European Criminal Law and European Integration Theory

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A. Introduction

The study of European Criminal Law is relatively new in the wider field of European Law or European Studies. Strictly speaking it wasn't until the Maastricht Treaty that Justice and Home Affairs was mentioned officially in the context of the EU and not until the Amsterdam Treaty (Article 31) and the elaboration on the notion of 'an area of freedom security and justice' that common action in the areas of police and judicial cooperation came within the framework of the Treaties. In fact, it is the special meeting of the European Council in Tampere[1] (1999) and the strategy paper on the prevention and control of organised crime[2] that is often sited as the beginning of the Communitarisation of criminal law, which was later strengthened by the Treaty of Nice and the creation of Eurojust. Since Tampere there have been, of course, numerous reports, initiatives and ECJ decisions elaborating and strengthening this relatively new area of European integration, which have been well documented elsewhere so there is no need to repeat them here.[3] Suffice it to say that at the moment this is one of a few still developing fields where there is scope for 'further integration' and, therefore, can be seen as fertile ground for the testing and even development of European integration theory.

Given that it is a relatively new field, it is not surprising that from a theoretical point of view EU criminal law is dominated by national legal perspectives, approaches and legal philosophy. Not that there have not been efforts to examine

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1 Tampere European Council, Presidency Conclusions, 15-16 October 1999. *See* http://www.presidency.finland.fi/frame.asp

2 *See The Prevention and Control of Organized Crime: A European Union Strategy for the Beginning of the New Millennium*, OJ 2000 C 124, 3.5.2000.

3 *See, for example*, W. Perron, *Perspectives of the Harmonization of Criminal Law and Criminal Procedure in the European Union*, *in* E. Johannes Husaba & A. Strandbakken (Eds.), Harmonization of Criminal Law in Europe 5-22 (2005); J. A. E. Vervaele, *The Europeanization of Criminal Law and the Criminal Law Dimension of European Integration*, College of Europe Research Papers in Law, No.3 (2005); G. Vermeulen, *Where Do We Currently Stand With Harmonisation in Europe*, *in* A. Klip & H. van der Wilt (Eds.), Harmonisation and Harmonising Measures in European Law 65-78 (2002); H. Xanthaki, *Cooperation in Justice and Home Affairs*, *in* J. Gower (Ed.), European Union Handbook 234-242 (2002).

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specific third pillar areas issues in the context of European integration theory[4] or more specific aspects of criminal justice cooperation in the context of governance and EU internal security.[5] What we do lack is an attempt to place EU criminal law in the wider context of European integration theory so that we have a preliminary 'longitude and latitude' of criminal law in the process of 'further integration'.

It is, of course, impossible for an article of this length to examine systematically EU criminal law against all theories of European integration. So, this article will attempt to examine EU criminal law against the main approaches to European integration and set some tentative parameters with reference to the theoretical study the development of EU criminal law in the context of European integration theory.

B. Conventional Wisdom and European Integration: Micro- and Macro-theoretical Perspectives

Different theories of integration have been offered in different periods as theoretical appraisals of the Community's development and evolution and by now it has become almost a cliché, if not an axiom, to say that no single theory can account for all developments throughout the Community's history.[6] The general problem has been the fact that the Community has kept springing surprises on the unsuspecting observers of European integration. Obviously "every theoretical journey has its rewards"[7] but in many ways Donald Puchala was right when he argued that experts came to different conclusions about European integration because they focused on different aspects of it.[8]

One of the features in the development of European integration theory has been the change in emphasis from general theories (*macro*) to sectoral theories (*micro*). Macro-theories attempted to give a full and comprehensive account of the integration process in Europe. They were the main theoretical tools used during the early years of the Community and were characterised by the original neofunctionalist *v.* realist (intergovernmentalist) jousting, federalist perspectives as well as attempts to apply new general theories, such as interdependence theory.[9] Essentially macro theories concentrated on the issue of sovereignty and polarised arguments by pursuing the nation state versus supranational state or

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4 *See, for example*, V. Guiraudon, *European Integration and Migration Policy: Vertical Policy-making as Venue Shopping*, 38(2) Journal of Common Market Studies 251-271 (2000).

5 *See, for example*, M. den Boer, *Plural Governance and Internal EU Security: Chances and Limitations of Enhanced Cooperation in the Area of Freedom, Security and Justice*, Paper for ARENA, Oslo, 25.5.04 (2004).

6 *See, for example*, M. O'Neill, The Politics of European Integration: A Reader, at 141-144 (1996); D. N. Chryssochoou, *et al.*, Theory and Reform in the European Union 51-52 (1999); B. Rosamond, Theories of European Integration 186-189 (2000).

7 Chryssochoou *et al., supra* note 6, at 51.

8 *See* D. J. Puchala, *Of Blind Men, Elephants and International Integration*, 10 Journal of Common Market Studies 267-284 (1972).

9 R. Keohane & J. Nye, Power and Interdependence: World Politics in Transition (1977).

superstate argument. Scholars directed most of their attention to finding cause and consequence relationships, which would be instrumental to the formulation of a general theory applicable to the EU. Community developments were studied in the hope that they would identify the, ever elusive, pattern of the European integration process. But conclusions depend on their premises and the premises were highly influenced primarily by supranationalist or realist interpretations, which over the years developed their own research agendas. Such interpretations have some inherent disadvantages. For example, by focusing on elites, pressure groups and institutions, and by underestimating the power of the nation state we miss half the elements of the process. Similarly, by concentrating on the nation state we ignore institutional dynamics which, without doubt, exist and influence the integration process in the EU. Useful and interesting as this approach was in the early years the 'old debate'[10] started to show its limitations and there was a gradual shift towards micro theories.

