jurisdiction, which appears to be agreed by almost all Member States.[22] This concept of territoriality encompasses situations in which at least one of the constituent elements of the offence occurs within the territory of one or more Member States. Conversely, as already anticipated, extraterritorial jurisdiction covers the prosecution of offences committed entirely beyond the EU's external borders.

In an attempt to join the dots of the observations indicated above, it can be said that extraterritorial jurisdiction in EU substantive criminal law entails the EU legislature exercising prescriptive jurisdiction over offences whose constituent elements take place entirely within the territory of one or more third states. As the following sections will demonstrate, EU extraterritorial prescriptive juris-

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[17] Caeiro claims that 'it is now indisputable that the EU has a true, *albeit* limited, (prescriptive) jurisdiction in criminal matters', see P. Caeiro, 'Jurisdiction in Criminal Matters in the EU: Negative and Positive Conflicts, and Beyond', 93 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 2010, at 369.

[18] D. Ireland-Piper, *supra* note 15, at 124.

[19] Among the many: P. Szigeti, 'The Illusion of Territorial Jurisdiction', 52 *Texas International Law Journal* 2017, 369-400; C. Ryngaert, 'Territory in the Law of Jurisdiction: Imagining Alternatives', 47 *Netherlands Yearbook of International Law* 2017, 49-82.

[20] K. Nuotio, 'A Legitimacy-Based Approach to EU Criminal Law: Maybe We Are Getting There, After All', 11 *New Journal of European Criminal Law* 2020, 20-39.

[21] C. Ryngaert, 'Territorial Jurisdiction over Cross-Frontier Offences: Revisiting a Classic Problem of International Criminal Law', 9 *International Criminal Law Review* 2009, 187-209, at 198.

[22] See M. Böse *et al.*, 'Comparative Analysis', in M. Böse *et al.* (eds.), *Conflicts of Jurisdiction in Criminal Matters in the European Union. Volume I: National Reports and Comparative Analysis* (Baden Baden: Nomos Publishers 2013), 411-463, at 412-413. This approach is also known in international practice as the "objective territoriality principle": see International Law Commission, 'Report of the Work of the Fifty-Eighth Session' [2006] A/61/10, Annex V, para. 11.

diction consists of compulsory as well as optional grounds, both of which are of interest for the purposes of this analysis. These prescriptive claims then require the implementation of enforcement and adjudicative jurisdiction over the extraterritorial offences by the Member States' national authorities.

2.2. Is the nature of Member States' extraterritorial criminal jurisdiction original or derivative?

The above analysis has highlighted that extraterritorial jurisdiction in EU criminal law entails a connection between two levels, namely the EU and the Member States. While the Union's legislature holds a predominant position in asserting extraterritorial prescriptive jurisdiction, only national authorities have the means to exploit what we have referred to as enforcement and adjudicative jurisdiction. Against this background, it remains to be seen whether it is the EU or the individual Member States that are genuinely interested in fostering extraterritorial prosecution. If the EU as a single entity holds an interest in exercising extraterritorial prescriptive jurisdiction, do the Member States act in the name of the Union through enforcement and adjudicative assertions? Or, is it the opposite? Do they act in their own interests?

These questions allow us to draw a significant line of continuity from international law theoretical models to EU criminal law. Indeed, this issue can be understood more clearly by referring to the traditional dichotomy between primary and derivative jurisdiction. The latter distinction has emerged, in particular, in relation to the *aut dedere aut iudicare* principle. In fact, it may be the case that an offender attempts to evade justice by moving to a country holding no jurisdiction over the crime committed. In order to address such situations, many international crime control treaties (*i.e.* treaties envisaging obligations for the Contracting Parties to prosecute a specific range of behaviours) have introduced a choice for the receiving country via the *aut dedere aut iudicare* rule: to extradite the offender or to establish its own extraterritorial jurisdiction. If the country opts for the latter, its national authorities are not deemed to be acting in their own penal interest, but on behalf of the other country which has been unable to exercise its enforcement jurisdiction.[23] Thus, the prosecution of a crime in pursuance of a penal interest held by a different country is generally recognised as a form of vicarious or derivative jurisdiction. The exercise of enforcement and adjudicative jurisdiction based on the same country's prescriptive assertion is conversely known as original or primary.

This model can be generalised and applied to the relationship between the EU and its Member States. As the described dichotomy relates to the spheres of enforcement and adjudication, it could be argued that the Member States under EU substantive criminal law pursue a form of derivative extraterritorial jurisdiction. This concept appears to be consistent with the remarks made by

[23] M. Böse, 'EU Substantive Criminal Law and Jurisdiction Clauses: Claiming Jurisdiction to Fight Impunity?', in L. Marin and S. Montaldo (eds.), *The Fight against Impunity in EU Law* (Oxford, Hart Publishing 2020), 79-98, at 81.

Böse, according to whom there is a functional link between prescriptive and enforcement jurisdiction.[24] Thus, assuming that extraterritorial prescriptive assertions are in place for the Union's legislature, it could be argued that Member States' authorities prosecute EU-harmonised offences in the name of the Union's interest in criminalisation. Against this argument, it could be claimed that the EU is not a state but a *sui generis* international organisation. Nevertheless, it is undeniable now that the legislative competence on substantive criminal law enshrined in Article 83 TFEU allows the Union to develop its own criminal policy.[25] Therefore, since a political dimension of criminal law actually exists in the EU system, there is also a genuine interest by the Union in criminalisation. Although it may be partially convincing, the presented hypothesis is not entirely exhaustive for two main reasons. Firstly, it is worth noting that the Member States themselves hold a concurrent interest in criminalising the same offences. In fact, the vast majority of EU substantive criminal law instruments deal with actions that are already traditionally regarded as crimes by national law.[26] Secondly, Member States' governments are always involved within the Council in the ordinary legislative procedure for the adoption of substantive criminal law directives. Therefore, the political will of the Member States in terms of criminalisation makes a significant contribution to the development of EU criminal policy.

