The EU's Fight against Corporate Financial Crime: State of Affairs and Future Potential

By Vanessa Franssen[*]

Abstract

Considering the efforts of the EU to tackle various forms of financial crime more effectively, especially since the financial crisis of 2008, one would expect that the Union has also been strengthening its grip on national law with respect to corporate financial crime. Nevertheless, this paper will find that the EU approach to corporate financial crime has actually not evolved that much over the past two decades. Moreover, it will argue that EU law still does not sufficiently take into account the specific features of both criminal liability and corporate entities (as opposed to individuals), nor does it fully exploit the potential strengths of a criminal law approach, as opposed to an administrative or civil law approach. In our view, the EU should more carefully consider the objectives and strengths of different kinds of enforcement mechanisms and adopt a more coherent approach, also (or even more so) with respect to corporations. Furthermore, when it comes to the corporate punishment, the EU definitely lacks ambition and creativity. EU legal instruments strongly focus on fines and insufficiently explore other, potentially more adequate sanctions to achieve certain punishment goals. Ultimately, this may undermine the effectiveness of the EU's fight against corporate financial crime.

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A. Introduction

Financial crime is very often committed in a business setting. Considering the efforts of the EU to tackle various forms of financial crime[1] – efforts which have definitely intensified since the 2008 financial crisis – it would not come as a surprise if the EU had also been strengthening its grip on national law in order to combat corporate (financial) crime.

In addition to important regulatory efforts,[2] which are primarily aimed at prevention and compliance, the deterrence and punishment of corporations (or "legal persons", which is the term preferred by the EU legislator) indeed features prominently among the concerns of the EU legislator. Recent examples thereof can be found in the EU legal framework on market abuse, counterfeiting of the euro, and the protection of the Union's financial interests.

Nevertheless, despite the EU's emphasis on combatting financial crime committed by or in the context of corporations, the EU does not explicitly require Member States to provide for corporate *criminal* liability. EU legal instruments encompassing a requirement to provide for corporate liability leave it up to the Member States to opt for a criminal, administrative or civil corporate liability regime. This margin of discretion can be explained by the fact that, after all these years, Member States still do not agree on the theoretical acceptability and/or practical feasibility of corporate criminal liability as such, even though there is clearly a growing acceptance.[3]

Yet, as we will see, the Member States' discretion to apply the label of their choice is not unlimited as those EU legal instruments set forth quite detailed rules on corporate liability, as well as impose certain punishment objectives and/or specific types of sanctions. Hence, even if a Member State decides to label the corporate liability regime as administrative or civil, the basic characteristics of this liability may still be essentially "criminal" in nature, i.e., according to the *Engel* criteria applied by the European Court of Human Rights (which are mirrored by the Court of Justice of the European Union in its *Bonda* case law).[4]

This paper will find that the EU approach to corporate financial crime has not evolved all that much over the past two decades, despite the efforts to combat financial crime more effectively. Moreover, it will argue that EU law still does not sufficiently take into account the specific features of both criminal liability and corporate entities (as opposed to individuals), nor does it fully exploit the potential strengths of a criminal law approach, as opposed to an administrative or civil law approach. In our view, the EU should more carefully consider the objectives and strengths of different kinds of enforcement mechanisms and adopt a more coherent approach,[5] also (or even more so) with respect to corporations.

Furthermore, when it comes to corporate punishment, the EU definitely lacks ambition and creativity. EU legal instruments strongly focus on fines and insufficiently explore other, potentially more adequate sanctions to achieve certain punishment goals. Ultimately, this may undermine the effectiveness of the EU's fight against corporate financial crime.

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[1] Defining (economic and) financial criminal law is a challenge in itself. Indeed, as a branch of criminal law, it is quite ill-defined. *See* Katalin Ligeti and Vanessa Franssen, *Current Challenges in Economic and Financial Criminal Law in Europe and the US*, *in* CHALLENGES IN THE FIELD OF ECONOMIC AND FINANCIAL CRIME IN EUROPE AND THE US 2-5 (Katalin Ligeti and Vanessa Franssen eds., 2017).

[2] For a critical analysis of the EU's regulatory approach in the field of financial crime, *see* Ester Herlin-Karnell, *Constructing Europe's Area of Freedom, Security, and Justice through the Framework of "Regulation": A Cascade of Market-Based Challenges in the EU's Fight against Financial Crime*, 16 GERMAN L.J. 49 (2015), 52 *et seq.*

[3] For instance, it is interesting to observe the evolution between 2000 and 2012. Whereas the authors of the *Corpus Juris* still concluded that "divergence is strong" with respect to the acceptability of corporate criminal liability, the authors of a 2012 study ordered by the European Commission established that "[d]espite a tendency towards the introduction of criminal liability of legal persons for offences, significant differences still exist in the approach developed in the member states." MIREILLE DELMAS-MARTY and JOHN A. E. VERVAELE, THE IMPLEMENTATION OF THE CORPUS JURIS IN THE MEMBER STATES 74-75 (2000); GERT VERMEULEN, WENDY DE BONDT AND CHARLOTTE RYCKMAN, LIABILITY OF LEGAL PERSONS FOR OFFENCES IN THE EU 10 (2012).

[4] For a more extensive analysis of the *Engel* criteria and comparison with the case law of the Court of Justice, *see* Vanessa Franssen, *La notion "pénale": mot magique ou critère trompeur? Réflexions sur les distinctions entre le droit penal et le droit quasi pénal*, *in* EXISTE-T-IL ENCORE UN SEUL *NON BIS IN IDEM* AUJOURD'HUI? 56-91 (Delphine Brach-Thiel ed., 2017).

