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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

By E. Herlin-Karnell*

A. Introduction

This article builds upon the idea that the EU's regulatory efforts in the EU Area of Freedom, Security, and Justice (AFSJ) are embedded with difficulties. The article argues that the current strains in the EU-AFSJ policy-making regime are caused by two things in particular. First, the EU's tactic in the AFSJ appears to depart from the classic internal market-based formula of the removal of obstacles for market creation and thereby ventures into the EU criminal law domain with all of its inherent complexities, without an adequately matured legal framework to endorse its policies from within. Second, to the extent that the EU adopts the market theory template in the AFSJ, there are global elements to the EU's sanction policies. These features confirm a hybridity in which legal sources are interacting within the AFSJ field. There is a clear complexity to the EU's fight against financial crimes and its interaction with the multiple sources of EU law where the meanings of "regulatory" and "risk assessment" need to be clarified. This article suggests that the current approach by EU's institutions to push forward the market theory model is a mistake, and that the AFSJ needs to be analyzed within the context of "regulatory powers," which would lead to a better understanding of the AFSJ framework.¹ This article aims to do so by using the political science concept of "regulatory" to critique the EU's current strategy and thereby argue that the legal debate on the development of the AFSJ could benefit from a more nuanced reading of the definition of "regulatory," and thereby help to construct the AFSJ and increase its effectiveness.

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¹ For early work on the notion of "regulatory," see Giandomenico Majone, *The Rise of the Regulatory State in Europe*, 17 W. EUR. POL. 77 (1994). See also David Levi-Faur, *Regulatory Networks and Regulatory Agencification: Towards a Single European Regulated Space*, 18 J. EUR. PUB. POL'Y 810 (2011).

Hence, this article starts at the claim that the market rationale is misplaced outside the traditional context of the internal market.

I. The AFSJ, the Market-Based Rationale, and Coercive Powers

The AFSJ is currently the EU's fastest expanding—and youngest—policy field. It was intensified by the entry into force of the Lisbon Treaty (title V, Treaty of the Functioning of the European Union). It deals with, *inter alia*, security issues, border control, anti-terrorism law, and crime. Hence, it represents a new and sensitive policy field in the EU—one which is currently being transformed from that of largely an isolated justice and home affairs space, to that of a European hub. The AFSJ as a legal landscape is characterized by the “hybridity” of legal sources on the one hand, and by high politics in terms of Member States' objections to the enterprise of the EU integration on the other hand. While market creation has always been focused on principally justifying aims of the Union's increased powers and curtailment of Member State competences,² the EU's rulemaking powers—when applied outside the traditional context of the internal market—ask pressing questions. They ask not just how far national sovereignty can be overturned by other concerns, such as the need for the construction of the EU market, but also its interaction with the EU's expanding security agenda and the role of fundamental rights protection. Today, not only is the AFSJ one of the most dynamic EU integration areas, but, as noted above, its policy area also raises fundamental issues in the framework of financial regulation and the need to fight financial crime effectively as part of the EU's strategy to bolster confidence in European financial markets. In other words, there is a clear internal market dimension to the AFSJ.

Against the backdrop of the EU as an experienced regulator within the internal market, the phenomenon of the financial crisis offers a particularly useful and interesting test case for legal regulatory challenges applied in the AFSJ context. Most of the EU's instruments to tackle financial crimes, and the increased need to impose sanctions to ensure the integrity of the EU market, have so far been based on the internal market provision of Article 114 TFEU and the EU legislature appears set to follow this route in the future. As a result of the Lisbon Treaty changes, though, financial crimes now form a specific part of the competences that are granted to the EU under Article 83 TFEU, posing the question of whether the EU will go down the AFSJ path or if it should stick to its traditional way of resorting to Article 114 TFEU. After all, Article 114 TFEU allows for a more expansive use of EU competences—as interpreted by the Court of Justice—way of reasoning.³ Though financial regulation is an objective of the internal market, any financial regulation that

² See, e.g., MICHELLE EGAN, *CONSTRUCTING A EUROPEAN MARKET: STANDARDS REGULATION, AND GOVERNANCE* (2001).

³ For a discussion of the court's extensive case law on Article 114 TFEU, see Stephen Weatherill, *The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law Has Become a "Drafting Guide,"* 12 GERMAN L.J. 827 (2011). See also ALEXANDER SOMEK, *INDIVIDUALISM* (2008).

involves criminal law responses to fight irregularities within the internal market trespasses on the turf of the AFSJ. Therefore, what is at stake here is, obviously, also a question of competence and a choice of the correct legal basis. The proposal for a Fourth Money Laundering Directive discussed below seems to confirm the view that the EU will stick to the market theory model rather than switching to a criminal law model within the AFSJ.⁴

And yet, with respect to the broader issue of sanctioning authority in the EU, many commentators on Europe have discussed the EU's lack of coercive power as the main feature that distinguishes it from a nation state.⁵ In spite of the EU's lack of traditional coercive powers, the "no monopoly of force" feature, which entered into force with Lisbon Treaty and thereby increased the powers of the Union legislator, the EU has gained increased sanctioning powers that have empowered the EU with state-like features. For example, should a European public prosecutor be established (Article 86 TFEU), such a prosecutor would have far-reaching investigative powers in the area of financial crimes.⁶ Moreover, Article 83 TFEU provides for far greater powers in criminal law concerning cross-border criminality. Regardless, these technical treaty arrangements do not tell us much about what it means to speak about regulatory powers in the context of EU financial crimes and the AFSJ more broadly.

This article serves the purpose of tentatively deconstructing the market rationale by exploring it within the framework of the constitutional construction site of the AFSJ. It will critically examine EU regulatory efforts in the EU anti-crime and security domain, AFSJ, by focusing, in particular, on anti-money laundering legislation and the fight against cybercrime as examples of recent financial crimes legislation. The paper starts by investigating the framework for understanding regulatory efforts in EU policy with the specific focus on the AFSJ and by questioning to what extent it is different from that of the internal market. Thereafter, the paper turns to the EU's anti-money laundering scheme, specifically the recent proposal for a Fourth Directive against money laundering and terrorist financing,⁷ asking in particular how it addresses the previous critique as presented

⁴ *Proposal for a Directive of the European Parliament and of the Council on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing*, COM (2013) 45/3 final (May 2, 2013), available at <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52013PC0045> (explaining the prevention of the use of the financial system for the purpose of money laundering and terrorist financing), .

⁵ E.g., JURGEN NEYER, *THE JUSTIFICATION OF EUROPE: A POLITICAL THEORY OF SUPRANATIONAL INTEGRATION* (2012).

⁶ See *Proposal for a Council Regulation on the Establishment of the European Public Prosecutor's Office*, COM (2013) 0534 final (July 7, 2013).

⁷ *Proposal for a Directive of the European Parliament and of the Council on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing*, *supra* note 4.

in connection with the Third Money Laundering Directive.⁸ Second, the paper looks at cyber security and the attempted regulation of the EU digital market. After having examined these two areas the paper turns to look at the global impact of AFSJ powers by investigating the effect of sanctions adopted within the framework of the failed Anti-Counter Trade Agreement (ACTA).

It is argued that the AFSJ should not be perceived as isolated from the EU's general regulatory framework, namely that of the internal market and EU market creation.⁹ In other words, the various EU policies including the AFSJ should be seen holistically, inexorably linked with other EU policies while still representing a special area of EU law as it deals, inter alia, with criminal law and due process rights at its core. While there may be some merit in understanding the EU through the lens of market power, it can be argued that such an understanding is too restrictive. Likewise, the growing literature on the AFSJ is often seen isolated from the rest of the EU *acquis* as an independent branch of EU law, which results in a distorted picture of what is actually happening, and constitutionally afoot, of contemporary EU-AFSJ integration. This paper tries to offer a new understanding of regulation in the AFSJ in the context of law by drawing not only on mainstream EU law as well as specific AFSJ law, but also on examples from political science literature on regulation.

The next section of this paper sets out to explain why the AFSJ field is different and how it creates hybridity to the market theory context.