It appears, therefore, that, in the context of the extraterritoriality of EU substantive criminal law, there is some overlap between the original and derivative dimensions of jurisdiction. In fact, when exercising extraterritorial jurisdiction on the basis of EU criminal directives, national authorities act both in the own state's interest in prosecuting crime and also in pursuance of the EU criminal policy. This peculiarity is probably unique in the international law panorama and should be regarded as a corollary of the dual-layered constitutional structure of the European Union, as discussed above. Furthermore, this reconstruction demonstrates that a public international law theoretical model designed to underpin inter-state relationships (namely the dichotomy between original and derivative jurisdiction) can be applied by way of approximation to the interconnection between the EU and its Member States in the criminal law context.

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[24] Ibid.

[25] In this regard see European Commission, 'Towards an EU Criminal Policy: Ensuring the Effective Implementation of EU Policies through Criminal Law', (Communication) COM (2011) 573 final. See also: A. Klip, 'European Criminal Policy', 20 *European Journal of Crime, Criminal Law and Criminal Justice* 2012, 3-12. At the same time, scholars have pointed out that the development of a fully-fledged EU criminal policy is still in the early stages. Among the many: A. Weyembergh and I. Wieczorek, 'Is There an EU Criminal Policy?', in R. Colson and S. Field (eds.), *EU Criminal Justice and the Challenges of Legal Diversity* (Cambridge: Cambridge University Press 2016), 29-47.

[26] On this point: R. Sicurella, 'EU Competence in Criminal Matters', in V. Mitsilegas *et al.* (eds.), *Research Handbook on EU Criminal Law* (Cheltenham: Edward Elgar Publishing 2016), 49-77.

2.3. **A categorisation of extraterritorial criminal jurisdiction in EU secondary law**

Having assessed the notion and theoretical specificities of extraterritoriality in EU substantive criminal law, we will now take a closer look at the relevant legal framework, as defined in the introduction. In particular, this section will briefly introduce the criteria used by EU substantive criminal law instruments to trigger extraterritorial jurisdiction. These harmonising clauses enjoy a crucial role in stretching Member States' jurisdiction beyond the EU's external borders, as demonstrated by some examples from national implementing provisions provided below.

Territoriality is the traditional criterion that underpins criminal jurisdiction.[27] This clause – requiring Member States to prosecute harmonised offences committed within their territory – is included in all analysed secondary legislation. It is worth underlining that the EU legislature favours a broad definition of 'territoriality'. By way of example, the EU Counter-Terrorism Directive requires each Member State to establish its own jurisdiction over offences committed 'in whole or in part'[28] in its territory. This provision is reproduced in all analysed directives and framework decisions, thus demonstrating a consistent approach to the definition of territoriality.

EU law has surrounded territoriality with other harmonising criteria; some of them mandatory, others optional. Firstly, all analysed directives and framework decisions enshrine the active personality principle, thus requiring the prosecution of EU harmonised offences when the latter are committed by nationals of the Member States.[29] This constitutes an example of extraterritoriality: in fact, the offender's nationality is sufficient to establish criminal jurisdiction wherever the offence is committed. Some scholars have argued that the nationality principle could be 'symbolic of an evolution from narrow, self-interested territorial interests to a broader collective interest in the conduct of nationals overseas'.[30] In light of this, Arnell claims that nationality-based jurisdiction could play a wider role in the EU context, thus facilitating effective prosecution of international and transnational crimes.[31] Indeed, this principle has played a significant role in stretching Member States' criminal jurisdiction. The Dutch implementing act of the Anti-Money Laundering Directive represents a clear example of this, as it introduced into domestic law a brand new nationality-based ground for the extraterritorial prosecution of this category of offences.[32]

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[27] C. Ryngaert, *supra* note 21.

[28] Art. 19(1)(a) Directive 2017/541/EU.

[29] To provide just one example, the Framework Decision on Organised Crime states that 'each Member State shall ensure that its jurisdiction covers at least the cases in which the offences […] were committed: […] (b) by one of its nationals (Art. 7(1)(b) Framework Decision 2008/841/JHA).

[30] D. Ireland-Piper, *supra* note 15, at 133.

[31] P. Arnell, 'The Case for Nationality Based Jurisdiction', 50 *International and Comparative Law Quarterly* 2001, at 961.

[32] Art. 1(A) Besluit van 8 juni 2020 tot wijziging van het Besluit internationale verplichtingen extraterritoriale rechtsmacht [Decision of 8 June 2020 amending the Decision on international obligations concerning extraterritorial jurisdiction], *Staatsblad* [2020] 163, 12.6.2020.