[5] *See, e.g., also* Michael Faure and Franziska Weber, *The Diversity of the EU Approach to Law Enforcement – Towards a Coherent Model Inspired by a Law and Economics Approach*, 18 GERMAN L.J. 823 (2017).

This paper will be structured as follows. Section B will start with a general overview of the legal framework on corporate crime at the EU level, finding that since the entry into force of the Amsterdam Treaty the EU's approach has changed very little, notwithstanding the extension of the EU's powers in the field of criminal law by the Lisbon Treaty. Next, Section C will examine more closely the existing EU provisions on the liability of and sanctions for legal persons. In a first step, it will analyse the nature of the liability regime imposed by the EU and investigate whether the approach of the EU is consistent with its own objectives. This is followed by a presentation of the different criteria for corporate liability comprised in the EU standard clause. Throughout the entire analysis special attention will be paid to the way in which the EU takes into account the particular characteristics of corporate offenders. Is the EU's approach sufficiently tailor-made? Subsequently, with respect to sanctions, the present requirements of the EU are scrutinized, as are some astonishing gaps in the current legal framework and striking differences with EU punitive administrative law. Section D will conclude that, while the EU legal framework on corporate financial crime seems firmly established, there is considerable room for improvement, not just with respect to the nature of and criteria for corporate liability, but definitely when it comes to the punishment of corporate crime.

B. General Overview of the Current EU Legal Framework on Corporate (Financial) Crime

As indicated in the introduction, the EU's fight against financial crime implies a strong focus on corporate crime.

Before looking into some prime examples of EU law in this area, it should be pointed out that financial crime is definitely not exclusively committed in a corporate setting, nor by corporations alone. Yet, the fact that it is frequently committed in the context of a business or another type of organisation creates particular problems and challenges. What happens inside an organisation, is likely to be a "black box" for the outside world. As we have argued elsewhere,[6] this complicates the investigation of corporate crime and pushes legislators and investigating authorities toward new investigative methods, including an increasing reliance on whistle-blowers and leniency programmes[7] and the adoption of (other) negotiated justice strategies.[8] This "black box" phenomenon, in part, also explains the growing importance of compliance[9] and monitoring programmes[10], as both preventive and reactive tools against corporate crime, even if the collateral consequences of corporate prosecutions play a considerable role too.[11] Moreover, the black box of an organisation also renders the attribution of criminal liability difficult, and questions the adequacy and effectiveness of certain sanctions (*infra*).[12]

As far as the fight against financial crime is concerned, the financial crisis triggered many questions about the effectiveness of existing regulations and liability regimes, as well as their enforcement. In an attempt to address existing weaknesses, the EU legislator adopted and amended various legal instruments in the area of financial criminal law, for instance with regard to insider dealing and market manipulation (in short, market abuse),[13]

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[6] Ligeti and Franssen, *supra* note 1, at 2 *et seq*.

[7] For a critical analysis, *see* C. Harding, *The Role of Whistleblowing and Leniency in Detecting and Preventing Economic and Financial Crime: A Game of Give and Take? in* CHALLENGES IN THE FIELD OF ECONOMIC AND FINANCIAL CRIME IN EUROPE AND THE US 95 *et seq.* (Katalin Ligeti and Vanessa Franssen eds., 2017).

[8] *See, e.g.,* ANTHONY S. BARKOW and RACHEL E. BARKOW, PROSECUTORS IN THE BOARDROOM. USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT (2011); David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295 (2012-2013).

[9] *See, e.g.,* Alexander Cappel, *The Necessity of Compliance Programmes under German Law – "Burden" or "Blessing"? , in* CHALLENGES IN THE FIELD OF ECONOMIC AND FINANCIAL CRIME IN EUROPE AND THE US 57 *et seq.* (Katalin Ligeti and Vanessa Franssen eds., 2017).

[10] *See, e.g.,* Vikramaditya Khanna, *Reforming the Corporate Monitor?*, *in* ANTHONY S. BARKOW and RACHEL E. BARKOW, PROSECUTORS IN THE BOARDROOM. USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 226 *et seq.* (2011); Bruce Zagaris, *Prosecutors and Judges as Corporate Monitors? The US Experience*, *in* CHALLENGES IN THE FIELD OF ECONOMIC AND FINANCIAL CRIME IN EUROPE AND THE US 19 *et seq.* (Katalin Ligeti and Vanessa Franssen eds., 2017).

[11] Vikramaditya Khanna, *supra* note 10, at 227-288.

[12] VANESSA FRANSSEN, EUROPEAN SENTENCING PRINCIPLES FOR CORPORATIONS 260-270 (KU Leuven, doctoral dissertation, 2013).

[13] Regulation (EU) 596/2014 of 16 April 2014 on market abuse and repealing Directive 2003/6/EC of the European Parliament and the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, 12 June 2014, O.J. (L 173) 1 (hereinafter : Market Abuse

money laundering,[14] the counterfeiting of the euro,[15] and most recently, the protection of the Union's financial interests.[16] Each of those new instruments stresses the importance of corporate (criminal) liability and contains, in addition to definitions on criminal offences, aggravating circumstances, accomplice liability and attempt, and some more procedural provisions (e.g. on jurisdiction[17], investigative measures[18] or even on prescription[19]), also specific provisions on the liability of and sanctions for legal persons.

Those provisions on corporate liability and sanctions first appeared after the entry into force of the Amsterdam Treaty, which explicitly put forward the ambition to "develop the Union as an area of freedom, security and justice."[20] Upon a first glance, those provisions seem to have hardly evolved over the past two decades, which in itself is somewhat surprising. Apparently, the questions raised in the aftermath of the financial crisis did not require an adjustment of those provisions. This definitely seems true for the provision on corporate liability, which, apart from some very punctual differences (*infra*), has remained unchanged and is copy-pasted from one legal instrument into another one.