⁸ Directive 2005/60, of the European Parliament and of the Council of 26 October 2005 on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing, 2005 O.J. (L 309) 15, 15–36 [hereinafter Directive 2005/60].

⁹ See CHRISTOPHER BICKERTON, EUROPEAN INTEGRATION: FROM NATION STATES TO MEMBER STATES (2012).

B. Three Layers: The AFSJ, Financial Regulation, and Externalities

A majority of the current instruments adopted by the EU in the area of the suppression against financial crimes have been adopted on the basis and justification that there is a need for increased regulatory response to financial crises. The discussion of the EU's stance on financial crimes is closely connected to the larger debate on the reform of the EU financial system and the rescue of the euro.¹⁰ Moreover, the occurrence of financial crimes has (since the early days of the EU) constituted the main criminal threat to the establishment of the internal market and has, until 9/11—when the fight against terrorism became a higher priority—been the core focus of the EU's approach to criminal law.¹¹ Therefore, there is an overlap—or hybridity in legal sources—here not only between EU internal market policies and the growing space of the AFSJ, but a majority of the measures currently adopted to fight the financing of terrorism have an external dimension as well. Moreover, financial market undertakings within the AFSJ are built around the notion of regulatory powers involving different actors and processes perhaps an indication of moving away from the “constitutionalized” picture and contexts where regulatory agencies such as *Eurojust* and *Eurojust* play an increasingly important role in the AFSJ. While there have been many intriguing studies on the international impact on EU policies in the area of fisheries (and risk regulation/medicine¹² in particular), the AFSJ and its regulatory consequences remain largely unexplored.¹³

I. EU Financial Regulation and the AFSJ

Financial regulation is traditionally concerned with market efficiency, transparency, and integrity, as well as consumer protection.¹⁴ In the EU internal market context, the importance of consumer protection and market efficiency has always been part of the EU legislator's vocabulary—particularly with regard to Article 114 TFEU.¹⁵ Interestingly,

¹⁰ Directive 2005/60, *supra* note 8.

¹¹ See, e.g., STEVE PEERS, *EU JUSTICE AND HOME AFFAIRS LAW 1* (2011).

¹² E.g., GIANDOMENICO MAJONE, *DILEMMAS OF EUROPEAN INTEGRATION: THE AMBIGUITIES AND PITFALLS OF INTEGRATION BY STEALTH* (2009).

¹³ On regulatory regimes, see Joana Mendes, *EU Law, and Global Regulatory Regimes: Hollowing Out Procedural Standards?*, 10 INT'L. J. CONST. L. 988. See also Joana Mendes, Professor, University of Amsterdam, *Procedural Legitimacy Between Legal Geographies and Transnational Spaces: An Empirical Account and Theoretical Perspectives*, Presentation at the VU Centre for European Legal Studies (Mar. 7, 2013).

¹⁴ For an overview what it means in the EU context, see Niamh Moloney, *The Legacy Effects of the Financial Crises on Regulatory Design in the EU*, in *THE REGULATORY AFTERMATH OF THE GLOBAL FINANCIAL CRISES* 111, 111 (Eli Ferran et al. eds., 2012).

¹⁵ Niamh Moloney, *Confidence and Competence: The Conundrum of EC Capital Market Law*, 4 J. CORP. L. STUD. 44 (2004).

market regulation and consumer confidence were not a focus of the EU's initial responses to the financial crisis nor were they reflected on the international agenda.¹⁶ When discussing financial regulation it is common to refer to different generations in the financial regulation life cycle. The first-generation instruments focused on institutional and systemic stability. The so-called "second generation" moved to a European self-styled architecture for regulatory design where anti-fraud rules are an imperative. Criminal law, as a policy tool for this kind of regulation, forms part of this second generation and is used to increase confidence and the enhancement of market integrity. For a long time, the EU has had preferences for relying on the slogan "confidence in the market" as an all-embracing justification for approximation under Article 114 TFEU and where criminal law has been used as a tool for boosting such confidence. The over-reliance on confidence as a justification for harmonization has long been observed (and criticized)¹⁷ in the context of private law and more lately spilled over into the field of EU criminal law. In any case, the EU legislator has always claimed that one set of rules—a single rulebook—at the EU level is desirable and, where there are measures in place to fight irregularities, will boost investor confidence and contribute to market making.¹⁸ For example, in the Commission's communication on "driving European recovery"¹⁹ the Commission referred to the high-level group, which stressed the importance of confidence, which had been taken for granted in well-functioning financial system but had been lost in the present crisis.²⁰ The reorganization of this system focused on the importance of the enhancement of market integrity and investor protection. The reformation of the sanctions system was seen as a crucial part of this strategy.²¹ As part of the Lamfalussy process, and the legislative activity that followed at the EU level, several scholars have studied the process of European financial integration in terms of regulatory convergence that has been taking place since 2000.²² Most of the discussion had concerned "hard core" financial regulation and processes, but has now been extended to cover the area of sanctions. The markets in financial instruments (Mifid) are the most important example in this regard as they

¹⁶ *Id.*

¹⁷ Thomas Wilhelmsson, *The Abuse of the Confident Consumer*, 27 J. CONSUMER POL'Y 317 (2004).

¹⁸ For a case study on EU financial crimes and the confidence ratio, see ESTER HERLIN-KARNELL, *THE CONSTITUTIONAL DIMENSION OF EUROPEAN CRIMINAL LAW* 131–137 (2012).

¹⁹ *Communication for the Spring European Council, Driving European Recovery*, COM (2009) 0114 final (Apr. 3, 2009).

²⁰ *The High Level Group on Financial Supervision in the EU Report* (Feb. 25, 2009), http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf.

²¹ *Directive of the European Parliament and the Council on Criminal Sanctions for Insider Dealing and Market Manipulation*, (Directive 2014/57/EU, L173/179)

²² Emiliano Grossman & Patrick Leblond, *European Integration: Finally the Great Leap Forward*, 49 J. COMMON MKT. STUD. 413 (2011).

reshaped the EU's share trading market place and were largely based on influence from various interest groups. Yet MiFID led to clashes between the stock exchange sector and the brokerage sector.²³ It is currently being renegotiated and largely influences current developments in the area of financial crimes. Thus, the EU's endeavors to stabilize and save the European market from financial turmoil is inexorably linked to the long-standing mission in the EU to increase investor confidence. As noted, prior to the entry into force of the Lisbon Treaty, this fight was mainly fought through the internal market provision of Article 114 TFEU. Today we are faced with the classic choice-of-legal-basis question where Article 83 TFEU is *lex specialis* if the measure in question is primarily a criminal law measure. Therefore, under the present Treaty framework there are good reasons to believe that the center of gravity test will point in the direction of more general internal market powers. Thus, "mainstream" internal market powers, such as Article 114 TFEU, are still of crucial importance and are particularly significant with respect to the impact in the national arena as this provision also allows for the adoption of regulations—thereby having a direct impact on citizens. From a Member State perspective, there is merit with respect to engaging Article 83(2) TFEU as compared to action taken under Article 114 TFEU, in that this provision grants the possibility for the Member States to pull an emergency brake if a proposed measure appears to be too sensitive for the national criminal law system. Moreover, use of Article 114 or Article 325 TFEU (antifraud rules) would mean that the UK, Ireland, and Denmark would not be granted the "cherry-pick" possibility of opt-outs as they otherwise would regarding legislation within the AFSJ (in accordance with Protocol 21 and Protocol 22).²⁴

Curiously, however, and regardless of the Treaty based technicalities as discussed above, a recent survey report issued by Europol, showed that the economic crises has not led to an increase in organized criminal activity but that there has been a notable shift in criminal markets.²⁵ For example, the counterfeiting business of luxury goods has now moved to the copying of consumer goods such as food, detergents, and medical products.²⁶ Furthermore, the growing need for cheap products and services stimulates a growing

²³ Guido Ferrarini & Niamh Moloney, *Reshaping Order Execution in the EU and the Rule of Interest Groups: From MiFID I to MiFID II*, 13 EUR. BUS. ORG. L. REV. 557 (2012). See also Elliot Posner, *The Lamfalussy Process: Polyarchic Origins of Networked Financial Rule-Making in the EU*, in EU GOVERNANCE: TOWARDS A NEW ARCHITECTURE? 108 (Charles Sabel & Jonathan Zeitlin eds., 2010).