Secondly, EU criminal law instruments have extended the active personality principle to legal persons.[33] In fact, the EU legislature has in some cases required Member States to establish their jurisdiction where 'the offence is committed for the benefit of a legal person established in [their] territory'. This criterion is present in the EU Counter-Terrorism Directive,[34] as well as the Framework Decisions on Organised Crime,[35] Ship-Source Pollution,[36] Corruption in the Private Sector,[37] Facilitation of Unauthorised Entry, Transit and Residence,[38] Drug-Trafficking,[39] Racism and Xenophobia.[40] The same provision has been included as an optional ground for exercising extraterritorial jurisdiction in the Directives on Trafficking in Human Beings,[41] Sexual Abuse and Exploitation of Minors,[42] Attacks against Information Systems,[43] Money-Laundering,[44] Fraud and Counterfeiting of Non-Cash Means of Payment,[45] Market Abuse,[46] and Fraud to the Union's Financial Interests.[47] A number of Member States have modified their domestic criminal law provisions in order to comply with this particular harmonising criterion. Among the many, the Portuguese law on cybercrime is a key example in this regard.[48]

Thirdly, the EU legislature has further extended the active personality principle to cases where the offender – although not a national – habitually resides

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[33] M. Böse, *supra* note 16, at 87.

[34] Art. 19(1)(d) Directive 2017/541/EU.

[35] Art. 7(1)(c) Framework Decision 2008/841/JHA.

[36] Art. 7(1)(e) Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution, *OJ* [2005] L 255/164, 30.9.2005.

[37] Art. 7(1)(c) Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, *OJ* [2003] L 192/54, 31.7.2003.

[38] Art. 4(1)(c) Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, *OJ* [2002] L 328/1, 5.12.2002.

[39] Art. 8(1)(c) Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, *OJ* [2004] L 335/8, 11.11.2004.

[40] Art. 9(1)(c) Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, *OJ* [2008] L 328/55, 6.12.2008.

[41] Art. 10(2)(b) Directive 2011/36/EU.

[42] Art. 17(2)(b) Directive 2011/93/EU.

[43] Art. 12(3)(b) Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA, *OJ* [2013] L 218/8, 14.8.2008.

[44] Art. 10(2)(b) Directive 2018/1673/EU.

[45] Art. 12(3)(b) Directive 2019/713/EU of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA, *OJ* [2019] L 123/18, 18.5.2018.

[46] Art. 10(2)(b) Directive 2014/57/EU.

[47] Art. 11(3)(b) Directive 2017/1371/EU.

[48] Art. 27(1)(b) Lei n. 109/2009 do Cibercrime [Law n. 109/2009 on Cybercrime], *Diário da República* [2009] 179/6319, 15.9.2009. This law had been enacted in order to implement the pre-Lisbon Framework Decision on attacks against information systems which, similarly to the Directive currently in force, included a requirement to extend active personality to legal persons (Art. 10(2)(b) Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems, *OJ* [2005] L 69/67, 16.3.2005).

in the Member State concerned. The rationale of this particular feature of active personality can be explained by the high mobility rate of persons between the EU Member States.[49] In this regard, the considerable degree of proximity between offenders and their Member State of habitual residence could easily justify this extension of national criminal jurisdiction. This harmonising clause was introduced as a compelling obligation in the Counter-Terrorism Directive,[50] thus reproducing a similar jurisdictional rule included in the previous 2002 Framework Decision on the same topic.[51] The innovative nature of the latter clause required Member States to adopt legislative provisions to extend criminal jurisdiction to terrorist offences committed by habitual residents, such as the statute adopted by the Irish legislature in 2005.[52] Habitual residence is also an optional ground for extending criminal jurisdiction to offences committed outside the Member State's territory under all the other directives concerned (not in the pre-Lisbon framework decisions), with the only exclusion of the Directive on Counterfeiting the Euro.[53] Optional jurisdictional grounds such as the one in question may seem to lack concrete relevance, as Member States can extend their criminal jurisdiction on this basis even in the absence of similar secondary law provisions. Nevertheless, they are particularly indicative of the evolution of the EU legislature's approach towards extraterritoriality in criminal law, as will be demonstrated by section 3.2.

An additional ground for exercising criminal jurisdiction, namely the passive personality principle (or protective principle), is the fourth point to be considered. This criterion grants Member States the possibility of prosecuting offences committed outside their territory against one of their nationals or habitual residents.[54] Three AFSJ Directives contain such a provision – namely, Trafficking in Human Beings,[55] Sexual Abuse and Exploitation of Minors[56] and Fraud and Counterfeiting of Non-Cash Means of Payment[57] – as an optional ground. On its part, the Directive on Attacks against Information Systems requires Member States to extend their jurisdiction where an offence is committed against an information system established within a Member State's territory.[58] In a similar perspective,

[49] As demonstrated by data on intra-EU mobility: see Eurostat, 'People on the Move: Statistics and Mobility in Europe', (2020), available at: <https://ec.europa.eu/eurostat/cache/digpub/eumove/>; European Commission, 'Annual Report on Intra-EU Labour Mobility 2020', (2020) available at: <https://ec.europa.eu/social/main.jsp?catId=738&langId=it&pubId=8369>.

[50] Art. 19(1)(c) Directive 2017/541/EU.

[51] Art. 9(1)(c) Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, *OJ* [2002] L 164/3, 22.6.2002.

[52] Sections 6(2)(c) Criminal Justice (Terrorist Offences) Act 2005, [2005] 2, 8.3.2005.

[53] Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA, *OJ* [2014] L 151/1, 21.5.2014.

[54] On the evolution of the protective principle, see: M. B. Krizek, 'The Protective Principle of Extraterritorial Jurisdiction: A Brief History and an Application of the Principle to Espionage as an Illustration of Current United States Practice', 6 *Boston University International Law Journal* 1988, 337-360.

[55] Art. 10(2)(a) Directive 2011/36/EU.

[56] Art. 17(2)(a) Directive 2011/93/EU.