By contrast, the provision on the sanctions for legal persons has changed a little bit over time. For instance, the Environmental Crime Directive of 2008[21] only states:

> Member States shall take the necessary measures to ensure that legal persons held liable pursuant to Article 6 are punishable by effective, proportionate and dissuasive penalties.[22]

A similar provision can be found in the Ship-Source Pollution Directive, as amended in 2009.[23]

On the contrary, the Directives adopted in the aftermath of the financial crisis are more precise with respect to the minimum requirements for sanctions for legal persons, setting forth the following:

> Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article […] is subject to effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions such as
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> (a) exclusion from entitlement to public benefits or aid ;
> (b) temporary or permanent disqualification from the practice of commercial activities;
> (c) placing under judicial supervision ;

Regulation) ; Directive 2014/57/EU of 16 April 2014 on criminal sanctions for market abuse, 12 June 2014, O.J. (L 173) 179 (hereinafter : Market Abuse Directive).

[14] Directive (EU) 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) 648/2012, and repealing Directive 2005/60/EC and Commission Directive 2006/70/EC, 25 November 2015, O.J. (L 141) 73 (hereinafter: the 4th Anti-Money Laundering Directive). It should be noted, though, that this Directive only obliges Member States to adopt administrative sanctions. For an in-depth analysis of the changes introduced by the Fourth Anti-Money Laundering Directive, *see* the paper of Maria Bergström in this issue.

[15] Directive 2014/62/EU of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA, 21 May 2014, O.J. (L 151) 1 (hereinafter : Euro Counterfeiting Directive).

[16] Directive (EU) 2017/1371 of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, 28 July 2017, O.J. (L 198) 29 (hereinafter: PIF Directive).

[17] *See, e.g.,* Art. 11 PIF Directive; Art. 10 Market Abuse Directive; Art. 8 Euro Counterfeiting Directive.

[18] *See, e.g.,* Art. 9 Euro Counterfeiting Directive; Art. 10 PIF Directive.

[19] *See, e.g.,* Art. 12 PIF Directive.

[20] *See* Art. 2 Treaty on the European Union, version Amsterdam Treaty (hereinafter: Amsterdam TEU). *See* also Art. 29, para. 1 Amsterdam TEU ("Without prejudice to the powers of the European Community, the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia.").

[21] Directive 2008/99/EC of 19 November 2008 on the protection of the environment through criminal law, 6 December 2008, O.J. (L 328) 28 (hereinafter: Environmental Crime Directive).

[22] *See* Art. 7 Environmental Crime Directive.

[23] Directive 2009/123/EC of 21 October 2009 amending Directive 2005/123/EC on ship-source pollution and on the introduction of penalties for infringements, 27 October 2009, O.J. (L 280) 52. It is worth noting that the 2005 Directive did not contain any particular provisions on legal persons, neither with respect to their liability nor regarding the applicable penalties.

(d) judicial winding-up ;
(e) temporary or permanent closure of establishments which have been used for committing the offence.[24]

One might be tempted to conclude that the additional requirements (although still not very stringent nor specific, as we will explain below) imposed by the EU are the result of a growing awareness that corporate sanctions should be better tailored to the nature of the corporate offender and the need for a more harmonised approach throughout the Union. But this would be a far too expeditious conclusion which does not take into account the constitutional framework of the Union.

In fact, going back in time, one will find various older legal instruments in the broader field of EU criminal law that already contained more precise requirements. This is, for instance, the case of the former Framework Decisions on fraud and counterfeiting of non-cash means of payment,[25] corruption in the private sector,[26] terrorism,[27] and organised crime,[28] which included, notwithstanding some small differences, what has by now become the standard clause on sanctions for legal persons. These instruments were adopted under the former, pre-Lisbon Third Pillar, whereas the Directives in the field of environmental crime and ship-source pollution[29] were adopted under the former First Pillar, in the wake of a significant institutional battle concerning the division of competences between the (former) European Community and the European Union.[30] This explains why the latter instruments are more cautious and less far-reaching in their requirements, sticking to the general obligation of "effective, proportionate and dissuasive penalties", imposed by the Court of Justice (hereinafter: CJEU) ever since the so-called "Greek Maize" case.[31]

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[24] *See, e.g.,* art. 7 Euro Counterfeiting Directive.

[25] *See* Art. 8 Council Framework Decision 2001/413/JHA of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment, 2 June 2001, O.J. (L 149) 1 (hereinafter: Framework Decision Fraud Non-cash Means of Payment).

[26] *See* Art. 6 Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, 31 July 2003, O.J. (L 192) 54 (hereinafter: Framework Decision Corruption).

[27] *See* Art. 8 Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, 22 June 2002, O.J. (L 164) 3. Meanwhile, this Framework Decision has been replaced by Directive (EU) 2017/541 of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, 31 March 2017, O.J. (L 88) 6. However, as far as the liability of and sanctions for legal persons is concerned, Articles 17 and 18 of the Directive simply reiterate the contents of Articles 7 and 8 of the 2002 Framework Decision.

[28] *See* Art. 6 Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, 11 November 2008, O.J. (L 300) 42. Organised crime is now quite largely viewed as economic or business crime committed by "entrepreneurs who operate under conditions of illegality." *See* Federico Varese, *What is Organised Crime?*, *in* REDEFINING ORGANISED CRIME. A CHALLENGE FOR THE EUROPEAN UNION? 33-34 (Stefania Carnevale, Serena Forlati and Orsetta Giolo eds., 2017).