The reason for these changes in emphasis is easy to understand, given the historical development of the Community. The lack of progress towards further integration in the 1966-1985 period and the lack of 'history making' developments from which broad conclusions about the direction of integration could be drawn meant that old arguments about the nature of the nation state and the nature of a superstate were being regurgitated when the Community offered opportunities to examine its complex polity in different terms. Macro theories operate at a wider level making them rather inappropriate for the close examination of specific areas of the system, e.g. bargaining in the Council. Experts agreed that the Community system was a very complex phenomenon. The growth of the system and the need for the empirical examination of specific aspects of it, e.g. specific policy areas, particular institutional developments and the decision-making process, meant that micro theories were more appropriate as analytical tools. Micro theories made no universal claim about the integration process and concentrated instead on governance issues, i.e. issues related to the process of making collective decisions.[11] In addition, some experts put forward the view that international relations theory was not necessarily the appropriate tool for examining the Community since EU politics is in many ways similar to national politics attempting to answer questions about allocation and distribution of resources. In this sense, comparative politics research design may be just as, if not more, appropriate as a conceptual tool.[12] Essentially, the shift to micro theoretical perspectives involved a new focus on theories which aim to explain "… elements of particular slices of EU polity."[13]

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[10] Rosamond, *supra* note 6, at 105-109.

[11] *See, for example,* G. Marks, L. Hooghe & K. Blank, *European Integration from the 1980s: State-Centric v. Multi-level Governance*, 34(3) Journal of Common Market Studies 341-378 (1996); J. Richardson, *Policy-making in the EU: Interests, Ideas and Garbage Cans of Primeval Soup*, *in* J. Richardson (Ed.), European Union Power and Policy-Making 3-23 (1996); T. Risse-Kappen, *Exploring the Nature of the Beast: International Relations Theory and Comparative Policy Analysis Meet the European Union*, 34(1) Journal of Common Market Studies 53-80 (1996).

[12] *See* S. Hix, *The Study of the European Community: The Challenge of Comparative Politics*, 17(1) West European Politics 1-30 (1994). *See also* S. Hix, The Political System of the European Union (1999).

[13] Rosamond *supra* note 6, at 126.

In macro theoretical terms such studies were frowned upon as instances of 'low politics'[14] and therefore unsuitable for generalisations about the nation state versus supranational institutions debate. However, as Richardson noted,[15] these low politics policy-making studies amount to nine-tenths of the work of the EU, which remains largely hidden and unexplored.

The shift towards micro theoretical perspectives has not ended the 'old debate'. Experts have continued to examine the EU through neofunctionalist or intergovernmentalist lenses and as Peterson has argued "… the gap between theories used to explain broad patterns of European Integration and those which seek to explain sectoral EU decision-making remains wide."[16] However, the truth is that the micro-macro see-saw has produced a *symbiosis* of macro- and micro-theoretical perspectives while generating a search for a 'synthetic' approach that combines elements of both. As a rule of thumb, supranationalist and realist perspectives tend to operate at the *macro* level while actors' relationships focus on the *micro* level, on issues such as bargaining. Essentially, all theories touch on these parameters. The difference is the degree of saliency they attach to each of them. As Wessels noted, "… for the growth of the EU system neither a 'deterministic law' nor an 'accidental political will' are to be made responsible".[17]

At a *macro*-theoretical level the reform of the Treaty (starting with the SEA and proliferating with the TEU, the Amsterdam Treaty and the Treaty of Nice) has seen a return of the basic theoretical themes of the 1950s and 1960s: the basic 'integration dialectic'.[18] The 'integration dialectic' refers to both the fundamental dilemma of the member states – which is the need to proceed with further integration while safeguarding more traditional conceptions of sovereignty – and the tension between forces favouring integration and those opposing integration. In this sense, Community developments, especially 'history making developments', represent the possible 'synthesis' at that moment in time. Inevitably the question of national sovereignty, which dominated the early years of the Community labelling gradualist interpretations of the Community system as pro-European and realist interpretations as anti-European, has made a comeback. The *Eurosceptics* versus *Europhiles* debate as well as the growth of sceptics amongst the ranks of European politicians indicate that the issue of sovereignty remains at the epicentre of European integration. Clearly there has been a revival of traditional general theories of integration, especially after the strengthening of integration following the SEA and the TEU. However, the

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[14] S. Hoffmann, *Reflections on the Nation-State in Western Europe Today*, *in* L. Tsoukalis (Ed.), The European Community Past, Present and Future 21-38 (1983).

[15] Richardson 1996, *supra* note 11, at 5.

[16] J. Peterson, *Decision-Making in the European Union: Towards a Framework for Analysis*, 2(1) Journal of European Public Policy 70 (1995).

[17] W. Wessels, *The Growth of the EC System – a Product of the Dynamics of Modern States? A Plea for a more Comprehensive Approach*, Paper presented at the XIVth World Congress of IPSA, at i (1988).

[18] C. Stefanou ¶ H. Xanthaki, A Legal and Political Interpretation of Article 215(2) [new Article 288(2)] of the Treaty of Rome: The Individual Strikes Back 25-26 (2000).

problems of general theories remain especially when it comes to 'prediction', the latter being important as most analyses of events or developments in the EU are subject to *post hoc* examinations.