[57] Art. 12(3)(c) Directive 2019/713/EU.

[58] Art. 12(2)(b) Directive 2013/40/EU.

the Counter-Terrorism Directive mandatorily requires jurisdiction to be established where the offences enshrined therein are committed against 'the institutions or people of the Member State in question or against an institution, body, office or agency of the Union based in that Member State'.[59] Similarly to the extension of active personality to habitual residents, the latter manifestation of the protective principle had previously emerged within the repealed pre-Lisbon Framework Decision on Terrorism.[60] Member States' implementing measures of this latter instrument – such as the Austrian measure[61] – are evidence of the influence applied by the protective principle derived from EU law on national criminal systems.

Finally, some EU substantive criminal law instruments include the *aut dedere aut iudicare* priniciple. This ground is strictly linked to a traditional understanding of jurisdiction based on international criminal cooperation,[62] as Member States are required to establish their jurisdiction over offences committed abroad by an individual if the latter is present within their territory and is not extradited. This applies, for instance, to the Framework Decision on Drug Trafficking[63] and the Directive on Counterfeiting the Euro.[64] Given the well-founded roots of the principle in question in international law practice, its inclusion in EU substantive criminal law instruments has a limited impact on Member States' criminal systems.

It follows from this overview that the EU legislative approach towards extraterritorial criminal jurisdiction relies on a combination of different criteria, thus creating an elaborate patchwork summarised in Table 1 below. Despite this, the following analysis will demonstrate that a consistent EU approach towards extraterritoriality – together with a defined trend – actually emerges from this complex panorama.

2.4. **EU criminal law in the general discourse on extraterritoriality**

The assessment of harmonising provisions on criminal jurisdiction included in EU secondary law will be followed here by a brief reference to the taxonomies developed within the scholarly discourse on the extraterritoriality of EU law, with a view to complementing the proposed conceptual appraisal. In particular, this paragraph deals with Scott's categorisation, which is one of the most well-known due to its generality.[65] This author distinguishes any manifestation of the extraterritorial application of EU law by creating three categories: extraterritorial jurisdiction in the strict sense, territorial extension and effects-based jurisdiction. While the first label includes situations where a measure does not enjoy a

[59] Art. 19(1)(e) Directive 2017/541/EU.

[60] Art. 9(1)(e) Framework Decision 2002/475/JHA.

[61] Art. 1(4) Strafrechtsänderungsgesetz 2002 [Criminal Law Amendment Act 2002], *BGBl.* [2002] I 134/2002, 13.8.2002.

[62] M. Böse, *supra* note 23, p. 83.

[63] Art. 8(3) Framework Decision 2004/757/JHA.

[64] Art. 8(2)(a) Directive 2014/62/EU.

[65] J. Scott, 'Extraterritoriality and Territorial Extension in EU Law', 62 *American Journal of Comparative Law* 2013, 87-125.

Table 1. The EU secondary law framework on extraterritorial jurisdiction in substantive criminal law.

		Jurisdictional grounds												
		Territoriality		Active personality: nationals		Active personality: residents		Active personality: legal persons		Protective principle		*Aut dedere, aut iudicare*		Optional exclusion of extraterritorial jurisdiction
Piece of legislation	**Subject matter**	**C**	**O**	**C**	**O**	**C**	**O**	**C**	**O**	**C**	**O**	**C**	**O**	**O**
FD 2008/841/JHA	Organised crime	✓		✓				✓				✓		✓
FD 2005/667/JHA	Ship-source pollution	✓		✓				✓						✓
FD 2003/568/JHA	Corruption in the private sector	✓		✓				✓				✓		✓
FD 2002/946/JHA	Facilitation of entry, transit or residence	✓		✓				✓				✓		✓
FD 2004/757/JHA	Drug-trafficking	✓		✓				✓				✓		✓
FD 2008/913/JHA	Racism and xenophobia	✓		✓				✓						✓
Dir. 2017/541/EU	Terrorism	✓		✓		✓		✓		✓		✓		
Dir. 2011/36/EU	Trafficking in human beings	✓		✓			✓		✓		✓			
Dir. 2011/93/EU	Sexual abuse and exploitation of minors	✓		✓			✓		✓		✓			
Dir. 2013/40/EU	Attacks against information systems	✓		✓			✓		✓	✓				
Dir. 2014/62/EU	Counterfeiting the Euro	✓		✓								✓		
Dir. 2018/1673/EU	Money laundering	✓		✓			✓		✓					
Dir. 2019/713/EU	Fraud and counterfeiting of non-cash means of payment	✓		✓			✓		✓		✓			
Dir. 2014/57/EU	Market abuse	✓		✓			✓		✓					
Dir. 2017/1371/EU	Fraud against the Union's financial interests	✓		✓			✓		✓					

Key: C = jurisdictional ground enshrined as compulsory for Member States; O = jurisdictional ground enshrined as optional for Member States

relevant connection with the regulating state, 'a measure will be regarded as giving rise to territorial extension when its application depends upon the existence of a relevant territorial connection, but where the relevant regulatory determination will be shaped as a matter of law, by conduct or circumstances abroad'.[66] Scott then identifies effects-based jurisdiction as a separate legal category, including situations where a foreign action is deemed to produce effects within the state's domestic sphere.[67] Against this background, the same

[66] Ibid., at 90.
[67] Ibid, at 92.

author concludes that the EU approach towards extraterritoriality makes limited recourse to extraterritoriality in the strict sense and effects-based jurisdiction, while consistently relying on territorial extension techniques.[68]

While Scott did not cover criminal law in her analysis, the trend identified in her research is only partially corroborated in our field of study. Considering the criteria used by the EU legislature to trigger the prosecution of foreign actions, it should be firstly noted that active personality with respect to nationals represents the only ground entailing a form of extraterritoriality in the strict sense. Indeed, a measure that entails nationality rather than territory as the relevant connection with the foreign action is considered to give rise to extraterritoriality rather than territorial extension.[69] This jurisdictional ground, however, is enshrined as compulsory in each piece of analysed legislation, thus revealing an approach taken by the EU legislator in making recourse to the form of extraterritoriality in the strict sense.