[29] Case C-176/03, *Commission v. Council*, 2005 E.C.R. I-7879 (annulling Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law); Case C-440/05, *Commission v. Council*, 2007 E.C.R. I-9097 (annulling Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution). In this landmark case law, the CJEU ruled that, prior to the Lisbon Treaty, the EC legislator could require Members States, under the former First Pillar, to adopt and apply effective, proportionate and dissuasive *criminal* penalties if the EC considered such measures "necessary in order to ensure that the rules which it lays down on environmental protection are fully effective." (*See* Case C-176/03, *Commission v. Council*, 2005 E.C.R. I-7879, para. 48.) By contrast, "the determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence." (Case C-440/05, *Commission v. Council*, 2007 E.C.R. I-9097, para. 70.) This case law subsequently lead to the adoption of Art. 83, para. 2 TFEU. For an analysis of this provision, *see, e.g.,* Vanessa Franssen, *EU criminal law and* effet utile*: a critical examination of the Union's use of criminal law to achieve effective enforcement*, *in* EU CRIMINAL LAW AND POLICY. VALUES, PRINCIPLES AND METHODS 87-88 (Joanna Beata Banach-Gutierrez and Christopher Harding eds., 2017).

[30] *See, e.g.,* Grazia Maria Vagliasindi, *The EU Environmental Crime Directive*, *in* ENVIRONMENTAL CRIME IN EUROPE 36 *et seq.* (Andrew Farmer, Michael Faure and Grazia Maria Vagliasindi eds., 2017); Michael G. Faure, *Effective, Proportional and Dissuasive Penalties in the Implementation of the Environmental Crime and Ship-source Pollution Directives: Questions and Challenges*, EUROPEAN ENERGY AND ENVIRONMENTAL LAW REVIEW 256 (2010), 257-258.

[31] Case C-68/88, *Commission v. Hellenic Republic*, 1989 E.C.R. 339, paras 23-24, emphasis added (in which the Court of Justice ruled that (former) Article 5 TEC (current Article 4 (3) TEU) "requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law," and "*whilst the choice of penalties remains within their discretion*, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are *analogous to those applicable to infringements of national law of a similar nature and importance* and which, in any event, make the *penalty effective, proportionate and dissuasive*.").

In sum, the provisions on sanctions for legal persons laid down in post-Lisbon, post-financial crisis Directives merely mirror the provisions of older Framework Decisions. One may thus conclude that in twenty years' time and notwithstanding the global shock caused by the 2008 financial crisis, limited progress has been made in the way in which the EU deals with the punishment of corporate crime in general, and corporate financial crime more particularly.

C. A Closer Analysis of the EU's approach to Corporate Financial Crime

Considering that the provisions on both the liability of and the sanctions for legal persons have changed so little over the past two decades, one may rightly say that those requirements are now firmly established. This warrants a closer and critical analysis of those requirements and the underlying objectives pursued by the EU legislator, in order to get a better understanding of the EU's grip on national law with respect to corporate financial crime.

I. Corporate Criminal *Liability?*

The standard EU provision of the liability of legal persons goes as follows:

> 1. Member States shall take the necessary measures to ensure that legal persons can be held liable for offences referred to in Articles […] committed for their benefit by any person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person, based on:
> (a) a power of representation of the legal person;
> (b) an authority to take decisions on behalf of the legal person; or
> (c) an authority to exercise control within the legal person.
> 2. Member States shall also take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control, by a person referred to in paragraph 1, has made possible the commission of an offence referred to in Article(s) […] for the benefit of the legal person.
> 3. Liability of legal persons under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are involved as perpetrators, inciters or accessories in the offences referred to in Article(s) […].[32]

As stated above, this standard clause has hardly been modified over time. Admittedly, the legislator occasionally added at the end of paragraph 1 "as well as for the involvement as accessories or instigators in the commission of such an offence,"[33] and in several legal instruments, paragraph 2 is completed with "by a person under its authority"[34] or "by a natural person under its authority."[35] While the precise reason for these punctual differences is not entirely clear, in essence, the provision on corporate liability remains the same in all instruments compelling the Member States to adopt criminal offences and sanctions for certain types of misconduct.

1. Criminal or Non-Criminal?

Taking a closer look at the corporate liability regime imposed by the EU, a first feature that stands out, is that the EU does not require Member States to create a *criminal* liability regime for legal persons. This is confirmed by the standard clause on sanctions for legal persons, which can be criminal or non-criminal (*infra*). The EU indeed only requires that "legal persons can be held liable" for the (criminal) offences defined or targeted by the legal

[32] *See, e.g.,* Art. 6 PIF Directive; Art. 10 Directive 2013/40/EU of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA, 14 August 2013, O.J. (L 218) 8 ; Art. 5 Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, 11 November 2008, O.J. (L 300) 42.

[33] Art. 7 Framework Decision Fraud Non-cash Means of Payment.

[34] *See, e.g.,* Art. 6 Environmental Crime Directive; Art. 6 Euro Counterfeiting Directive; Art. 8 Market Abuse Directive ; Art. 7 Framework Decision Fraud Non-cash Means of Payment. In the pending proposal for a Directive replacing the latter Framework Decision, the excerpt will be deleted. *See* Council Presidency, Art. 9 Proposal for a Directive of the European Parliament and of the Council on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA – General Approach, 8 March 2018, No. 2017/0226.

[35] *See, e.g.,* Art. 8b Ship-Source Pollution Directive; Art. 60, paras 5-6 4th Money Laundering Directive.

instrument at hand. In other words, while the underlying conduct is criminal in nature, the legal person for whose benefit the offence was committed could potentially also be held civilly or administratively liable.