²⁴ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) (citing Protocol 21 attached to the Lisbon Treaty). According to Articles 1 and 3 of Protocol 21 attached to the Lisbon Treaty, the UK and Ireland do not take part in legislation adopted within the AFSJ unless they opt to participate in such legislation by notifying the President of the Council in writing within three months after a proposal or initiative has been presented to the Council. *Id.* Protocol 22 grants Denmark a complete opt out from the AFSJ.

²⁵ EUROPOL, EU SERIOUS AND ORGANIZED CRIME THREAT ASSESSMENT (Mar. 19, 2013), available at <https://www.europol.europa.eu/content/eu-serious-and-organised-crime-threat-assessment-socta>.

²⁶ *Id.*

appetite in shadow markets. This, then, would indicate that identifying the “right” EU market is crucial when fighting financial crimes.

In addition, although located in the TFEU, and being one of the EU’s internal objectives, the AFSJ is becoming an increasingly important external actor. After all, the external action in the AFSJ accounted in 2012 for over 20% of all texts adopted by the Justice and Home Affairs Council.²⁷

What the EU does internally is important externally and vice versa. In addition, Article 5(3) TEU stipulates that the EU shall seek to promote its values abroad, the most obvious example being the enlargement agenda and the promotion of human rights.²⁸ There are also more recent examples, such as the EU’s emission trading scheme.²⁹ In so far as AFSJ action interacts with the Common Foreign and Security Policy (CFSP) field in the area of security related issues, Article 21(h) TEU stipulates that the EU shall promote good global governance. Hence, the Lisbon Treaty makes an explicit link between internal and external policy objectives. In addition, the EU shall ensure consistency between the different areas of its external action and between these and its other policies.³⁰ Notwithstanding the external effect of action taken within the AFSJ, it should perhaps be pointed out that the EU is not a single player on the global stage. It could be argued that regardless of the EU’s record as a normative European power,³¹ the AFSJ as a policy area offers an example of the EU as a norm importer.³² Generally speaking, within the AFSJ framework, the EU has to a large extent copied the Council of Europe framework and translated it (and gone much further) to form the unique concept of a European AFSJ.³³ Arguably, the EU has used the international *fora* to extend global norms into the domestic setting. The fight against money laundering and terrorist financing offers perhaps the best example of the EU as a

²⁷ Jurg Monar, *The EU’s Growing Role in the External AFSJ Domain: Factors, Framework and Forms of Action*, 27 CAMBRIDGE REV. INT’L AFF. 147 (2014).

²⁸ E.g., Joseph Weiler, *Deciphering the Political and Legal DNA of European Integration*, in THE PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW 137 (J. Dickson & Pavlos Eleftheriadis eds., 2012); Ian Manners, *Normative Power Europe: A Contradiction in Terms?* 40 J. COMMON MKT. STUD. 235 (2002); Thomas Forsberg, *Normative Power Europe, Once Again: A Conceptual Analysis of an Ideal Type*, 49 J. COMMON MKT. STUD. 1183 (2011).

²⁹ Joanne Scott, *The Multi-Level Governance of Climate Change*, in THE EVOLUTION OF EU LAW 805 (Paul Craig & Grainne de Búrca eds., 2011).

³⁰ On coherence, see, for example, Christoph Hillion, *Mixity and Coherence in EU External Relations: The Significance of the Duty of Cooperation* (CLEER, Working Paper 2009/2).

³¹ Ian Manners, *Normative Power Europe: A Contradiction in Terms?*, 40 J. COMMON MKT. STUD. 235 (2002).

³² See Ester Herlin-Karnell, *The EU as a Promoter of Values and the European Global Project*, 13 GERMAN L.J. 1225 (2012).

³³ On the history of the JHA see, for example, STEVE PEERS, EU JUSTICE AND HOME AFFAIRS (2011).

norm importer.³⁴ Indeed, international steps against financial crimes have for a long time largely influenced the EU legal framework.

A particularly significant actor in the global war against money laundering and an important trendsetter for the EU in these matters is the Financial Action Task Force (FATF) and its *40 Recommendations on Money Laundering*. For example, the EU's mandate was extended to cover not only money laundering but also terrorist financing, owing to the adoption of nine special recommendations at the FATF level.³⁵ The main justification for extended EU powers has been the need to update EU law in light of the FATF. This poses difficulties from the EU's internal perspective. More profoundly, it asks questions of how the AFSJ policy area fits into the EU's regulatory regime. After all, the FATF framework has been characterized by a lack of transparency and strong preventive focus.³⁶ The problem is that the AFSJ field is now an EU policy, among others, while dealing with fundamentally different policy fields, such as that of human rights protection, security, and national sovereignty claims at its core.

The next section seeks to address the important issue of what the regulatory challenges in the AFSJ are and how viewing this area through the lens of market making contributes to a better understanding of the AFSJ.

C. Regulatory Challenges Within the Internal Market and the AFSJ

What, then, are the regulatory challenges facing the EU in the AFSJ sphere with respect to the eradication of financial crimes as a way of ameliorating the financial crisis? As Niamh Moloney points out, the failure of markets ultimately caused the European financial crisis.³⁷ In a recent paper, Daniel Kelemen and Terence Teo argue that the EU relies too much on coercive measures while neglecting the importance of "clarity."³⁸ Indeed, it appears that a common theme in EU financial crisis regulation involves the EU's current

³⁴ Valsamis Mitsilegas, *The European Union and the Rest of the World: Criminal Law and Policy Interconnections*, in *BEYOND THE ESTABLISHED LEGAL ORDERS* 149 (Panos Koutrakos & Malcom Evans eds., 2011)

³⁵ FINANCIAL ACTION TASK FORCE, FATF IX SPECIAL RECOMMENDATIONS (2001), <http://www.fatf-gafi.org/media/fatf/documents/reports/FATF%20Standards%20-%20IX%20Special%20Recommendations%20and%20IN%20rc.pdf>.

³⁶ See, e.g., BILL GILMORE, *MONEY LAUNDERING: THE EVOLUTION OF INTERNATIONAL MEASURES TO COUNTER MONEY LAUNDERING AND THE FINANCING OF TERRORISM* (3d ed. 2004).

³⁷ See Moloney, *supra* note 14, at 111 (evaluating the impact of the financial crisis on market regulation).

³⁸ See R. DANIEL KELEMEN & TERENCE K. TEO, *LAW AND THE EUROZONE CRISIS: LAW, FOCAL POINTS AND FISCAL DISCIPLINE 2* (2013), http://eucoe.org/eusa/2013/papers/5g_kelemen.pdf ("[I]f balanced budget rules work by coordinating decentralized punishment by bond investors rather than by posing a credible threat of judicial enforcement, then the clarity of the focal point provided by the rule, rather than the strength of its judicial enforcement mechanisms, should be the key to its effectiveness.").

approach—an eagerness to do “something,” which results in hasty legislation lacking clarity.

Yet while financial market regulation relies on a range of tools, anti-fraud rules remain imperative. Thus, in the EU context, the fight against fraud and related activities always sparks a complex debate as to the competences of the EU. Up until the entry into force of the Lisbon Treaty, the EU fought organized crime through the framework of the former third pillar, and also adopted a number of third pillar instruments on anti-fraud measures.³⁹ With the Lisbon Treaty, the EU received the specific competence to adopt anti-money laundering legislation and take measures in order to counter organized crime under Article 83(1) TFEU. However, the EU continues to rely on a joint regulatory approach in the fight against money laundering, through measures taken under the “normal” internal market framework (Article 114 TFEU) and measures within the AFSJ grid. Therefore, the EU’s acts in this regard doubly affect the national systems stemming from it. In addition, what the EU does internally is reflected in the international debate on the suppression of money laundering and terrorist financing, particularly with the regard to the global standard setter in this area: The FATF.