Conversely, active personality with respect to habitual residents meets the definition of territorial extension. In fact, this extraterritorial jurisdiction is triggered by a factual requirement – namely the offender's residence – establishing a genuine link with the territorial sphere of the Member State. This affirmation is no less true in relation to the *aut dedere aut iudicare* principle. While Scott argues that the presence of a foreigner in a Member State's territory is often accepted as a ground for exercising territorial jurisdiction,[70] well-established doctrine on the *aut dedere aut iudicare* principle considers it a form of vicarious extraterritorial jurisdiction.[71] For that reason, the latter principle in Scott's taxonomy should be seen more correctly as a form of territorial extension, provided that the offender's local presence represents a territorial link with the prosecuting Member State.

Finally, the broadening of the active personality principle to legal entities, along with the protective principle, is considered to give rise to effects-based jurisdiction. In fact, the power of Member States' authorities to prosecute an offence committed abroad on this type of active personality depends solely on the specific effect of the crime, namely the existence of a benefit for a legal person established within their territory. The same reasoning applies to the protective principle, as the harmful effects of the offence are sufficient to trigger extraterritorial jurisdiction.

Consequently, an assessment of EU substantive criminal law in the context of Scott's taxonomy reveals that this discipline is characterised by jurisdictional grounds giving rise to territorial extension, effects-based jurisdiction or extraterritoriality in the strict sense.

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[68] Ibid., at 94.

[69] J. Scott, 'The Global Reach of EU Law', in M. Cremona and J. Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford: Oxford University Press 2019), 21-63.

[70] J. Scott, *supra* note 65, at 91.

[71] See *supra*, section 2.2.

3. THE EVOLUTION OF THE EU'S EXTRATERRITORIAL APPROACH IN SUBSTANTIVE CRIMINAL LAW

Turning to the second prong of the proposed research topic – namely the assessment of the actual reach of extraterritorial jurisdiction under EU substantive criminal law instruments – this section will analyse the dynamic dimension of the phenomenon in question. Two different evolutionary lines will be considered here: firstly, the relationship between international crime control treaty practice and the EU legislative approach; secondly, the progression from pre-Lisbon instruments to the current criminal law directives.

3.1. **A changing approach between international crime control treaties and the EU substantive criminal law framework**

Approximation of national criminal jurisdiction is nothing new in international law, as every crime-related treaty has always imposed similar obligations on states. Nevertheless, the following analysis will reveal that EU criminal law has departed from international treaty practice, developing its own strategy on extraterritorial prosecution. This conclusion emerges from a comparison of international crime control treaties concluded by the European Union – namely the UN Convention against Transnational Organised Crime,[72] the UN Protocols on Trafficking in Persons[73] and Smuggling of Migrants,[74] the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,[75] the UN Convention against Corruption,[76] the European Convention on the Prevention of Terrorism[77] – as well as the Convention on the Protection of the European Communities' Financial Interests,[78] to the EU secondary law instruments on the same topics.[79] The international agreements mentioned above basically rely on the same criteria outlined in section 2.3, namely the active personality principle, the protective principle and the *aut dedere aut iudicare* obligation. This is not surprising: it is commonly accepted in legal doctrine that EU legislation on criminal jurisdiction was originally derived from international practice.[80] How-

[72] United Nations Convention against Transnational Organised Crime 2000 (UNTOC), 2225 *UNTS* p. 209.

[73] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UNTOC 2000, 2237 *UNTS* p. 319.

[74] Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UNTOC 2000, 2241 *UNTS* p. 507.

[75] United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, 1582 *UNTS* p. 95.

[76] United Nations Convention against Corruption 2003, 2349 *UNTS* p. 41.

[77] Council of Europe Convention on the Prevention of Terrorism 2005, *CETS* 196.

[78] Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the Protection of the European Communities' Financial Interests, *OJ* [1995] C 316/49, 27.11.1995.

[79] Namely, Framework Decision 2008/841/JHA, Directive 2011/36/EU, Framework Decision 2002/946/JHA, Framework Decision 2004/757/JHA, Framework Decision 2003/568/JHA, Directive 2017/541/EU, Directive 2017/1371/EU.

[80] M. Böse, *supra* note 23, at 87. For a more in-depth analysis, not limited to substantive criminal law, see: E. Fahey, 'Joining the Dots: External Norms, AFSJ Directives and the EU's Role in the Global Legal Order', 41 *European Law Review* 2015, 105-121.

ever, taking a closer look at the relevant provisions, the use of these criteria by EU secondary law instruments currently in force differs sharply from the corresponding international arrangements.

In examining, firstly, the UN Convention against organised crime, its Article 15 identifies the principle of active personality as an optional ground, while under Framework Decision 2008/841/JHA it is compulsory. Conversely, the UN Convention enshrines the protective principle as an optional ground for extraterritorial jurisdiction, while this was not incorporated in the respective EU law provision. As far as the *aut dedere aut iudicare* principle is concerned, this obligation is included in both the international and the EU instruments.