In this respect, and notwithstanding the fact that many Member States have in the meantime accepted the principle of corporate criminal liability, the position of the EU is still the same as it was in the early 1990s, when the CJEU ruled in the *Vandevenne* case that

> neither Article 5 of the EEC Treaty nor Article 17(1) of Regulation No 3820/85 requires a Member State to introduce into its national law the principle of criminal liability of legal persons.[36]

Member States which are reluctant to adopt corporate criminal liability, are thus not forced by the EU to go down that road. In this sense, EU law only imposes minimum rules and grants Member States a bigger margin of discretion for legal persons than for natural persons. This difference has everything to do with the persisting lack of consensus on corporate criminal liability among Member States, especially due to the remaining theoretical objections of some (bigger) Member States.[37] For instance, under German law, corporations can only be held liable under administrative law, even if one could argue though that this administrative liability is basically criminal liability in the meaning of Articles 6 and 7 ECHR.[38] Italy, whose legal tradition in criminal law for historical reasons is closely linked to Germany's, has created a *sui generis* regime of administrative liability with some characteristics of criminal liability.[39] Finally, in Sweden, corporate criminal liability has not been introduced either, but the Criminal Code provides for corporate fines (up to approximately one million euro) that, formally speaking, are not considered criminal sanctions but, like forfeiture and seizure of property, "special consequences of crime defined by law."[40]

Nevertheless, even if EU law does not formally oblige Member States to adopt rules on corporate criminal liability, Member States are not entirely free with respect to the choice of liability regime. For one, Member States must still ensure that the national law meets the standard of "effective, proportionate and dissuasive sanctions" (*infra*). For another, national law also has to observe the principle of assimilation or equivalence. According to the CJEU, whenever the choice of the nature of the liability (and the penalties) remains within the discretion of the Member States, they must indeed ensure that infringements of EU law

> are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance.[41]

Therefore, if a Member State provides for corporate criminal liability for similar offences under national law, it is obliged to apply an equivalent liability regime to the offences for which the EU has laid down minimum rules. Member States are regularly reminded of this obligation, as some legal instruments, implicitly or explicitly, reiterate this principle. For instance, Recital (18) of the Market Abuse Directive states that

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[36] Case C-7/90, *Criminal proceedings against Paul Vandevenne, Marc Willems, Jozef Mesotten and Wilms Transport NV*, 1991 E.C.R. I-4383, para. 13.

[37] For a more detailed analysis of the theoretical and practical objections to corporate criminal liability, *see* Vanessa Franssen, *Corporate Criminal Liability and Groups of Corporations: Need for a More Economic Approach*, *in* WHITE COLLAR CRIME : A COMPARATIVE PERSPECTIVE … (to be completed – book soon to be published) (Katalin Ligeti and Stanislaw Tosza eds., *forthcoming*).

[38] Dieter Dölling and Christian Laue, *Corporate Criminal Liability in Germany. A Never Ending Story?*, *in* LA RESPONSABILITÉ PÉNALE DES PERSONNES MORALES EN EUROPE – CORPORATE CRIMINAL LIABILITY IN EUROPE 25ff (Stanislas Adam, Nathalie Colette-Basecqz and Marc Nihoul eds., 2008); Marc Engelhart, *Corporate Criminal Liability and Compliance in Germany*, *in* CORPORATE CRIMINAL LIABILITY AND COMPLIANCE PROGRAM 168-169 (Antonio Fiorella and Alfonso Maria Stile eds., 2011).

[39] For a summary of the Italian system, *see, e.g.,* ASTOLFO DI AMATO, ITALY, in *International Encyclopaedia of Laws: Criminal Law* paras 145-150 (Frank Verbruggen, Vanessa Franssen, Roger Blanpain and Michele Colucci eds., 2015). For a more extensive analysis see *e.g.* Fabrizio Cugia di Sant'Orsola and Silvia Giampaolo, *Liability of entities in Italy: Was it not* societas non delinquere potest*?*, 2 *NJECL* 59 (2011), 59-74.

[40] *See, e.g.,* Siv Jönsson, *Criminal Legal Doctrine as a Spanner in the Works? The Swedish Experience*, *in* LA RESPONSABILITÉ PÉNALE DES PERSONNES MORALES EN EUROPE – CORPORATE CRIMINAL LIABILITY IN EUROPE 298-302 (Stanislas Adam, Nathalie Colette-Basecqz and Marc Nihoul eds., 2008); Anna Salvina Valenzano, *Main Aspects of Corporate Liability "Ex Crimine" in Northern European Countries: Denmark, Sweden and Finland*, *in* CORPORATE CRIMINAL LIABILITY AND COMPLIANCE PROGRAMS. VOL. 1: LIABILITY 'EX CRIMINE' OF LEGAL ENTITIES IN MEMBER STATES 469-474 (Antonio Fiorella ed., 2012).

[41] Case C-68/88, *Commission v. Hellenic Republic*, 1989 E.C.R. 2965, para. 24.

> Member States should, where appropriate and where national law provides for criminal liability of legal persons, extend such criminal liability, in accordance with national law, to the offences provided for in this Directive,

while Recital (15) of the PIF Directive sets that

> [i]n order ensure equivalent protection of the Union's financial interests throughout the Union by means of measures which should act as a deterrent, Member States should provide for certain types and levels of sanctions when the criminal offences defined in this Directive are committed.

One may thus conclude that even if Member States maintain a margin of discretion, the EU nonetheless sets important limits to this discretion.

II. A Label Corresponding to the EU's Enforcement Objectives with respect to Financial Crime?

While the Union's minimum approach to corporate crime is perfectly understandable in light of the principle of conferral of powers,[42] one may nonetheless wonder whether a non-criminal approach for legal persons can actually fulfil the ambitions and objectives set by the EU legislature.