As noted above, Article 83 TFEU provides far-reaching powers in criminal law concerning cross-border criminality. But “mainstream” internal market powers, such as Article 114 TFEU, are still crucially important in the context of the EU’s fight against financial crimes and are particularly significant with respect to the effect on the national arena, as this provision also allows for the adoption of regulations (thereby directly impacting citizens and Member State legislation).⁴⁰ The Commission’s Communication on reinforcing sanctioning regimes in the financial sector proves particularly intriguing in this context.⁴¹ It states that efficient and sufficiently convergent sanctioning regimes amount to the necessary corollary to the new supervisory system and that “[s]upervision cannot be effective with weak, highly variant sanctioning regimes. It is essential that within the EU and elsewhere, all supervisors are able to deploy sanctioning regimes that are sufficiently convergent, strict, resulting in deterrence.”⁴² Yet the Commission concludes that it would assess whether, and in which areas, the introduction of criminal sanctions and the establishment of minimum rules on the definition of criminal offenses and sanctions may prove essential in order to ensure the effective implementation of EU financial services

³⁹ Treaty of Amsterdam Amending the Treaty on European Union arts. 29–31, Oct. 11, 1997, 1997 O.J. (C 340) 1.

⁴⁰ See generally *Proposal for a Directive of the European Parliament and of the Council on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing*, *supra* note 4; NIC RYDER, MONEY LAUNDERING—AN ENDLESS CYCLE? A COMPARATIVE ANALYSIS OF THE ANTI-MONEY LAUNDERING POLICIES IN THE UNITED STATES OF AMERICA, THE UNITED KINGDOM, AUSTRALIA AND CANADA (2012).

⁴¹ *Reinforcing Sanctioning Regimes in the Financial Services Sector*, COM (2010) 716 final (Aug. 12, 2010).

⁴² *Id.* at 2.

legislation.⁴³ Unfortunately, the EU's current response to financial crimes does not seem to reflect any such assessment, as will be shown below.

I. What Regulatory Powers?

The classic debate in EU internal market law centers on the question of how to prevent the internal market provision of Article 114 TFEU from becoming a claim to general regulatory competence.⁴⁴ Many argue that the Court of Justice has gradually expanded the scope of the internal market, both in judicial and legislative terms.⁴⁵ The EU is regulatory in nature.⁴⁶ In contrast to its Member States, the EU "specializes in regulatory, rather than in distributive or redistributive, policies."⁴⁷ Succinctly put, "[R]egulation is the organization and control of economic, political and social activities by means of making, implementing and enforcing rules."⁴⁸ According to Giandomenico Majone, the EU is best understood as a regulatory state as it sets internal housekeeping rules for the European machinery.⁴⁹ One could potentially argue that the EU acts as a parasite on the nation state, and this, paradoxically, leads to its dynamic nature, as it requires the nation state to reinvent from within and receive EU law in a re-regulated fashion. But the notion of regulatory here is not

⁴³ See *id.* at 11 ("The Commission holds the view that a legislative initiative is warranted to set some minimum common standards that Member States should respect in designing administrative sanctions for violations of financial services rules and when applying sanctions in this field.")

⁴⁴ See, e.g., *Germany v. Parliament and Council*, CJEU Case C-376/98, 2000 E.C.R. I-8419, I-8425 ("The Community's internal-market competence is not limited, a priori, by any reserved domain of Member State power. It is a horizontal competence, whose exercise displaces national regulatory competence in the field addressed. Judicial review of the exercise of such a competence is a delicate and complex matter.")

⁴⁵ See, e.g., Joseph Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2459 (1991) (discussing the effect of the Community's preemption measures and default rules on internal markets).

⁴⁶ See, e.g., Steve Weatherill, *The Challenge of Better Regulation*, in BETTER REGULATION 1, 3 (Stephen Weatherill ed., 2007) ("The EU itself is a creature with a relatively small budget but a very broad rule-making power—it too is predominately regulatory in nature."). See generally SANJA BOGOJEVIC, EMISSIONS TRADING SCHEMES: MARKETS, STATES AND LAW 56 (2013); Elliot Posner & Nicholas Veron, *The EU and Financial Regulation: Power Without Purpose?*, 17 J. EUR. PUB. POL'Y 400 (2010).

⁴⁷ Burkard Eberlein & Edgar Grande, *Beyond Delegation: Transnational Regulatory Regimes and the EU Regulatory State*, 12 J. EUR. PUB. POL'Y 89 (2005).

⁴⁸ Alasdair Young, *Regulators Beyond Borders: The External Impact of EU's Rules*, Paper to the Thirteenth Biennial EUSA Conference Baltimore, at 3 (May 9–11, 2013), http://euce.org/eusa/2013/papers/3b_young.pdf (quoting Walter Mattli & Ngaire Woods, *In Whose Benefit? Explaining Regulatory Change in Global Politics*, in THE POLITICS OF GLOBAL REGULATION 1 (Walter Mattli & Ngaire Woods eds., 2009)).

⁴⁹ See GIANDOMENICO MAJONE, REGULATING EUROPE 162 (1996) (describing the function of independent intermediary institutions, such as the EU, which regulate and set rules).

meant as a way of regulation in terms of technocracy,⁵⁰ but rather as a way of describing European powers in all their complexities. Indeed, it is well known that classic concepts such as positive and negative integration in EU law lead to regulation becoming a cumbersome political task. Judicially-led integration often acts in many areas as a forerunner to later treaty amendments. Hence, many commentators refer to a “deregulating state” rather than a “European regulatory state.”⁵¹ Nevertheless, in analyzing the EU’s role in financial regulation this distinction seems insufficient, and commentators often turn to various capitalist theories in order to understand “how countries approach international economic and regulatory negotiations.”⁵² These theories in turn provide a way of understanding how countries approach EU negotiations.⁵³ They refer to the EU post-crisis agenda, which reflects a move away from open market strategies to a stability-oriented pattern. Some scholars have described the current state of play in the EU as a departure from a normative European power towards that of a confirmation of a market power Europe.⁵⁴ Others have noted limits to the market theory and have argued that the EU encompasses more in the process of establishing a social Europe, and thus asserting that the market is the failure itself.⁵⁵

Theorists often pose that the efforts of the EU to improve EU regulation consists of the endorsement of the EU’s institutions to sanction impact assessments, the establishment of

⁵⁰ See *id.* (noting issues with technocracy, such as its hindrance of states’ ability to formulate their general interests); HANDBOOK ON THE POLITICS OF REGULATION 192 (David Levi-Faur ed., 2011) (surveying the different ways which regulators may legally operate).

⁵¹ See *e.g.*, Anand Menon & Steve Weatherill, *Democratic Politics in a Globalising World: Supranationalism and Legitimacy in the European Union* (Working Paper No. 13/07), <http://www.lse.ac.uk/collections/law/wps/WPS13-2007MenonandWeatherill.pdf> (“The EC, and even more prominently the wider EU, has become far more than a regulatory state fixed on contained market-making objectives . . .”).

⁵² See EILIS FERRAN, CRISIS-DRIVEN EU FINANCIAL REGULATORY REFORM 6 (2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2028003 (“[T]he theory postulates that the stance that countries adopt with respect to new regulatory initiatives will be influenced by their determination of whether those initiatives are likely to sustain or undermine the comparative institutional advantages of their nation’s economy.”).

⁵³ See *id.* (“With reference specifically to the EU, it suggests that when Member States fail to agree on detailed harmonization this may be attributable to crucial differences in their political economies.”).

⁵⁴ See Chad Damro, *Market Power Europe*, 19 J. EUR. PUB. POL’Y 682, 682 (2012) (“This article asserts that the EU need not necessarily be preconceived . . . as a particular or different normative identity in order to understand it as a power. Rather, because the EU is, at its core, a market, it may be best to conceive of the EU as a market power Europe.”); Hans Micklitz & Dennis Patterson, *From the Nation State to the Market: The Evolution of EU Private Law as Regulation of the Economy Beyond the Boundaries of the Union?*, in BART VAN VOOREN, STEVEN BLOCKMANS & JAN WOUTERS, *THE EU’S ROLE IN GLOBAL GOVERNANCE: THE LEGAL DIMENSION* 59, 66 (2013) (describing the “accession to the age of the market state”).