Similar considerations apply with regard to the Protocols on trafficking in persons and smuggling of migrants: by supplementing the UN Convention on organised crime, these instruments refer to the same jurisdictional rules included therein. Conversely, Directive 2011/36/EU, as well as Framework Decision 2002/946/JHA, mandatorily require Member States to extend their jurisdiction based upon the active personality principle. The cited EU instruments also enshrine active personality with respect to legal persons. Furthermore, the directive on trafficking in human beings includes the extension of active personality to habitual residents, along with the protective principle.

Secondly, under the UN Convention on drug trafficking, territoriality represents the only mandatory ground for exercising jurisdiction, while states remain free to choose whether or not to expand their criminal jurisdiction extraterritorially by relying on the active personality principle.[81] However, Framework Decision 2004/757/JHA compels Member States to rely on the active personality principle, also entailing the extension to legal entities discussed above.[82] Indeed, the only faculty left to Member States in the context of the EU instrument is to limit the application of the (broad) active personality principle in cases of offences committed abroad. This is exactly the opposite perspective to the UN Convention: while, under the latter agreement, extraterritorial prosecution is a discretional option, the Framework Decision applies the active personality principle as the rule, with any departure from it merely being an exception.

Thirdly, similar discrepancies can be identified by comparing the UN Convention against corruption with Framework Decision 2003/568/JHA. In fact, Article 42 of the cited agreement binds the Contracting Parties only with reference to territorial jurisdiction and the *aut dedere aut iudicare* rule. The corresponding EU instrument, however, mandatorily requires Member States to extend their criminal jurisdiction on the basis of the active personality principle with respect to nationals as well as legal entities.[83] As far as the *aut dedere aut iudicare* principle is concerned, the latter was also included in the analysed Framework Decision.[84]

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[81] Art. 4 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

[82] Namely the ground deemed to be a form of effects-based jurisdiction in the context of section 2.4.

[83] Art. 7(1) Framework Decision 2003/568/JHA.

[84] Ibid., Art. 7(3).

Fourthly, other differences between EU and international criminal provisions emerge in the context of counter-terrorism law. In fact, Article 14 of the European Convention on the Prevention of Terrorism requires the State Parties to establish their extraterritorial jurisdiction based on the active personality principle limited to their own nationals, leaving to their discretion the option of relying on a range of different grounds. The EU Directive, on the other hand, enshrines active personality as a mandatory criterion also with regard to habitual residents and legal entities, not leaving any optional restriction to the Member States.[85]

Finally, looking at the relevant provisions for protecting the Union's financial interests, both Article 4 of the related Convention and Article 11 of Directive 2017/1371/EU envisage mandatory jurisdiction based on the active personality principle. Nevertheless, the conventional norm allows Member States to derogate from this criterion. At the same time, the latter also envisages compulsory national criminal jurisdiction if an intentional abettor or inducer of the fraud is present in the territory of the Member State concerned, an atypical ground which has not been reproduced in Directive 2017/1371/EU.

It appears that the European Union has expanded the scope of extraterritorial prosecution compared to international treaty practice on criminal jurisdiction. In fact, the mandatory grounds for extraterritorial criminal jurisdiction in EU law are more numerous than those enshrined in international crime control treaties, although the criteria applied are generally the same.

3.2. The evolution from pre-Lisbon framework decisions to post-Lisbon substantive criminal law directives

Moreover, a closer look into the 'internal' sphere of the process of European integration reveals a significant change in the EU legislative approach between pre- and post-Lisbon secondary law instruments.

As anticipated, a remarkable evolution has occurred in the context of the optional grounds for extraterritorial jurisdiction. Indeed, the old-fashioned AFSJ framework decisions always grant Member States the option of restricting the application of the mandatory grounds laid down therein where the offence is committed outside their territory. More specifically, under this range of provisions 'a Member State may decide that it will not apply, or that it will apply only in specific cases or circumstances'[86] the broad active personality principle[87] with respect to offences committed outside its territory. This exception is likely to lead to a sharp reduction in the exterritorial reach of EU criminal law. However, this approach was completely overturned by post-Lisbon criminal directives. The latter only allow Member States to extend further their extraterritorial crim-

[85] Art. 19(1) Directive 2017/541/EU.

[86] Art. 7(1) Framework Decision 2008/841/JHA; Art. 7(2) Framework Decision 2005/667/JHA; Art. 7(2) Framework Decision 2003/568/JHA; Art 4(2) Framework Decision 2002/946/JHA; Art. 8(2) Framework Decision 2004/757/JHA; Art. 9(3) Framework Decision 2008/913/JHA.

[87] More specifically, the cases in which the offence has been committed by one of its nationals or for the benefit of a legal entity established within its territory. See *supra*, section 2.3.

inal jurisdiction beyond the mandatory requirements envisaged therein, thus introducing optional grounds. In particular, depending on the piece of legislation in question, national legislatures can rely on the passive personality principle, as well as the extension of the active personality criterion concerning habitual residents or legal entities. This group of norms is shared by all substantive criminal law directives, with the only exception being the one on counterfeiting the Euro.[88]

The contrast is evident: while Member States were allowed to opt for *less* (or even *no*) extraterritorial prosecution in the pre-Lisbon era, the only discretional choice is *more* extraterritoriality in the current EU criminal law system. It seems that the Treaty of Lisbon's entry into force marked the establishment in secondary law of a 'level playing field' for extraterritorial prosecution of EU-harmonised offences, with which Member States must comply. Incidentally, as many pre-Lisbon framework decisions are still currently in force, the two normative approaches actually coexist in today's legal scenario.