Generally speaking, the European Commission defined the goals of criminal law enforcement in a policy statement published (relatively) shortly after the entry into force of the Lisbon Treaty.[43] This policy statement leaves no doubt about one of the most important goals of EU criminal law, which is to ensure the effective implementation of EU policies.[44] According to that statement, EU criminal law seeks "to prevent and sanction serious offences against EU law in important policy areas."[45]

Moreover, when choosing between criminal sanctions and other kinds of sanctions,

> [t]he seriousness and character of the breach of law must be taken into account. For certain unlawful acts considered particularly grave, an administrative sanction may not be a sufficiently strong response.[46]

Criminal sanctions

> may be chosen when it is considered important to stress strong disapproval in order to ensure deterrence. The entering of conviction in criminal records can have a particular deterrent character.[47]

In other words, criminal sanctions are considered particularly deterrent and therefore more effective than other sanctions because they express strong societal disapproval and because criminal convictions are entered into criminal records. For these reasons, they are required for more serious infringements of the law.[48] This shows that EU criminal law pursues both prevention through deterrence and retributive denunciation, appealing to the expressive function of criminal law and emphasizing the importance of the underlying social or moral norms.[49]

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[42] Art. 4(1) TEU.

[43] *Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law*, COM (2011) 573 final (20 September 2011).

[44] For a critical assessment of the EU's effectiveness approach in the field of criminal law, *see* Vanessa Franssen, *supra* note 29.

[45] *Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law*, COM (2011) 573 final (20 September 2011), at 5.

[46] *Id.* at 11.

[47] *Id.* at 11.

[48] *Id.* at 11.

[49] The term "retributive denunciation" indeed refers to a specific account of retributivism, according to which punishment is "the emphatic denunciation by the community of a crime." (Lord Denning 1953, as cited by John Cottingham, *Varieties of Retribution*, 29 PHIL.Q. 238 (1979), 245.) By giving the offender what he deserves, punishment expresses social and moral disapproval of his culpable behaviour. *See, e.g.,* RALPH HENHAM, PUNISHMENT AND PROCESS IN INTERNATIONAL CRIMINAL TRIALS 139 (2005). This theory highlights the symbolic function of criminal punishment, which distinguishes it from other types of sanctions. Unlike other retributivist theories, this interpretation of retributivism can,

Furthermore, considering the principles of subsidiarity and proportionality as laid down in Article 5 TEU, the European Commission notes that "criminal law measures (…) unavoidably interfere with individual rights" and that "[c]riminal investigations and sanctions may (…) include a stigmatizing effect," so they should be used as a *last resort* and in accordance with the principle of proportionality.[50] Therefore, the EU legislator should only oblige the Member States to enforce EU law through criminal law when the effective implementation and enforcement of EU law cannot be achieved through other less far-reaching and less stigmatizing but equally effective sanctions.

Even if the 2011 policy statement was the first time after the adoption of the Lisbon Treaty the Commission was so explicit about its overall objectives in the field of criminal law, the objectives as such were not at all new. Similar arguments can indeed be found in policy papers and legal instruments adopted before the entry into force of the Lisbon Treaty.

In 2004, the European Commission already published a Green Paper on the approximation and mutual recognition of criminal sanctions,[51] which was conceived as a first step in identifying the need of further EU action to harmonize national criminal sanctions in combination with the mutual recognition of judicial decisions. At that time, the Union's competences in the field of criminal law were, of course, more limited than today. Nevertheless, the criminal law policy objectives put forward in that Green Paper still very much correspond to the above post-Lisbon objectives and, to some extent, were even more all-encompassing. First, the existence of common offences and criminal penalties at the EU level would send out a "symbolic message" and "a clear signal that certain forms of conduct are unacceptable and punished on an equivalent basis" in the EU legal order.[52] The approximation of penalties would also give the people in the EU "a shared sense of justice,"[53] an objective which clearly relates to the expressive and denunciatory function of criminal law and punishment. Second, common minimum criminal law standards would also benefit crime prevention throughout the EU, because offenders would no longer be able to take advantage of the differences in national criminal law and profit from so-called safe havens.[54] Interestingly, the risk of offenders relocating to jurisdictions where they expect lower sentences *or* a lower probability of detection and punishment, seems particularly relevant with regard to corporations.[55] Third, the approximation would serve the further elaboration of an EU area of freedom, security and justice, by enhancing mutual trust and thereby facilitating mutual recognition of judicial decisions.[56] Fourth, more compatible rules governing the execution of penalties would also benefit the rehabilitation of offenders – an idea that has been given less consideration over the past few years.[57] And last but not least, the approximation of

in our view, be easily applied to corporations too, their punishment being society's way to express strong public disapproval of the corporation's behaviour, whether this behaviour is really immoral or simply wrong because infringing essential social norms. For a further analysis, *see* VANESSA FRANSSEN *supra* note 12, at 32-33 and 254-260.

[50] *Id.* at 7. *See, e.g., also* Petter Asp, *The Importance of the Principles of Subsidiarity and Coherence in the Development of EU Criminal Law*, 1 EUCLR 44 (2011); Ester Herlin-Karnell, *What Principles Drive (or Should Drive) European Criminal Law*, 11 GERMAN L.J. 1115 (2011); Maria Kaiafa-Gbandi, *The Importance of Core Principles of Substantive Criminal Law for a European Criminal Policy Respecting Fundamental Rights and the Rule of Law*, 1 EUCLR 7 (2011); Marc S. Groenhuijsen and Jannemieke W. Ouwerkerk, *Ultima ratio en criteria voor strafbaarstelling in Europees perspectief*, *in* ROOSACHTIG STRAFRECHT: LIBER amicorum THEO DE ROOS 249ff (Marc S. Groenhuijsen, Tijs Kooijmans and Jannemieke Ouwerkerk eds., 2013) ; Annika Suominen, *The Sensitive Relationship between the Different Means of Legal Interpretation : Mutual Recognition and Approximation*, *in* THE NEEDED BALANCES IN EU CRIMINAL LAW. PAST, PRESENT AND FUTURE 176-181 (Chloé Brière and Anne Weyembergh eds., 2018).