⁵⁵ See Agustin Jose Menendez, *The Existential Crisis of the European Union*, 14 GERMAN L.J. 453, 508 (2013) (explaining how the EU simultaneously fosters a single market and works against it).

agencies, and networked-based governance—for example, use of networks of national regulators as a means of supplementing the expertise of the Commission for sector regulation in the EU.⁵⁶ In any event, discussions concerning the EU's regulatory endeavors often highlight its sanctioning authority as a necessary component for its survival on the market arena. Indeed, the EU has not limited its ambitions to the EU territory but has also stated that it wants to “expand the regulatory space” by “promoting, globally and with like-minded countries, supervisory and regulatory convergence and equivalence, in line with EU rules.”⁵⁷ More broadly, it raises the issue of how the theories of EU market powers can translate into that of EU financial crimes, and thus step into the new waters of EU policies, namely the AFSJ and criminal law. It is all about the striving for regulation—but who regulates what and the limits of EU competences is far from an unambiguous question. This discourse is now taking shape within the AFSJ field and, considering the extended possibility of differentiation in this area, it seems a safe bet to assume that it is a complex one.

In the following section, I will examine how the EU reads the global element in AFSJ law in light of the market creation endeavor. The section focuses on regulatory features as introduced by recent measures proposed by the Commission to fight financial crimes.

D. EU Anti-Money Laundering Action: The Fourth Directive

The proposal for a Fourth Money Laundering Directive offers an interesting example of the EU broadening its mandate further by following the international trend in the fight against dirty money and terrorist financing.⁵⁸ One must remember that the first EU Directive on anti-money laundering was adopted in 1991.⁵⁹ Subsequently, the EU amended this Directive in 2001,⁶⁰ and then replaced it with a third Directive in 2005.⁶¹

⁵⁶ See *Smart Regulation in the European Union*, at 7, COM (2010) 543 final (Aug. 10, 2010) (asserting that it is now time to step up a gear). *Id.* at 2 (“Better regulation must become smart regulation and be further embedded in the Commission’s working culture.”).

⁵⁷ Damro, *supra* note 54, at 694.

⁵⁸ See *Proposal for a Directive of the European Parliament and of the Council on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing*, *supra* note 4 (relaying general information on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing).

⁵⁹ See Council Directive 91/308, 1991 O.J. (L 166) 77 (covering the issue of prevention of the use of the financial system for the purpose of money laundering).

⁶⁰ Council Directive 2001/97, 2001 O.J. (L 344) 76 (amending Council Directive 91/308 on the prevention of the use of the financial system for the purpose of money laundering).

⁶¹ Directive 2005/60, *supra* note 8.

Importantly, money laundering is by definition based on another crime termed a “predicate offense,” which gives rise to the laundering in question. There is an ongoing doctrinal debate about the need to have a general definition of “predicate offenses” in order to meet the legality requirement of strict construction in criminal law.⁶² Some suggest that a problem with the 1991 and 2001 Money Laundering Directives involved their failure to provide a definite list of predicate offenses 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 that it neglected in the Third Directive. The Fourth Directive claims to follow the international fashion by including a specific reference to tax crimes within the serious crimes which can be considered a predicate offense to money laundering; a new aspect in contrast with its predecessor.

Nonetheless, novelties as introduced by the Fourth Directive, such as the extended duty of risk assessment to the Member States, raise the question of whether the Member States are fit for this job. Considering the Third Money Laundering Directive’s ongoing difficulties in the national systems, and the implementation of this instrument still lagging behind, the Commission is withdrawing the carrot before it has been given. The Fourth Money Laundering Directive argues that the EU must act because solely national action is not enough. Interestingly, the EU legislator has also added the caveat that European action is insufficient, indicating the desire to globalize. It also stresses the inclusion of tax crimes in the broader definition of money laundering, in line with the recommendations set by the FATF. The proposed Fourth Directive states that money laundering and terrorist financing are international problems, and the effort to combat them should be global. Intriguingly, the Directive also covers these illegal activities committed on the Internet.⁶³

As explained, since 2001 the EU has generally followed the FATF’s lead. Accordingly, the FATF updated its recommendations in February 2012, and one year later the EU announced its proposal for a new directive. As noted, the proposed new directive is—as its predecessors—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. Moreover, one would have thought that, for example, cyber crime—which now indirectly forms a large part of the Directive to ensure a high level of security—would fit in 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 will also propose an instrument based on Article 83 TFEU as a complementary

⁶² See, e.g., ESTER HERLIN-KARNELL, *THE CONSTITUTIONAL DIMENSION OF EUROPEAN CRIMINAL LAW* 146 (2012) (laying out additional references).

⁶³ *On the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing*, *supra* note 4.

measure to fight money laundering (not yet announced). This follows a similar trend as that of the Market Abuse Directive,⁶⁴ where the EU adopted double measures regulating the same area in question but through different legal bases.

In any event, the Directive ensures consistency by emphasizing its compliance with wishes set out in the Stockholm program, as well as the EU's internal security strategy.⁶⁵ In addition, the Directive 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,⁶⁶ as well as the guidelines set by the commission's communication on "reinforcing sanctioning regimes" in the financial service sector.⁶⁷ 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 EU's adopted approach does not seem particularly ambitious, as it does not strengthen the protection. Most interestingly, considering the strong preventive focus of this instrument, the Commission stipulates not only that the Directive complies with data protection rules, but that it will also indirectly protect the right to life, which perhaps seems difficult to understand. The proposed measure clearly confirms, however, the longstanding security focus within the EU, which has crosspollination effects between the AFSJ and the internal market, affirming that less is no longer more. The vocabulary has shifted from better regulation, to smart regulation, and then to that of "effective" governing.

1. The Risk-Based Approach Getting Stronger

The groundbreaking Third Money Laundering Directive adopted a risk-based approach and combined the fight against dirty money and terrorist-financing into the same instrument. Yet the term "money laundering" continues to prove rather misleading as it not only concerns money, but also "grey" property of virtually any kind, and also embraces a continuum of economic activity. Conversely, the terrorist-related laundering process is sometimes known as "reverse money laundering," which refers to the use of "clean"

⁶⁴ Regulation (EU) No 596/2014 of the European Parliament and of the Council on Insider Dealing and Market Manipulation, of the European Parliament and of the Council of 16 April 2014 on market abuse (OJ L 173, market abuse regulation); Directive on Criminal Sanctions for Insider Dealing and Market Manipulation, *supra* note 21.

⁶⁵ *The EU Internal Security Strategy in Action: Five Steps Towards a More Secure Europe*, at 2, COM (2010) 673 final (Nov. 22, 2010) (noting that the communication "builds on what Member States and EU institutions have already agreed, and proposes how we over the next four years can work together to be more effective in fighting and preventing serious and organised crime, terrorism and cybercrime, in strengthening the management of our external borders. . .").

⁶⁶ *Proposal for a Directive of the European Parliament and of the Council on the Freezing and Confiscation of the Proceeds of Crime in the European Union*, COM (2012) 36 final (May 20, 2013).