Therefore, it follows from the above considerations that the EU has revised and broadened the scope of extraterritorial prosecution not only concerning provisions of international crime control treaties, but also with regard to its previous legislative approach.

4. CONFLICTS OF CRIMINAL JURISDICTION BETWEEN MEMBER STATES AND THIRD COUNTRIES: A WAY FORWARD

The previous section identified an evolutionary trend towards the increasing extent of extraterritorial jurisdiction in EU substantive criminal law. Such a dynamic process, however, entails a pathological dimension, consisting of the emergence of conflicts of jurisdiction. In fact, possible overlaps between different punitive systems prosecuting the same conduct represent a natural corollary of the extension of criminal jurisdiction beyond territoriality. However, the issue of conflicts with third countries' authorities has not received any great attention in legal doctrine.

'Conflicts of jurisdiction' in criminal prosecution is a twofold notion, traditionally being distinguished into two different categories. Firstly, so-called 'negative' conflicts of jurisdiction arise when 'no state is willing or able to prosecute'[89] an offence, thus leading to the offender's impunity.[90] Secondly, 'positive' conflicts entail situations where two or more states are in position to establish their own criminal jurisdiction over the same behaviour.[91] As Caeiro pointed out, these notions reveal two specific legal issues: 'some state (or entity) should have or

[88] Directive 2014/62/EU.

[89] F. Zimmermann, 'Conflicts of Jurisdiction in the European Union', 3 *Bergen Journal of Criminal Law and Criminal Justice* 2015, 1-21, at 2.

[90] Ibid.

[91] A similar definition, albeit limited to conflicts between Member States, has been provided in: P. Panayides, 'Conflicts of Jurisdiction in Criminal Proceedings: Analysis and Possible Improvements to the EU Legal Framework', 77 *Revue Internationale de Droit Penal* 2016, 113-119, at 113.

exert jurisdiction over a case, when in fact none has or does (*negative* conflict), or, conversely, […] the concurrent holders should not adjudicate the case as if there were no claims from other jurisdictions (*positive* conflict)'.[92]

With a view to assessing potential clashes between Member States and third countries in criminal prosecutions, it is worth focusing on positive conflicts. The latter lead to a distinction between two different legal issues. Firstly, as far as positive conflicts between Member States are concerned, a lack of cooperation between national criminal authorities in prosecuting harmonised offences is likely to arise. The EU legislature itself has identified these issues. To provide just one example, seminal rules on coordinating Member States' jurisdiction over the same behaviours were introduced in the context of the Counter-Terrorism Directive.[93] Moreover, dealing with positive conflicts between Member States forms part of the mandate of Eurojust, which is called upon to provide non-binding opinions in concrete cases.[94] A number of scholars have addressed these 'intra-EU' conflicts of jurisdiction.[95] In particular, a recent research project by the European Law Institute ultimately led to the drafting of some legislative proposals aimed at dealing with positive conflicts within the Union.[96]

Secondly, positive conflicts of jurisdiction could arise with regard to third countries. Quite surprisingly, the debate developed on conflicts between Member States has not looked into the 'extra-EU' dimension of this issue, which is of great interest for the purposes of this paper.[97] One exception is in a recent chapter written by Böse, highlighting that conflicts of criminal jurisdiction are likely to constitute serious obstacles to the extraterritorial reach of EU substantive criminal law.[98] Consequently, this author takes a critical approach concerning the broad scope of extraterritorial jurisdiction as enshrined in the current legal framework, assuming *inter alia* that a lack of cooperation by third countries' authorities represents a deal breaker for extraterritorial criminal jurisdiction. This perspective is insightful: the effectiveness of the overall system of extraterrito-

[92] P. Caeiro, *supra* note 17, at 369.

[93] Directive 2017/541/JHA, Art. 19(3).

[94] Art. 4(4) Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA, *OJ* [2018] L 295/138, 21.11.2018. See also: Eurojust, 'Guidelines for Deciding "Which Jurisdiction Should Prosecute?"', (2016) available at <https://www.eurojust.europa.eu/sites/default/files/Publications/Reports/2016_Jurisdiction-Guidelines_EN.pdf>.

[95] Among the many: N. I. Thorhauer, 'Conflicts of Jurisdiction in Cross-Border Criminal Cases in the Area of Freedom, Security, and Justice: Risks and Opportunities from an Individual Rights-Oriented Perspective', 6 *New Journal of European Criminal Law* 2015, 78-101; M. Luchtman, 'Transnational Law Enforcement Cooperation – Fundamental Rights in European Cooperation in Criminal Matters', 28 *European Journal of Crime, Criminal Law and Criminal Justice* 2020, 14-45.

[96] K. Ligeti *et al*., 'Instrument of the European Law Institute. Draft Legislative Proposals for the Prevention and Resolution of Conflicts of Jurisdiction in Criminal Matters in the European Union', *European Law Institute* (2017) available at <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Conflict_of_Jurisdiction_in_Criminal_Law_FINAL.pdf>. See also: K. Ligeti and G. Robinson (eds.), *Preventing and Resolving Conflicts of Jurisdiction in EU Criminal Law* (Oxford: Oxford University Press 2018).

[97] Some insights, however, from EU Member States' legal orders are provided in M. Böse *et al.* (eds.), *supra* note 22.