At the *micro*-theoretical level theorists concerned with the EU have been most productive and successful. Back in 1975 Harrison warned against a scientific procedure where generalisations about European integration are based on a single instance of a phenomenon and he rightly noted that "… European integration is not a single event. It is a term which refers to a variety of comparable decisions, actions and reactions in a specific environment."[19] Yet, because of the lack of progress in the 1970s and early 1980s many observers of the EC chose to concentrate on single instances developing, and sometimes elevating, micro theories as general theories. Thus, domestic politics or international political economy have at times been looked at as possible general theory candidates. While the limits of these single factor analyses were obvious from the beginning their success in accounting for specific developments in the Community system, especially in the policy field, and their widespread acceptance as credible theoretical tools resulted in their frequent application on Community developments. The exposure of these approaches inevitably softened the theories' 'rough edges' and perfected their exegetic powers.

C. Which Theoretical Perspective for European Criminal Law?

As noted in the introduction shifts in emphasis between macro and micro theoretical perspectives have been a feature in the development of theoretical endeavours about the European integration process. Generally speaking, macro or grand or general or core theories claim to have an adequate explanation of the European integration process as whole. In other words these are offered as complete packages and their starting point is the basic question 'what is the EU' or, as Haas called it, 'the dependent variable'.[20] They all come with a list of propositions and conditions but at their core rests a fundamental proposition about the nature of the EU. And because of the way the study of the EU evolved in the 1950s and 1960s[21] the two main fundamental propositions centre around the role of non-state actors, such as the EU, in the world polity and therefore the issue of national sovereignty.

In contrast, micro or sectoral theories do not aim to explain the whole of the integration process but aspects of it, concentrating on individual actors' behaviour[22] or specific developments in the process of integration. In the context

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[19] R. J. Harrison, Europe in Question 23 (1974).

[20] E. B. Haas, *The Study of Regional Integration: Reflections of the Joy and Anguish of Pretheorising*, *in* L. N. Lindberg & S. A. Scheingold (Eds.), European Integration: Theory and Research 18 (1971).

[21] Rosamond *supra* note 6, at 10-11.

[22] *See* D. McKay, Federalism and European Union A Political Economy Perspective 74 (1999).

of European integration micro theoretical perspectives take two forms. Firstly, those which have evolved from general theories. In other words, those which evolved from the systematic study of particular aspects (propositions) of macro theories. For example, some general theories regard the central institutions, such as the Commission, as vital to the process of integration. Other general theories see the member states (nation-states) as the only important actors. Consequently some research concentrated on specific propositions or conditions relevant to a macro theoretical perspective, e.g. in depth studies of the Commission or the ECJ focusing on its impact on the integration process. Although in the early days such research was linked back to general theories, over the years the close and continuous study of institutions, such as the Commission, or the way in which member states form policy preferences, which subsequently influence decision-making, has generated its own set of hypotheses about their functions and role in the integration process. Secondly, those which regard the EU as a *sui generis* development and are not at all concerned with propositions put forward by general theories. They tend to study particular aspects of the EU – i.e. a specific policy area or a specific institution or a specific EU process – for two main reasons: (a) either because they have identified these aspects as meriting attention for being *de facto* salient within the EU, e.g. the influence of the Franco-German relationship on policymaking or (b) because they are concerned with 'governance' and therefore areas such as policy bargaining in the Council, which identify 'who gets what', are *de facto* legitimate areas of research.[23]

Clearly some micro theoretical perspectives have a direct relationship to macro theories, even if this relationship is not acknowledged – either because the experts do not agree with other tenets of that theory or because they see such research as part of governance studies. However, there is also the view that micro theoretical perspectives could be related to general theories if only there was a wider research agenda.[24] In other words, there is also the view that micro theoretical perspectives could be directly or indirectly related to macro theories and that there is an overlap – intended or unintended – between sectoral perspectives and general theories.

But why do we care about macro-micro perspectives in the context of EU Criminal Law? As mentioned already despite the fact that criminal law is a fast moving policy area we still lack an understanding of its standing in the context of the European integration process. Should EU criminal law and its impact on the EU processes be examined through macro theoretical perspectives as part of the integration dialectic or should we concentrate on micro perspectives, i.e. specific instances of criminal law cooperation (e.g. specific agreements or relevant ECJ decisions) in order to understand and analyse its relevance – if any – on the European integration process? In order to answer such questions it is necessary to look at EU criminal law from macro and micro theoretical perspectives individually.

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[23] Rosamond has noted four main areas where investigations of the EU are located. *See* Rosamond, *supra* note 6, at 14-16.

[24] *See* Wessels' comment about pieces of research floating around and not being taken up by colleagues, hence his plea for a more comprehensive approach. *See* Wessels, *supra* note 17, at 12.

I. European Criminal Law from a Macro-Theoretical Perspective

Looking at the history and development of criminal law cooperation in the EU[25] it becomes evident that right from the onset this was regarded as an important area for national sovereignty indeed one that the member states wanted to keep firmly within their grasp. The Communitarisation of JHA with the TEU confirmed the salience that member states attached to this field by the fact that JHA was and still is an intergovernmental pillar, in other words a pillar where it is possible for a member state to block proceedings through the use of a veto – while the role of the ECJ is drastically reduced.

In some ways the development of EU criminal law confirms realist interpretations of the integration process where national governments are seen as monolithic, trying to protect their hard shells against penetration from international organisations, such as the EU, and having the satisfaction of their domestic imperatives as their sole purpose.[26] The EU is seen as the forum where this continuous struggle for the satisfaction of strictly national priorities and requirements takes place. Obviously, the issue of national sovereignty becomes central to the realist argument. Indeed, one can even argue that EU criminal law is in line with the distinction described by Stanley Hoffmann, one of the leading advocates or realism. According to Hoffmann a distinction must be made between 'high' and 'low' politics.[27] High politics includes issues that governments regard as vital to the existence of the nation state. while low politics includes less controversial, largely administrative issues. Hoffmann maintained that agreement on issues of low politics is easier than agreement on matters of high politics because national governments feel less threatened and are, therefore, able to make some concessions which facilitate agreements. Hoffmann has subsequently modified his position, not least because practice showed that the distinction between high and low politics is not at all clear; less controversial issues can, and do, become salient where national sovereignty is not jeopardised. However, in the case of European criminal law it is evident that member states have identified criminal law as one of those areas where loss of national sovereignty is, at least at this stage, unwarranted.