⁶⁷ *Reinforcing Sanctioning Regimes in the Financial Sector*, *supra* note 41.

money for “dirty” ends.⁶⁸ It is therefore much harder for a financial institution to identify terrorist-related money laundering, and it is extremely difficult to trace or prove the proceeds of crime before a crime is committed. Therefore, one could argue that countering the financing of terrorism presupposes a different risk perception concept than that of classic anti-money laundering. Within such a risk-based approach to money laundering, private actors, such as lawyers and banks, are expected to make risk assessments of their customers and divide them into low and high-risk.⁶⁹ The rationale for actively engaging the private sector in the anti-money laundering process is to make them collect the appropriate information.⁷⁰ Therefore, this is commonly referred to as a “risk-based approach” because private actors are required to pass on sensitive information based on a risk assessment of their clients. But the risk-based approach could also be seen in a broader governing context of risk regulation at the EU (criminal law) level. Thus, the question of the governing of risk initially connects to the justification of EU legislative action.⁷¹

The Fourth Directive adds an additional layer to the complexity of the EU’s web of risk regulation by requiring an evidence-based approach and by including the European Agencies, such as the European Supervisory Authority, in the anti-money laundering scheme. Moreover, the Directive requires Member States to estimate and mitigate the risks facing them, which they can, according to the Directive, supplement with the European Supervisory Authorities (ESA) or Europol. Put simply, the Directive states that the use of a risk-based approach uses evidence to better target the risks. In particular, the Fourth Directive tightens the rules regarding due diligence, which have been considered too lenient. Interestingly, the proposal for the Fourth Directive introduces the notion of risk assessment, and therefore no longer bases the measure solely on “risk.” The Directive states that each Member State shall use the assessment to improve its anti-money laundering regime and combat terrorism financing regimes by undertaking national risk assessment. This complies with the FATF recommendations and the main justification as to why the Directive now follows this approach. However, one could argue that clearer rules

⁶⁸ E.g., Armand Kersten, *Financing of Terrorism – A Predicate Offence to Money Laundering?*, in FINANCING TERRORISM 49, 56 (Mark Pieth ed., 2002).

⁶⁹ This is the so-called customer due diligence requirement (know-your-customer) and forms part of the risk-based confidence and transparency policy. In short, customer due diligence is to be applied in four cases. First, when establishing a “business relationship”; second, when carrying out larger transactions; third, regardless of any derogation, exemption, or threshold, where there is a suspicion of money laundering or terrorist-financing; and fourth, where there are doubts about the veracity or adequacy of previously obtained customer identification data.

⁷⁰ For an interesting discussion on how these private actors can be held accountable, see Maria Bergstrom et al., *A New Role for For-Profit Actors? The Case of Anti-Money Laundering and Risk Management*, 49 J. COMMON MKT. STUD. 1043 (2011).

⁷¹ See ESTER HERLIN-KARNELL, THE CONSTITUTIONAL DIMENSION OF EUROPEAN CRIMINAL LAW 164 (2012).

for risk assessment were not desirable here, but rather proper guidance regarding risk management.

Furthermore, the Directive introduces one important change as compared to the previous framework. The proposal contains several areas where work by the ESA is envisaged and which raise crucial issues with respect to the relationship between this agency and AFSJ agencies, such as Europol.⁷² This complex interaction of AFSJ policies and financial regulation within the heart of the internal market is intensified by the fact that the European Bank Authority is 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 what factors should be taken into account when applying simplified customer due diligence 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, whereas financial institutions must adapt their internal controls to deal with specific situations.

In tandem with the proposed Directive, the Commission also proposed a Regulation, based on Article 114 TFEU, regulating the transfer of funds. This regulation focuses on the information of the payer, made immediately available to law enforcement and prosecutorial authorities and linked to the EU's internal security strategy.⁷³ Remarkably, the Regulation, while largely overlapping with the Directive, points out that it may not always be possible in criminal investigations to identify the data in question or the person concerned. Thus, a preventive approach should be adopted until long after the original transfer, meaning that all information is stored in order to facilitate investigation.⁷⁴ This raises two immediate issues: First, it is difficult to see how it differs from the risk-based approach as fostered by the Fourth Directive. Second, 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. Furthermore, it is difficult to see how the proposal complies with data protection, as indicated by the Commission.

Finally, the Fourth Money Laundering Directive also covers online transactions and associated money laundering or terrorism financing, but refuses to call it "cyber crime." Needless to say, any legal expert reading this Directive wonders what exactly the

⁷² *Proposal for a Directive on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing*, *supra* note 4.

⁷³ *Proposal for a Regulation of the European Parliament and of the Council on Information Accompanying Transfers of Funds*, *supra* note 64, at 3.

⁷⁴ *Proposal for a Regulation of the European Parliament and of the Council on Information Accompanying Transfers of Funds*, *supra* note 64, at paras. 14–19.

Commission's intention is here: To cover as much as possible while leaving the legal basis somewhat unclear? Specifically, what is then the relationship between this regime and that of EU cyber crime regulation?

E. Cyber Crime: The Digitization of the AFSJ Market

In line with a number of market-related instruments in the fight against financial crimes, the Commission proposed a Directive that seeks to ensure a high level of network security.⁷⁵ The Directive has recently been adopted and is the first in a line of many that aims at stepping up the fight against cyber crime and building an international cyber security policy for the EU in the transnational space.

Indeed, European cyber crime appears to be the focus of the latest AFSJ security buzz and will most likely play an important role in the new AFSJ program that will succeed the Stockholm program—which was scheduled to be adopted in 2014. It is interesting from the perspective of EU market regulation as well. The Commission had indicated early on that its intention to create the European Cybercrime Centre was a priority of the European Internal Security Strategy that was launched in 2010.⁷⁶ Thus, the new Directive is based on Article 83(1) TFEU, which covers computer crime in a broad sense.⁷⁷ For the past ten years, the EU has made significant efforts to develop a framework capable of dealing with cyber security in the EU space.⁷⁸ The Directive on attacks against information systems was recently adopted and should be seen in tandem with the establishment of the European Cybercrime Centre established by Europol. The Commission indicated its intention to create a European Cybercrime Centre as a priority of the Internal Security Strategy.⁷⁹ This Centre, established on 11 January 2013, is part of the Europol's mission to ensure a crime-free European space.⁸⁰

⁷⁵ *Directive on Attacks Against Information Systems and Repealing Council Framework Decision 2005/222/JHA*, 2013 O.J. (L 218) 8. See also *Proposal for a Directive on Attacks Against Information Systems and Repealing Council Framework Decision 205/222/JHA*, COM (2010) 517 final (Sept. 30, 2010).

⁷⁶ *The EU Internal Security Strategy in Action: Five Steps Towards a More Secure Europe*, COM (2010) 673 final (Nov. 22, 2010).

⁷⁷ *Directive on Attacks Against Information Systems and Repealing Council Framework Decision 2005/222/JHA*, *supra* note 75.

⁷⁸ Laviero Buono, *Gearing Up the Fight Against Cyber Crime in the EU: A New Set of Rules and the Establishment of the European Cyber Crime Centre*, 3 *NEW J. EUR. CRIM. L.* 332 (2012).

⁷⁹ *Tackling Crime in Our Digital Age: Establishing a European Cybercrime Centre*, COM (2012) 140 final (Mar. 28, 2013).

⁸⁰ On the transatlantic dimension, see Patrick Pawlak, *The Unintentional Development of the EU's Security Governance Beyond Borders*, 17 *EUR. FOREIGN AFF. L. REV.* 87 (2012).

An obvious question worth asking is whether the internal market is the same as the digital market. Some instruction is given by the Commission website and the 2020 goal for Europe.⁸¹ In this context, the Commission stipulates that “Europe lacks a unified market for online content.”⁸² The digital market appears to be different from the internal market in that it aims at preserving and spreading European culture abroad and at home. The agenda states that: “Europe-wide rules and an agreed legal framework to enable further digitization and dissemination of our cultural resources—literary, musical and artistic.” Moreover, as a borderless communication instrument, digital information systems—the internet in particular—are interconnected across Member States and play an essential role in facilitating the cross-border movement of goods, services, and people. Needless to say, any regulation of what takes place in the digital environment is bound to have an external effect outside the AFSJ.

There is, then, a side effect of EU-imported norms in the security context that they incorporated into the EU *acquis*, and also an impact on the EU external landscape.

F. The Increased Importance of EU Agencies in the Context of Sanctions: A Snapshot

As noted above, the proposal for a Fourth Money Laundering Directive opens up a whole new discourse with novel actors on the stage. However, the importance of agencies in EU lawmaking in general is far from new. Agencies are often said to represent a step in the direction of “better regulation.”⁸³ Yet, as is usually the case with all AFSJ law, agencies are new players in the EU criminal law context. In particular, Europol plays an important function in the EU’s fight against terrorism and the agreements concluded with the USA.⁸⁴ It appears to be unclear what exactly is the place of these agencies in the legislative context and their place in the AFSJ machinery. After all, areas such as medical authorization, electricity regulation, and health regulation are spaces that have all been reformed in recent years and have offered examples of hybrid governance in terms of combining traditional EU legal instruments with network models relying on agencies and new forms of governance such as comitology and open method coordination.⁸⁵ This is all new in the AFSJ. While this paper will not delve into this complex debate, it is clear that the

⁸¹ See, *A Digital Agenda for Europe*, EUROPEAN COMMISSION, <http://ec.europa.eu/digital-agenda/> (last visited Feb. 10, 2015).