[51] *Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union*, COM (2004) 334 final, 30 April 2004 (hereinafter: Green Paper).

[52] *Id.* at 9.

[53] *Id.* at 9.

[54] *Id.* at 9-10. *See* also Green Paper, at 47.

[55] *Cf.* Green Paper, at 47 ("It would be interesting to consider whether this is a purely academic hypothesis or corresponds to reality in the event, for example, of financial, business or computer crime.") That being said, for some corporations it may be easier to relocate and organize their activities in another country than for others, depending on the type of activities and the accessibility of the market.

[56] *Id.* at 10.

[57] *Id.* at 10.

penalties would ensure a more effective implementation of (substantive) EU law, particularly in harmonized areas,[58] and in order to ensure "a high level of security."[59]

Furthermore, some specific legal instruments in the broader field of economic crime,[60] such as the Environmental Crime Directive, highlight that:

> the existing systems of penalties have not been sufficient to achieve complete compliance with the laws for the protection of the environment. Such compliance can and should be strengthened by the availability of *criminal penalties, which demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law*.[61]

The Ship-Source Pollution Directive phrases the same objective slightly differently, but confirms the qualitative difference between criminal and administrative liability:

> Criminal penalties, which demonstrate *social disapproval of a different nature than administrative sanctions, strengthen compliance* with the legislation on ship-source pollution in force and should be *sufficiently severe to dissuade* all potential polluters from any violation thereof.[62]

In more recent, post-Lisbon legal instruments relating to financial crime, such as the Euro Counterfeiting Directive, the seriousness of the criminal conduct is emphasized, as is its wide-spread harm for individuals and businesses, which need to be able to rely the authenticity of euro notes and coins.[63] For this reason, common definitions of criminal offences are necessary "to act as a deterrent"[64] and, for individuals, imprisonment will serve as a strong deterrent for potential criminals."[65]

Similarly, the Market Abuse Directive[66] insists on the importance of market integrity and investor confidence, which are both undermined by market abuse.[67] In addition, the legislature acknowledges the qualitative difference between administrative and criminal sanctions, as well as the stronger deterrent effect of the latter, by stating that

> [t]he adoption of administrative sanctions by Member States has, to date, proven to be insufficient to ensure compliance with the rules on preventing and fighting market abuse.[68]

To ensure such compliance, it is essential to provide for

> criminal sanctions which demonstrate a *stronger form of social disapproval* compared to administrative penalties. Establishing criminal offences for at least serious forms of market abuse *sets clear boundaries*

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[58] Green Paper, at 10.

[59] *Id.* at 47.

[60] Although the definition of the term "economic crime" varies, there is growing concensus on the inclusion of environmental crime. *See* Katalin Ligeti and Vanessa Franssen, *supra* note 1, at 3-4. Moving beyond the terminological discussion, environmental crime undeniably has an important impact on the economy sustainability. *See, e.g.,* Andrew Farmer, Michael Faure and Grazia Maria Vagliasindi, *Environmental Crime in Europe: State of Affairs and Future Perspectives*, *in* ENVIRONMENTAL CRIME IN EUROPE 320 and 330 (Andrew Farmer, Michael Faure and Grazia Maria Vagliasindi eds., 2017).

[61] Recital (3) Preamble of the Environmental Crime Directive, emphasis added.

[62] Recital (3) Preamble of the Ship-Source Pollution Directive, emphasis added.

[63] Recitals (2) and (15) Preamble of the Euro Counterfeiting Directive.

[64] *See, e.g.,* Recital (10) Preamble of the Euro Counterfeiting Directive.

[65] *See, e.g.,* Recital (17) Preamble of the Euro Counterfeiting Directive.

[66] For a further analysis of the justification for criminalising market abuse, *see* Vanessa Franssen *supra* note 44 at 95-98.

[67] Recital (1) Preamble Market Abuse Directive.

[68] Recital (5) Preamble Market Abuse Directive.

> *for types of behaviour* that are considered to be *particularly unacceptable* and *sends a message to the public and to potential offenders* that competent authorities take such behaviour very seriously.[69]

Finally, in the proposal for the PIF Directive, the European Commission argued that:

> [c]riminal law is needed in order to have a *preventive effect* in this area, where the *threat of criminal law sanctions*, and their *effect on the reputation* of potential perpetrators, can be presumed to act as a *strong disincentive* to commit the illegal act in the first place.[70]

The text of the eventually adopted Directive continues to stress the idea of deterrence and strong dissuasion[71] but, interestingly, the emphasis on the reputational effect of criminal sanctions has disappeared.

Briefly summarized, it results from the above legislative considerations that criminal sanctions are considered necessary, first of all, because they express stronger social disapproval and have a stronger stigmatizing effect due to their negative impact on the perpetrator's reputation. Second, criminal sanctions are more deterrent than other sanctions, thereby ensuring a more effective enforcement of EU law.

Yet, if criminal sanctions are really of a qualitatively different nature, justifying the need for the EU legislature's intervention in a particular field of crime, how can one then explain that these qualitative features are eventually not so important and determining with respect to corporations? Because if they were, surely, the EU would also require criminal sanctions of legal persons, or would it not?[72] Are the policy objectives different with respect to legal persons, or are criminal sanctions for legal persons not supposed to have the same characterising features – strong deterrence and strong societal denunciation?

III. Criteria for Corporate Liability

Pursuing the analysis beyond the divide criminal/non-criminal, it is worthwhile noting that the EU standard clause on corporate liability, in fact, entails two layers of liability.