Yet, at the same time, there seems to be some progress when it comes to cooperation in the field of EU criminal law,[28] as evident by recent legislative instruments such the 2000 Mutual Legal Assistance Convention and its Protocol, the Framework Decision on Joint Investigations Teams,[29] the Framework Decision

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[25] *See* Perron, *supra* note 3, at 5-11.

[26] *See* W. J. Feld, West Germany and the European Community-Changing Interests and Competing Policy Objectives 22-25 (1981); *also see* W. Hager, *Δημόσιο Συμφέρον και Αγορά: Η Ευρωπαϊκή Προοπτική του 1992*, *in* P. Kazakos (Ed.), Η Εξέλιξη της Ευρωπαϊκής Αγοράς στην Ευρώπη και η Ελλάδα, 435-469 (1989).

[27] S. Hoffmann, *Reflections on the Nation-State in Western Europe Today*, *in* L. Tsoukalis (Ed.), The European Community Past, Present and Future 21-38 (1983).

[28] *See* Council of the EU, The Hague Programme: Strengthening Freedom, Security and Justice in the EU, 16054/04 JAI 559, 13.12.2004, at 22.

[29] Framework Decision 2002/465/JHA/ of 13.6.2002 on joint investigation teams, OJ 2002 L 162, at 1.

on Combating Terrorism,[30] the Framework Decision on Money Laundering,[31] the European Arrest Warrant,[32] the Framework Decision on the Execution of Orders Freezing Property or Evidence.[33] Clearly after years of cooperation EU developments are beginning to have an impact at the national level.[34]

This progress could be attributed to the well known neofunctionalist 'expansive logic of integration'[35] that has at its centre the notion of 'spillover' – which is based on Mitrany's doctrine of 'ramification'.[36] There are two types of spillover associated with neofunctionalism. The first is what Monnet called 'functional spillover' and the second is 'political spillover'. The idea behind functional spillover is that the integration of one policy sector between states will create pressures for the integration of other sectors. Obviously, if the sector is very salient the pressures for further integration will increase. It is equally important, though, that the chosen sector is not vital to the very existence of the states because then the all important support from the political elites, as well as the states themselves, will disappear, thus jeopardising the future of this process. While this process of spillover, starting with a carefully chosen sector, would go on, another process of 'political spillover' would take place. Integration in the neofunctionalist model would be a process mostly carried out by elites[37] and since the central institution (the Commission) would be the leading group of Eurotechnocrats, it would be their task to ensure the shift of people's loyalties from the national to the European level.[38]

So, is it a case of 'high' politics or a case or 'spillover'? Or is it all part of the integration dialectic? As has been pointed out, it is "… an accepted norm of EU decision-making … that issues may remain on the Union's agenda for long periods of time, even though they remain far from resolution"[39] The second money

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30 Framework Decision 2002/475/JHA of 13.6.2002 on combating terrorism, OJ 2002 L 164, at 3.

31 Framework Decision 2001/500/JHA of 26.6.2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, OJ 2001 L 182, at 1.

32 Framework Decision 2002/584/JHA of 13.6.2002 on the EAW and the surrender procedures between member states, OJ 2002 L 190, at 1.

33 Framework Decision 2003/577/JHA of 22.7.2003 on the execution in the EU of orders freezing property or evidence, OJ 2003 L 196, at 45.

34 *See* the point about insider dealing regulations in G. Dannecker, *Strafrecht der Europäischen Gemeinschaft*, *in* A. Eser & B. Huber (Eds.), Strafrechtsentwicklung in Europa, 4.3 (1995). *See also* L. Moreillon & A. Willi-Jayet, Coopération judiciaire pénale dans l'Union européenne (2005), chapter 3.

35 *See* E. B. Haas, The Uniting of Europe, Political Social and Economic Forces 1950-1957 (1958), in particular Chapter 9.

36 *See* D. Mitrany, A Working Peace System (1966). *See also* R. Dehousse, *Rediscovering Functionalism*, Harvard Jean Monnet Working Paper No.7 (2000).

37 *See* L. N. Lindberg, The Political Dynamics of Political European Integration 8-12 (1963); *also see* S. George, Politics and Policy in the European Community 21-24 (1985).