⁸² *Id.*

⁸³ See Frank Vibert, *Better Regulation and the Role of Agencies*, in *BETTER REGULATION 387* (Stephen Weatherill ed., 2007).

⁸⁴ See, e.g., Helena Carrapico & Florian Trauner, *Europol and the EU’s Fight Against Organized Crime: Exploring the Potential of Experimentalist Governance*, 16 *PERSP. IN EUR. POL. & SOC.* 357 (2013).

⁸⁵ POUL KJAER, *BETWEEN GOVERNING AND GOVERNANCE* 161 (2010); Charles Sabel & Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the European Union*, 14 *EUR. L. J.* 271 (2008).

technocratic approaches pose difficulties from the democratic perspective as many issues such as medical regulation touch upon ethical issues that require democratic legitimation and accountability.⁸⁶ Nevertheless, the prospect of adopting a technocratic model to 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 have increasingly important players in the regulatory machinery within the AFSJ. As Monar points out, the Member States have kept the 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.⁸⁷ Yet Europol has been given extended powers to supervise the EU crime-fighting agenda within the AFSJ. This has resulted in a complex relationship between AFSJ legislation and the role played by Europol in, for example, the financial tracking program and those proposals such as the Fourth Money Laundering Directives, discussed above, that are part of the internal market *acquis*. As for those instruments adopted within the internal market, the European Securities and Market Authority (ESMA) is responsible for any supervision. The ESMA contains a review clause that grants the Court of Justice the power to review the fines imposed by this agency. But it is not clear to what extent Europol and Eurojust can be held to account for their actions.⁸⁸ The same holds true for the possible establishment of a European Public Prosecutor, which will have far-reaching powers to investigate EU financial crimes.⁸⁹

As explained, the Fourth Money Laundering Directive seeks to establish an increased focus on risk assessment at the national level. Such a risk assessment is to be carried out in liaison with various agencies that should provide guidance for the Member States as to how to carry out risk assessments and where European Supervisory Authority plays a key role by also being asked to provide regulatory technical standards where needed for financial institutions to adapt their internal controls to deal with specific situations. Europol is the main player in the EU anti-terrorism tracking system. According to the Europol Decision, the agency is given a number of principal tasks including: (1) the collection, storage, analysis, and exchange of information and intelligence, and (2) the

⁸⁶ JURGEN NEYER, *THE JUSTIFICATION OF EUROPE: A POLITICAL THEORY OF SUPRANATIONAL INTEGRATION* 25 et seq. (2012).

⁸⁷ See generally, Jurg Monar, *Experimentalist Governance in Justice and Home Affairs*, in *EXPERIMENTALIST GOVERNANCE IN THE EUROPEAN UNION* 237 et seq. (Jonathan Zeitlin & Charles Sabel eds., 2010).

⁸⁸ On Agencies, see MADALINA BUSUIOC, *EUROPEAN AGENCIES: LAW AND PRACTICE OF ACCOUNTABILITY* (2013); Madalina Busuioc, Deidre Curtin & Martijn Groenleer, *Agency Growth Between Autonomy and Accountability: The European Police Office as a "Living Institution,"* 18 J. EUR. PUB. POL. 848–67 (2011). See also Pierre Schammo, *The European Securities and Market Authority: Lifting the Veil on the Allocation of Powers*, 48 COMMON MKT. L. REV. 1887 (2011).

⁸⁹ Gerard Conway, *Holding to Account A Possible European Public Prosecutor: Supranational Governance and Accountability Across Diverse Legal Traditions*, 24 CRIM. L. F. 371 et seq. (2013).

exchange of information concerning Member States about criminal offences.⁹⁰ According to Article 88 TFEU, “Europol’s mission shall be to support and strengthen action by the Member States’ police authorities.” It is then meant to act as a complementing authority, but it is becoming a primary actor. The present paper can do no more than point out the complex interrelationship between the need to decentralize and make the Commission more effective, and basic concerns about the rule of law and legitimacy as well as accountability in criminal law.

The final section of this paper will briefly look at the AFSJ in the global framework and cautiously ask to what extent the global effect impacts AFSJ law in the market context.

G. Internal Market Powers Uploaded: The AFSJ and the Global Sphere

One problem often neglected in the discussion of the EU and its relationship to the rest of the world is that some of the main ideas underpinning the EU’s regulatory machinery might simply be too difficult to export outside the EU context. This is because the EU is unique and, over time, has developed a complex institutional and constitutional system.⁹¹ As noted by Ferran, much of the transnational financial crimes issues have been of a transatlantic nature and mostly concerned with the United Kingdom and the United States and not so much the EU as a whole. And yet, the area of financial crimes offers perhaps one of the few examples where the EU could actually achieve something in the national arena by structuring an area that is already scattered due to international engagement. And, where the EU’s involvement in the anti-money laundering struggle is a positive contribution to an existing patchy system where the legal picture has been rather foggy as a result of UN and FATF involvement. For example, one of the main problems with the fight against terrorism at the global level has been the lack of an internationally accepted definition of “terrorism.” The EU has been surprisingly innovative here, in that there is at least a definition at the EU level.⁹²

As mentioned above, the Lisbon Treaty creates a specific link between internal and external policies as stipulated in Article 21 TEU. In the same vein, the Commission sets out in its communication on Global Europe a number of objectives to be achieved. In the AFSJ the picture looks slightly different. Not only is this area characterized by a backlog in the sense that it is catching up and slowly is being “Lisbonized,” but this is an area

⁹⁰ Claudio Matera, *The Influence of International Organisations on the EU’s Area of Freedom, Security and Justice: A First Inquiry*, in BETWEEN AUTONOMY AND DEPENDENCE: THE EU LEGAL ORDER UNDER THE INFLUENCE OF INTERNATIONAL ORGANISATIONS 269 et seq. (Stephen Blockmans & Ramses Wessel eds., 2013).

⁹¹ Ellis Ferran, *Where in the World is the EU Going?*, in THE REGULATORY AFTERMATH OF THE GLOBAL FINANCIAL CRISES 99 (Ellis Ferran et al. eds., 2012).

⁹² Council Framework Decision 2002/475/JHA, 2002 O.J. (L 164); Council Framework Decision 2008/919/JHA, 2008 O.J. (L 330).

characterized by greater caution from the Member States regarding their willingness to surrender sovereignty and where the EU only very recently received legislative powers. The Commission promises to establish a Global Europe set as an objective of EU trade policy to play a leading role in sharing best practices and developing global rules and standards.⁹³ As Cremona points out, the Commission's promise of establishing a Global Europe set as an objective of EU trade policy to play a leading role in sharing best practices and developing global rules and standards.⁹⁴ Moreover, this means that the EU has to take into account worldwide best practices when developing regulatory standards in new areas, most prominently the AFSJ.

The question of coherence between internal EU values, objectives, and standards, and external action arises on a number of occasions here.⁹⁵ But the EU justification is that of market construction and ultimately one of EU values and the bolstering of investor confidence. So the classic question is still, how much regulatory power should the EU possess? How much market creation is "enough" to activate the use of Article 114 TFEU?⁹⁶

The market in emission trading provides a similar picture to that of the AFSJ endeavors. As Bogojevic argues, environmental law and the emission trading scheme should not be seen in isolation from the general regulatory framework, namely that of the internal market and EU market making.⁹⁷ So the EU endeavor of constructing a market is crucial for understanding EU policies, from environmental protection to that of the fight against crime. There is, thus, a clear overlap between the internal market powers and that of the AFSJ. It has several important consequences. Aside from the technical arrangements in the AFSJ as mentioned above—the opt-outs and the emergency brake—Article 69 TFEU emphasizes the extra importance of subsidiarity within the criminal law field and attention to national diversity, and it could be emphasized that that actually means an extended obligation in justice and home affairs to take such an obligation seriously.