[98] M. Böse, *supra* note 23, at 97.

rial prosecution should represent one of the guiding criteria.[99] Indeed, if the approximation of Member States' extraterritorial criminal jurisdiction is aimed at preventing the emergence of safe havens for offenders, as well as at securing the EU's own interests,[100] any prescriptive extraterritorial claim by the EU should be regarded as functional to achieving these objectives. If obstacles such as conflicts of jurisdiction arise with regard to third countries, the EU clearly does not have the power to overcome them by regulating these clashes. Existing international agreements,[101] as well as dialogue with third states' authorities through their Liaison Prosecutors seconded to Eurojust, could contribute to obtaining cooperation from the third states involved. Among the practice developed so far, it is interesting to note that a conflict with a third country concerning a deadly shipwreck was settled by virtue of dialogue between the national authorities, as well as by reference to the jurisdictional rules enshrined in Article 97 of the United Nations Convention on the Law of the Sea.[102]

However, where similar overlaps of jurisdictions with third countries actually impair effective prosecution by Member States, any assertion of prescriptive extraterritorial prosecution by the EU legislature could be in vain. As a result, the exercise of criminal jurisdiction beyond the limits of territoriality may lack reasonable justification in relation to protecting the EU's interests, thus frustrating the derivative nature of Member States' extraterritorial prosecution driven by EU law as theorised in section 2.2.

It thus appears that the broad scope of extraterritorial criminal prosecution under EU law identified in the previous sections may need to be reconsidered if conflicts of jurisdiction are likely to prevent the practical enforcement of EU substantive criminal law. This affirmation is, however, far from conclusive, although it does set the scene for additional research on the actual impact of conflicts of jurisdiction with third countries on the exercise of extraterritorial criminal jurisdiction by the Member States. Further analysis in this area is crucially important in order to assess the appropriateness of the current EU approach towards extraterritoriality in substantive criminal law.

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[99] This finding is further reinforced by making reference to well-established doctrine which recognises the principle of effectiveness as instrumentally underpinning the evolution of the EU criminal system. See *inter alia*: S. Melander, 'Effectiveness in EU Criminal Law and Its Effects on the General Part of Criminal Law', 5 *New Journal of European Criminal Law* 2014, 274-300.

[100] See *inter alia*: M. Kaiafa-Gbandi, 'The Importance of Core Principles of Substantive Criminal Law for a European Criminal Policy Respecting Fundamental Rights and the Rule of Law', 1 *European Criminal Law Review* 2011, 6-33.

[101] For instance, see the Agreement on Mutual Legal Assistance between the European Union and the United States of America, *OJ* [2003] L 181/34, 19.7.2003.

[102] United Nations Convention on the Law of the Sea 1982 (UNCLOS), 1833 *UNTS* p. 3. This case is reported in Eurojust, 'Report on Eurojust's casework in the field of prevention and resolution of conflicts of jurisdiction', (2018) available at: <https://www.eurojust.europa.eu/sites/default/files/2020-09/2018_Eurojust-casework-on-conflicts-of-Jurisdiction_EN.pdf>, at 10.

5. CONCLUSIONS

This article has dealt with a theoretical systematisation of extraterritorial jurisdiction in EU substantive criminal law, as well as assessing its actual reach. The analysis firstly provided a comprehensive conceptual reconstruction of the phenomenon, defined as the exercise by the Union's legislature of prescriptive jurisdiction over behaviours whose constituent elements are found entirely within a third state's territory. This assertion constitutes the basis for the subsequent implementation of enforcement and adjudicative jurisdiction by Member States' authorities. These findings are particularly indicative of the special nature of extraterritoriality in EU criminal law, an aspect to which this contribution has paid particular attention. In fact, the paper has highlighted that the separation of the prescriptive, enforcement and adjudicative functions of jurisdiction between the EU and its Member States stems from the double-layered structure of the European Union. At the same time, the analysis has demonstrated that the relationship between the two levels can be contextualised by making recourse to the traditional dichotomy between primary and derivative jurisdiction. From this perspective, the original and derivative dimensions overlap, as Member States should be deemed to be acting both in the state's interest and on the basis of the EU's own criminal policy. Having then categorised the criteria employed by the Union's legislature to stretch Member States' jurisdiction beyond the EU's external borders, it has been demonstrated that the EU approach to extraterritorial jurisdiction in substantive criminal law is not fully in line with Scott's findings.

As far as the actual reach of extraterritorial criminal jurisdiction under EU law is concerned, the outcome of the analysis is not yet conclusive. The paper has revealed that the Union's legislature has greatly broadened the scope of extraterritorial jurisdiction as designed by international crime control treaties, thus significantly diverging from international practice. A changing perspective on extraterritoriality between pre-Lisbon framework decisions and post-Lisbon AFSJ directives has also been identified: while the former allowed Member States' discretionary restrictions on the scope of extraterritorial prosecution, the latter only envisage the possibility of extending it. Notwithstanding the ever-increasing scope of extraterritorial criminal jurisdiction in EU secondary law, its actual reach is likely to be impaired by conflicts of jurisdiction between Member States and third countries. In this regard, further research is required, as a number of questions still need to be addressed: do these conflicts actually arise in the Member States' current practice? Are existing EU and international law instruments capable of effectively overcoming them? Can any conclusion of further international agreements with third states provide a contribution to dealing with such conflicts? Or, conversely, do extraterritorial conflicts of jurisdiction represent a deal-breaker for the extraterritorial assertion of enforcement and adjudicative jurisdiction by Member States? The answers to these questions are pivotal to assessing whether the EU current approach towards extraterritoriality in substantive criminal law should be reconsidered.