38 For a discussion about the 'shift of loyalties' *see* Rosamond, *supra* note 6, at 65-68.

39 J. Peterson & E. Bomberg, Decision-Making in the European Union 55 (1999).

laundering Directive is a good example of this practice[40] and if we look more carefully into EU practices of past decades we will find that some reforms took perhaps 10-20 years from the time they were initially put forward till they were placed within the framework of the Treaty.[41] Waiting for the so-called 'window of opportunity' or 'policy window'[42] is a normal EU practice accepted by the member states and the EU institutions. In the past, because of the limited scope of the Treaty the member states had allowed themselves to extend cooperation into policy areas not covered by the Treaty under the old Article 235 (new Article 308). Cooperation under this Article was strictly intergovernmental and the Commission did not have a role. Yet, over the years, one after another policy areas on which cooperation was agreed under old Article 235 were gradually brought within the framework of the Treaty through reform of the Treaty. The development of European Political Cooperation, a policy area which has traditionally been seen as the bastion of national sovereignty, is a good example of this practice. Initially agreed in the 1974 Paris Summit under old Article 235, European Political Cooperation was brought within the framework of the Treaty with the Single European Act and subsequently strengthened with the Maastricht Treaty. Incidentally, Research and Technological Development, Environmental Policy and Social Policy are also examples of a policy area which was initially agreed under old Article 235 and subsequently brought within the framework of the Treaty (by the Single European Act). This slow but steady strengthening, harmonisation and, finally, Communitarisation of policy areas where there was strictly intergovernmental cooperation is typical of neofunctionalist 'gradualism' (something that experts seem to have rediscovered recently[43]). Yet, at the same time the fact that policy areas such as criminal law remain intergovernmental indicates that the member states continue to have reservations about further integration in policy areas which erode national sovereignty. Whether the various initiatives or Framework Decisions will gradually Communitarise criminal law remains to be seen but the theoretical connection could be explored more explicitly.

Macro-theoretical perspectives focusing on national sovereignty were often seen as part of the 'old argument' and were rather unfashionable. However, the growth of Eurosceptics in practically every member state, the failure of the Constitutional Treaty, the shock of the 2004 enlargement and the current slow progress – some might even call it institutional inertia – is reminiscent of the EU's slow development in the 1970s and intergovernmental/realist perspectives are

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[40] *See* C. Stefanou & H. Xanthaki, *The EU Draft Money Laundering Directive: A Case of Inter-institutional Synergy*, (3)4 Journal of Money Laundering Control (2000).

[41] For example, if we look at the reform proposals of the 'Vedel Report' (*Bulletin of the EC*, Supplement 4/1972) or the 'Tindemans Report' (*Bulletin of the EC*, Supplement 1/1976) we will see that these reports had as their themes the strengthening of the member states' economic and political and institutional reform with specific proposals that were eventually included in the Single European Act and the Maastricht Treaty. In other words, it took almost 20 years for some of the proposals to become part of the *acquis* (Communitarisation).

[42] Stefanou & Xanthaki 2000, *supra* note 40, at 337.

[43] *See* P. C. Schmitter, *Neo-Neo-Functionalism: Déjà vu, all over again?*, *in* A. Wiener & T. Diez (Eds.), European Integration Theory (2003); L. Hoghe and G. Marks, *The Neofunctionalists Were (almost) Right: Politicization and European Integration*, ConWEB No.5 (2005).

once again making a come back.[44] After all experience shows that the European integration process goes through high points when there is rapid progress and low points when progress is slow. The development of EU criminal law might, therefore, become an interesting and important case study on the traditional intergovernmental *v.* supranationalist dialectic at a time when movement towards further integration is minimal. Under this prism, the role of the ECJ becomes

TABLE 1: European Criminal Law: Macro-Theories and expected outcomes

	The EU Sphere		**International Sphere**	**National Sphere**
	Institutional context	*National-EU Context*		
Functionalism/neofunctionalism	EU institutions, especially the Commission expected to be the main forces (ECJ can assist through rulings). Progress expected to strengthen the position of institutions and transfer sovereignty from the national to the supranational setting.	Decision-making process expected to be dominated by domestic concerns but Commission expected to form and pursue a maximalist agenda, which would be 'irresistible' to member states, through the use of pay-offs if necessary. Progress expected to result in more communitarisation of this policy area.	Expected to be an impediment to the integration process as external threats tend to emphasise nation state perspectives. Progress emanating from international developments will strengthen the intergovernmental nature of European criminal law.	Expected to be an impediment to further integration as member states resist erosion of sovereignty. However, possibility of 'spillover' and 'learning' to cultivate functional linkages amongst interest driven actors, thus allowing progress.
Realism/intergovernmentalism	Institutions expected to be active but as member states are the main actors Commission and EP proposals expected to be successful only if they coincide with member states' requirements. Treaty not expected to strengthen power of institutions.	Negotiations based on narrowly defined national interest (zero-sum bargaining). Pay-offs successful as long as they do not impinge on sovereignty. Progress generally not expected to favour more QMV (except in very specific instances where there are distinct advantages for doing so).	Security considerations expected to highlight the dominance of the nation state, especially in times of uncertainty. Progress not expected to intensify integration as a result of the international environment, which is not seen as a source of communitarisation.	Member states expected to resist erosion of their sovereignty. Progress not expected to take powers away from the member states, eg transfer of EU criminal law in the first pillar.

[44] *See* G. Majone, *State, Market and Regulatory Competition in the European Union: Lessons for the Integrating World Economy*, *in* A. Moravcsik (Ed.), Centralization or Fragmentation: Europe Facing the Challenges of Deepening, Diversity and Democracy (1998). *See also* G. Majone, *Delegation of Regulatory Powers in a Mixed Polity*, 8(3) European Law Journal (2002).