⁹³ Marise Cremona, *Expanding the Internal Market: An External Regulatory Policy for the EU?*, in *THE EU'S ROLE IN GLOBAL GOVERNANCE* 162 et seq. (Bart van Vooren, Steven Blockmans & Jan Wouters eds., 2013).

⁹⁴ On ACTA, see Ben Farrand, & Helena Carrapico, *Copyright Law as a Matter of (Inter)national Security?: The Attempt to Securitize Commercial Infringement and its Spillover onto Individual Liability*, 57 *CRIM., L. & SOC. CHANGE* 373 et seq. (2011).

⁹⁵ *Id.*

⁹⁶ Steve Weatherill, *The Limits of Legislative Harmonisation Ten Years After Tobacco Advertising: How the Court's Case Law has Become a "Drafting Guide"*, 12 *GERMAN L.J.* 827 (2011).

⁹⁷ SANJA BOGOJEVIC, *EU EMISSION TRADING: MARKETS, STATES AND LAW* 56–82 (2013).

I. Global Sanctions Against Counterfeiting Infringements: The Failed ACTA

The Anti-Counter Trade Agreement (ACTA) dealing with worldwide intellectual piracy offenses is particularly relevant in the EU context and offers a concrete example of EU action on the global scale. Specifically, it offers a good test case for EU-AFSJ action with all the above components as discussed earlier in this article in place; that is, criminal law sanctions, competence and regulatory efforts in the EU context. The proposed agreement failed however as the European Parliament voted no to its adoption on 4 July 2012.

For our purposes, the ACTA represents more than global standard setting; it should also be viewed against the history of the EU's endeavors to fight intellectual property infringements and the longstanding battle to adopt criminal law sanctions in this area. Thus, the basic idea of the ACTA within the EU internal context is by no means new. For a long time, the EU has tried to establish a criminal law system to fight piracy and counterfeiting, but those proposals pre-Lisbon were always stranded in the legislative process. For example, in 2004 the Commission presented a Directive⁹⁸ that initially referred to the use of criminal law, but this reference was later amended as the European Parliament voted against the idea of allocating a criminal law competence to the EU.⁹⁹ Thereafter, the Commission adopted a new proposal (replacing COM (2005) 276) for a Directive (COM (2006) 168 final)¹⁰⁰ to combat intellectual property offenses, but the proposal was later abolished.¹⁰¹ Against this backdrop it is perhaps not so surprising that any such ambitions on the global stage would fail. The difference is that, internally, the EU now has the competence to enact sanctions of a criminal law character. Hence it could perhaps be cautiously speculated that the EU will first have to overcome the internal battle and accept such sanctions before it can be done in the global sphere. As noted above, this means that the EU has to take into account best practices worldwide when developing regulatory standards and internal enforcement of intellectual property rules.

⁹⁸ Directive 2004/48/EC, 2004 O.J. (L 157).

⁹⁹ *Revised Proposal for a Directive on Measures and Procedures to Ensure the Enforcement of Intellectual Property Rights*, COD (2003) 24 final (Feb. 16, 2004).

¹⁰⁰ *Proposal for a European Parliament and Council Directive on Criminal Measures Aimed at Ensuring the Enforcement of Intellectual Property Rights*, COM (2006) 168 final (Apr. 26, 2006).

¹⁰¹ During the legislative process of this instrument, Members of the Legal Affairs Committee backed the overall aim of the Directive and amended some of its provisions. They excluded patent rights from its scope and decided that criminal sanctions should only apply to those infringements deliberately carried out to obtain commercial advantage. *Enforcement of Intellectual Property Rights*, EUROPEAN COMMISSION (Oct. 3, 2014), ec.europa.eu/internal_market/iprenforcement/index_en.htm (last visited Feb. 10, 2015).

Finally, the EU as a global actor in the context of market making also poses the question of what values should form the EU's agenda here.¹⁰² It is clear that non-market values now influence the EU market enterprise¹⁰³ and that it is therefore crucial that the values in question are the values representative for a successful AFSJ cooperation. So far most of the values on the EU agenda in the context of criminal law have been focused on precautionary market creation and a preventive approach to criminal law, largely neglecting the need for robust human rights concern.¹⁰⁴

H. Conclusion: A Fountain That Keeps Pouring

This paper has attempted to assess the EU's current tactics in the fight against financial crimes by reviewing it from the perspective of "regulatory" and by drawing on examples from political science to better understand the AFSJ legal framework. In doing so, this paper sought to problematize the EU's current approach to the fight against EU money laundering and cyber crime. It was argued that a better understanding of what it means to speak about "regulatory" would improve the AFSJ legislative grid. This paper also pointed to the hybrid dimension of AFSJ law and how it offers a good test case for understanding the interaction of the different layers of European law, whether mainstream internal market law, AFSJ law, or external relations. The objective of this paper was to question the underlying rationale of the market concept when discussing the fight against financial crimes in EU law and what external "bouncing" effects it may have. In addition, this paper placed the EU's regulatory efforts in this area by locating it in the context of the current tide of global EU action. The study of EU financial crime poses difficulties as it demonstrates a very complex relationship between various actors and various legal bases and offers an example of non-market values read into Article 114 TFEU. In the words of Weatherill, there is a pressing need for all actors in the EU legislative carousel to make the crucial assessment of how much centralization is worth pursuing where it will damage local autonomy.¹⁰⁵

The contemporary EU has become far more than a regulatory state fixed on contained market-making objectives, being that of a European social project.¹⁰⁶ Yet it is not just a social project, as it is increasingly taking over "state"-like features, such as sanctioning

¹⁰² See, e.g., Bruno De Witte, *Non-market Values in Internal Market Legislation*, in REGULATING THE INTERNAL MARKET 61 et seq. (Niamh NicShuibhne ed., 2006).

¹⁰³ Case T-526/10, *Inuit Tapirijit Kanatamj and Others v. Commission* (2013) (unpublished), available at <http://eur-lex.europa.eu/legal-content/EN/NOT/?uri=CELEX:62010TJ0526>.

¹⁰⁴ See Ester Herlin-Karnell, *The Development of EU Precautionary Criminalization*, 1 EUR. CRIM. L. REV. 149 (2011).

¹⁰⁵ Weatherill, *supra* note 96, at 827.

¹⁰⁶ Steve Weatherill & Anand Menon, *Legitimacy, Accountability and Delegation in the European Union*, in ACCOUNTABILITY AND LEGITIMACY IN THE EUROPEAN UNION (Anthony Arnall & David Wincott eds., 2002).

powers, which have a direct impact on EU citizens. It now encompasses a European area of freedom, security, and justice, and the EU is an increasingly important player on the sanction scene. While financial regulation and the fight against financial crime is still at the heart of the EU's "getting tough on crime" approach, the old internal market endeavors in this area are now much more complex than they used to be. The security within the AFSJ confirms that the preventive focus seems not to be running out of petrol. Rather, it is fueled by the internal market—and external effects—of EU action in the ASJ sphere. More mileage may however be found elsewhere; the Charter of Fundamental Rights offers a good starting point with regard to the limits set to security reasoning.

On the one hand, the financial crimes sector ought simply to be part of the AFSJ mission: Fighting crime. But the EU relies instead on the internal market provision of Article 114 TFEU creating as it does a complicated double system of non-criminal law sanctions on the one hand and criminal law sanctions on the other. Whilst this paper has mainly discussed regulatory issues, it cannot be denied that the fundamental rights dimension is perhaps the most important question for the future. International agreements in EU criminal law and multilateral cooperation might be needed to fight crime effectively. Yet the challenges it poses and how the rights of the individual can be upheld in the increased focus on effective rule making poses conundrums for the future.

While ACTA failed, it was probably not the last attempt. The Fourth Money Laundering Directive and the EU cyber crime measure take one giant step further as an example of regulatory powers in the EU machinery of financial regulation, with consequences inside and outside Europe while making the Member States its local policemen.