Federalism	EU institutions, especially the Commission, the EP and the ECJ expected to be the main forces behind progress. Outcome expected to reinforce the gradualist process of integration and strengthen the Union at the expense of national governments.	Treaty expected to shift policymaking from the national to the supranational setting. Introduction of QMV also expected. National legislation expected to streamline with developments at the EU level. Subsidiarity will ensure that national sensitivities and priorities are respected.	Uncertainty expected to bring member states closer together, as the political, economic and security benefits from the creation of a federal EU become evident.	National governments expected to resist 'sharing' power with the EU but may accept some transfer of sovereignty if there are clear and formal demarcation lines between EU and national competences.
Interdependence	Inability of the Commission to gather sufficient strength so that it represents an alternative source of power. Progress not expected to give institutions more powers.	Member states accept present 'restraints' hoping for future 'opportunities' (principle of non-reciprocation). Bureaucratic contact (especially at the EU level) important in the process of negotiation, so Council, European Council and Presidency are important elements in negotiations. Any progress expected to be the outcome of pay-offs on individual policies and variable-sum bargaining.	Emphasis on the effects of International Political Economy on member states. Economic transactions at the epicentre of the international environment and a source of communitarisation. Progress expected to reflect member states economic relationships with third countries.	Member states are the main actors. Transnational and trans-governmental activities erode the power of national governments; however, the principle of non-reciprocation prevails most of the time so some governments may be prepared to accept less equitable 'package deals'.

very important as an agent of further integration – a role which the ECJ played very successfully from 1965 to 1986.[45] Thus, cases where the ECJ rules on the distribution of powers between the first and third pillars in the area of criminal law in such a way that EU criminal law is actually strengthened (such as the recent *Commission v. Council* case 176/03[46]) can become important points of reference and even serve as benchmarks on the process of integration.

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[45] This point has been well argued, *see* A-M. Burley & W. Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 (1) International Organization 40-75 (1993).

[46] *See* C-176/03, Commission of the EC *v.* Council of the EU, [2005] ECR I-7879. *See also* Communication from the Commission to the European Parliament and the Council on the implications of the Court's judgment of 13 September 2005 (Case C-176/03, Commission *v.* Council), COM (2005) 583.

Table 1 sketches out one possible way of linking EU criminal law with macro-theoretical perspectives. Although the list is in no way definitive or exhaustive it, nevertheless, offers one way of approaching progress in EU criminal law with reference to four general theories of integration.

II. European Criminal Law From a Micro-Theoretical Perspective

The current state of literature in the wider field of European criminal law indicates that there is a wealth of empirical research which, though, is sporadically related to micro-theoretical perspectives. The one area where research is sometimes focused is 'governance',[47] in its various guises, or the wider notion of Europeanization[48] (which also has various guises[49] and problems[50]). However, on the whole empirical research is not systematically related to specific micro theoretical perspectives. What we do have in the field of EU criminal law is a lot of empirical research which addresses specific instances of integration either as in depth analyses of specific Directives[51] or initiatives[52] or developments.[53] In other words we have a lot of research on 'events', mostly examined for their own merit. While European integration does consist of important 'events' it is equally important to relate these events to the 'process' (this point will be examined again later in this Article). But what kind of micro-theoretical research is possible in the field of European criminal law? Perhaps more importantly, is there a framework that can be used to peg the various micro theories? Although the breadth of such research can be quite wide, there are – broadly speaking – three main spheres of focus:[54] The National sphere, the EU sphere and the International sphere.

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47 *See, for example*, V. Mitsilegas, Money Laundering Countermeasures in the European Union, A New Paradigm of Security Governance versus Fundamental Legal Principles (2003). *See also* Den Boer, *supra* note 5.

48 *See, for example*, C. Stefanou, *Organised Crime and the Use of EU-wide Databases*, *in* I. Bantekas & G. Keramidas (Eds.), International and European Financial Criminal Law 215-243 (2006). *See also* Vervaele, *supra* note 3.

49 *See* J. P. Olsen, *The Many Faces of Europeanisation*, ARENA Working papers No.1/2 (2001).

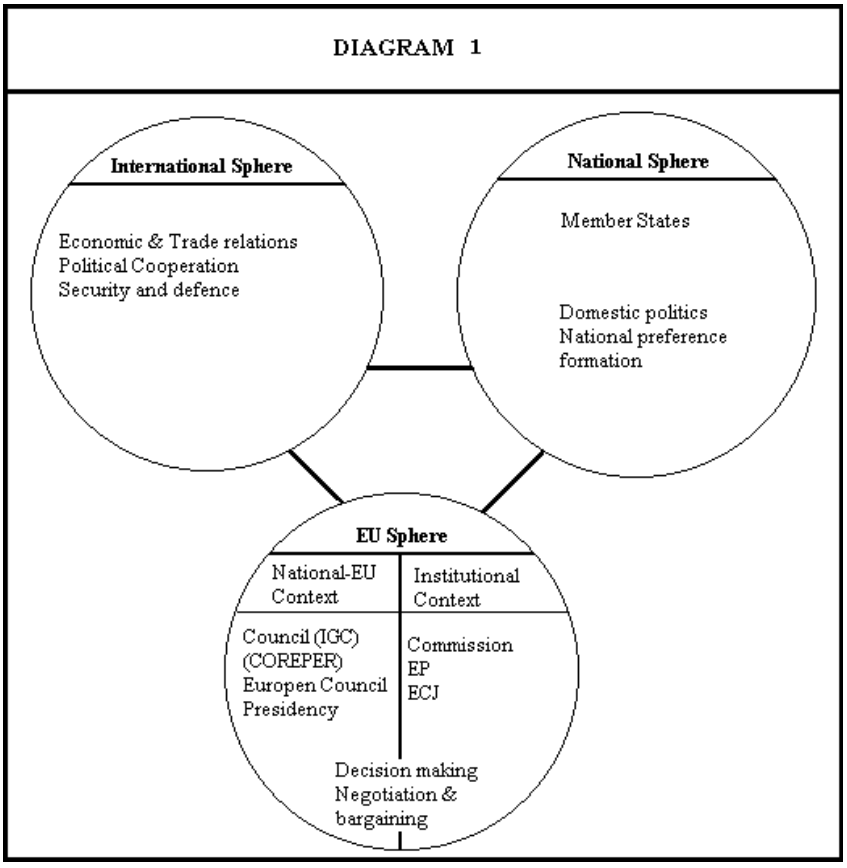
50 C. M. Radaelli, *Europeanisation: Solution or Problem?*, 8(16) European Integration online Papers (2004), http://eiop.or.at/eiop/texte/2004-016a.htm.

51 *See, for example,* H. Xanthaki, *The Duties of Lawyers under the Draft Money Laundering Directive: Is Confidentiality a Thing of the Past?*, 3(2) European Journal of Law Reform 111-129 (2001). *See also* E. Denza, *The 2000 Convention on Mutual Legal Assistance in Criminal Matters*, 40 Common Market Law Review (2003).

52 *See, for example*, H. Nilsson, *The Council of Europe Laundering Convention: A Recent Example of a Developing International Criminal Law*, 2(2) Criminal Law Forum 419-441 (1991).

53 D. Kioupis & I. Bandekas, *Mutual Legal Assistance and Extradition Concerning International Financial Crime in the European Union*, *in* I. Bantekas & G. Keramidas (Eds.), International and European Financial Criminal Law (2006).

54 *See* C. Stefanou, The Dynamics of the Maastricht Process (forthcoming 2007), chapter 1.



(1) *The National sphere* represents the domestic parameters. All those issues and priorities that contribute to the formation of national positions (national preference formation[55]). The key actors are the nation states and the focus is on internal priorities and predicaments, which shape a member state's position on a given issue. Although the formation of national preferences varies from issue to issue and from one EU development to another, economic priorities and long-term national positions on European integration are also important. Strictly speaking, the parallel examination of national preference formation is comparative by nature. By identifying common threads in national preference formation we may be able to explain the formation of minimalist or maximalist coalitions or *ad hoc* coalitions on specific policies. In addition, in depth examinations of national preference formation will allow us to understand why some developments in EU criminal law seem to receive more widespread acceptance and are more rigorously implemented than others.

[55] *See* A. Moravcsik, The Choice for Europe, Social Purpose and State Power from Messina to Maastricht (1998).

(2) *The International sphere* refers to international developments that often shape EU initiatives/responses which, in turn, form EU developments. Classic examples of wider Community developments that resulted from external stimuli here are the commencement of Summit meetings, following the 1973 oil crisis, or the 30th May 1981 Mandate to the Commission[56] that started the process that led to the SEA. A more recent example of specific policy developments in the area of EU criminal law is the EU Money Laundering Directive[57] as well as the European response to terrorist financing,[58] which seem to be the EU's response to stimuli from the international environment. The traditional areas of interest here are the EU's external policy (especially US-EU relations) and geopolitical/security concerns. The international environment is important because depending on the issue at hand it can be a source of Communitarisation or a source of reinforcement of national positions. In recent years, however, proposals or developments that had international support or were responses to cross-border problems seem to have been more successful than those which did not. It is possible here to distinguish between the position and interests of the EU as an actor in the international system and the position and interests of individual member states. However, such differences are resolved in the EU sphere.

(3) *The EU* sphere represents the institutional dynamics of the Union and can be divided into two contexts.

(i) The institutional context. The actors here are the traditional 'pro-integrative forces' represented by the Commission, the EP, and the ECJ. Their history, importance and influence on the European integration process are the main features of institutionalism[59] (or new institutionalism[60]), a theory that places emphasis on the role of institutions in the development of specific policy areas as well as European integration as a whole. As the study of the EU has developed it is practically unthinkable to omit or exclude the institutional context for most analyses of EU developments, indeed recent theoretical paradigms (e.g. new institutionalism) stress the influence that central Community institutions exert on the integration process. In particular we are interested in both strategic and tactical moves by the institutions to advance the process of integration. In the context of European criminal law, the ECJ, despite its limited competence, becomes an important institution to watch because of its 'law creating' abilities and because during periods of 'slow' integration through its activist rulings it can give the process of integration a useful kick-start.

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56 *See Bulletin of the EC*, Supplement 1/1981, point 6.

57 Stefanou & Xanthaki 2000, *supra* note 40, at 325-335.

58 Directive 2005/60/EC 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, OJ 2005 L 309.

59 D. Beach, The Dynamics of European Integration, Why and When EU Institutions Matter (2005); J. G. March & J. P. Olsen, *Elaborating the 'New Institutionalism'*, ARENA Working Paper No.11 (2005).

60 Originally referred to as institutionalism, the terms neoinstitutionalism or new-institutionalism are also acceptable – although strictly speaking advocates of different versions of this approach tend to use different terms. *See* Rosamond, *supra* note 6, at 113-122.

(ii) The national-Community context. The main actor here is the Council and permanent delegations, such as COREPER, usually seen as the nationalistic, 'anti-integrative' forces. Traditionally emphasis is placed on bargaining and the negotiating process (e.g. 'two-level games',[61] bureaucratic politics etc[62]), although in recent years institutionalist perspectives have also become relevant and prominent. A key feature in this sphere is the Council and the European Council, especially European Councils that result in 'history making' decisions because of the dynamics they produce in the shaping of the final agreement. These are important 'events' in the 'process' of reform and, of course, European integration. Council and COREPER negotiations as well as Working Groups' positions are of particular importance in the context of EU criminal law because it is part of an intergovernmental pillar of the EU and, therefore, agreements tend to be formulated there. With reference to EU criminal law the national-Community context is a crucial area as the intergovernmental character of this policy area dictates that proposals and agreements are almost by default generated and negotiated within the same setting, which is dominated by the member states.

It is, of course, also possible to use micro-theoretical perspectives that cut across different spheres, e.g. Multi Level Governance perspectives,[63] which is something that some experts are doing already even though they do not always relate their findings to the main premises of this theory. In fact, it is possible to utilise the above framework for macro-theoretical research (see Table 1) just as it is possible to utilise both micro and macro-theoretical perspectives in order to examine issues such as the 'events' and 'processes' debate.

The events and processes debate is particularly interesting because it allows the utilisation of a range of micro theories to examine different aspects of it. The gist of the argument in this debate concerns the role of history-making[64] developments in the EU as a whole as well as history making developments in a specific policy area. Although integration is a process, it is also clear that history making decisions are important 'events' in this process. Similarly, in any policy area that is in the process of being harmonised or Communitarised there are important 'events' where the actual decision is made to accept or reject the package of proposals/reforms. These events are invariably Council or European Council meetings where member states are called to resolve all the minor or major outstanding points where agreement could not be reached at working group

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61 *See* P. Gourevitch, *The Second Image Reversed: The International Sources of Domestic Politics*, 32 International Organization 881-911 (1978). *See also* R. D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 International Organization 427-460 (1988).

62 *See, for example,* H. Wallace, *The Best is the Enemy of the 'Could': Bargaining in the European Community*, *in* S. Tarditi *et al.* (Eds.)., Agricultural Trade Liberalization and Economic Policy Perspectives in the European Community (1989); H. Wallace, *Making Multilateral Negotiations Work*, *in* W. Wallace (Ed.), The Dynamics of European Integration (1990). *See also* Gourevitch 1978, *supra* note 61 and Putnam 1988, *supra* note 61.

63 L. Hooghe & G. Marks, Multi-level Governance and European Integration (2001); J. Peterson, *Policy Networks*, *in* A. Wiener & T. Diez (Eds.), European Integration Theory 117-135 (2004).

64 J. Peterson, *Decision-Making in the European Union: Towards a Framework for Analysis*, 2(1) Journal of European Public Policy (1995). *See also* J. Peterson & E. Bomberg, Decision-Making in the European Union 10-16 (1999).

or COREPER level. This much is almost self-evident. But do these 'events' create their own dynamics and if so which are they? Do they influence the final package – and by default the integration process itself – or are they mere rubber-stamping occasions where leaders simply proceed on a pre-planned course dictated by the negotiations? In fact, given that there usually are outstanding points on the agenda and that the outcome of such 'events' requires a unanimity and ratification, can the 'event' ever be a mere rubber stamping occasion? In the context of criminal law events such as, for example, the special meeting at Tampere or the *Corpus Juris* project hold special significance as important first steps in the harmonisation of national criminal law and the development of European criminal law; and yet, they have not been explored in macro or micro-theoretical terms. It is possible to examine such events from a micro-theoretical perspective in terms of bargaining or domestic preference formation or even test specific institutionalist tenets just as it is possible to look at the process of policy harmonisation from a macro-theoretical point of view, i.e. supranational versus intergovernmental perspectives.

A final word about the usefulness of micro theories: what is it that we gain by the utilisation of micro theories (usually in the form of specific hypotheses)? At the moment, research on EU criminal law seems to take two forms: gnostic and agnostic. In its gnostic form it has two opposing underlying normative assumptions broadly corresponding to the Europhiles v. Eurosceptics debate: (i) that the Cummunitarisation of criminal law and criminal procedure is a 'good thing' and, therefore, should be encouraged and supported; and (ii) that the Cummunitarisation of criminal law and criminal procedure is a 'bad thing' and, therefore, should be seen under a sceptical prism. In its agnostic form – most popular at the moment – it takes it manifests itself as mere reporting of developments. Micro-theoretical research will be most useful in testing aspects of the gnostic form enabling us to understand what it is exactly that we gain or lose in the context of the national, international and EU spheres by more or less integration in the field of EU criminal law.

D. Conclusions

What I hope I have achieved in this article is to show that research in EU integration theory in the field of European criminal law is both possible and warranted. This is not so much a plea for more theoretical research as it is a plea for all the excellent empirical research in the field to be related to macro or micro (or both) theoretical perspectives. While experts are already producing quality research on EU criminal law using comparative perspectives[65] there is precious little work on integration theory and European criminal law. Clearly more macro-theoretical research is needed to test empirically some of the main tenets of general theories and re-examine the integration dialectic. Similarly, we need more empirical research to be geared towards micro-theoretical themes so that we can gradually build a wider picture about the relevance of what is happening in the field of European

[65] *See, for example*, M. Dalmas-Marty, G. Guidicelli-Delage & E. Lambert-Abdelgavad (Eds.), L'Harmonisation de Sanctions Pénales en Europe (2003).

criminal law to the integration process in general. As already mentioned because harmonisation in European criminal law is still developing it is fertile ground for testing new theoretical approaches.

A brief look at the database of the European Research Papers Archive (ERPA)[66] confirms the paucity of European integration related research in the field of EU criminal law. So, what we need at this stage (before we even begin to think about coordination of research) is to convince experts that their research does not have to be narrowly channelled towards national perspectives. Unfortunately, the fact that EU criminal law remains in an intergovernmental pillar and the resistance of the member states to some harmonisation initiatives and proposals has reinforced the idea that national perspectives should prevail in research.

Irrespective of whether one uses macro or micro-theoretical perspectives EU criminal law will draw the attention of EU experts as one of the few policy areas where there are still 'battles' to be fought. In fact, as long as progress towards the ratification of the Constitutional Treaty is limited policy areas such as criminal law will become important theoretical testing grounds. Empirical research which relates its findings to integration theory themes will certainly lead the way.

[66] *See* http://www.eiop.or.at/erpa/.