First of all, it targets criminal offences committed by a (natural) person who has a leading position within the legal person, regardless of whether he or she acts individually or as part of an organ of the legal person. Moreover, those criminal offences should be committed for the legal person's benefit. Second, and in addition to that, the legal person should also be liable for criminal offences that could be committed due to a lack of supervision or control by the above-described person with a leading position.

The aforementioned first layer of liability definitely presents all characteristics of a system of vicarious liability. Vicarious (also referred to as indirect, derivative or agency[73]) liability is based on the civil law theory of *respondeat superior*, which in a number of legal systems has been transposed to the area of criminal liability. US

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[69] Recital (6) Preamble Market Abuse Directive, emphasis added.

[70] European Commission, *Proposal for a directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law*, at 7, COM (2012) 363 final (11 July 2012), emphasis added.

[71] Recitals (15), (18) and (28) Preamble of the PIF Directive.

[72] *Cf.* Christopher Harding, *Tasks for Criminology in the Field of EU Criminal Law and Crime Policy*, *in* EU CRIMINAL LAW AND POLICY. VALUES, PRINCIPLES AND METHODS 122 (Joanna Beata Banach-Gutierrez and Christopher Harding eds., 2017), identifying "the imposition of criminal responsibility on corporate persons" as one of the "key questions of the present moment" at the level of EU criminal law.

[73] Celia Wells, *Corporate Criminal Liability in the United Kingdom. Much Ado About Nothing?*, *in* LA RESPONSABILITÉ PÉNALE DES PERSONNES MORALES EN EUROPE – CORPORATE CRIMINAL LIABILITY IN EUROPE 286 (Stanislas Adam, Nathalie Colette-Basecqz and Marc Nihoul eds., 2008).

corporate criminal liability is a prominent and old example thereof.[74] In the EU, countries like Spain[75] and France[76] too have adopted corporate criminal liability on this basis. Under this theory, it suffices to establish that an individual within the legal person has committed an offence, on behalf of the legal person, to hold the legal person liable. The material and mental element of the offence are thus first established on the part of the individual and subsequently attributed to the legal person on the basis of certain objective criteria, such as the fact that the offence has created a benefit for the legal person.

At the same time, this first layer of corporate liability also recalls the identification theory, which can be found in jurisdictions like England and Wales,[77] because the natural person who commits the offence has to be a person having a leading position within the corporate organisation.[78] Having a leading position is defined as having a power of representation of the legal person, or the authority to take decisions on behalf of the legal person or to exercise control within that legal person. As we have argued elsewhere,[79] considering that the identification theory seeks to establish the (directive) mind of the corporate entity, it tends, in some respects, towards autonomous criminal liability, requiring guilt to be established *directly* at the level of the corporate entity without the need to link it to an offence committed by an individual. Yet, in practice, the difference with indirect criminal liability seems fairly limited.[80]

The second layer of liability of the EU clause on corporate liability is of a somewhat different nature. Basically, it corresponds to situations where someone within the legal person is able to commit an offence due to a lack of supervision or control of the persons having a leading position. The latter can be considered as "functional perpetrators," a notion that is well-known under, *e.g.*, Dutch criminal law.[81] A functional perpetrator is someone who, due to his or her position, is liable for criminal behaviour committed by other persons acting under his or her supervision or control. As such, he or she is not necessarily guilty of the same offence as the person(s) acting under their supervision or control. For instance, in case of an intentional offence, the functional perpetrator does not necessarily (or even rarely so) intentionally turned a blind eye to the criminal activity, but was simply negligent in performing his or her supervision tasks. A functional perpetrator can, to some extent, be compared to an accomplice, with that difference that there is, in principle, no intent to participate in the commission of the offence.[82] Therefore, it is usually not possible to hold the functional perpetrator criminally liable on the same

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[74] *See, e.g.,* John K. Villa, *Corporate Criminal Liability: When a Corporation is Liable for Criminal Conduct by an Employee*, 2 CORPORATE COUNSEL GUIDELINES § 5:5 (2011); Han Hyewon and Nelson Wagner, *Corporate Criminal Liability*, 44 AM. CRIM. L. REV. 337 (2007), 339-347; HARRY FIRST, BUSINESS CRIME: CASES AND MATERIALS 167ff (1990).

[75] For a very long time, the Spanish legislator refused to create *criminal* liability for corporations. Yet this fundamentally changed with the Organic law 5/210 of 22 June 2010. For a concise analysis of the new legal regime, *see, e.g.,* LORENA BACHMAIER WINTER and ANTONIO DEL MORAL GARCÍA, SPAIN, in *International Encyclopaedia of Laws: Criminal Law* paras 256-261 (Frank Verbruggen, Roger Blanpain and Michele Colucci eds., 2012).

[76] Nevertheless, the vicarious nature of the French system of corporate criminal liability seems less certain than it may appear at first sight. Some argue the French system is in practice much closer to an autonomous or organisational model. *See* in this respect Juliette Tricot, *Corporate Criminal Liability in France*, *in* CORPORATE CRIMINAL LIABILITY AND COMPLIANCE PROGRAM 135ff (Antonio Fiorella and Alfonso Maria Stile eds., 2011).

[77] In England and Wales, the identification test is the "default position of the courts," "when no [other] test of corporate liability is provided for in a statute." Other tests of corporate criminal liability can, however, be found in specific statutes such as the Corporate Manslaughter and Corporate Homicide Act and the Bribery Act. For a clear and critical analysis see James Gobert, *Corporate Criminal Liability – What Is It? How Does It Work in the UK?*, *in* CORPORATE CRIMINAL LIABILITY AND COMPLIANCE PROGRAMS 222-229 (Antonio Fiorella and Alfonso Maria Stile eds., 2012).

[78] *Cf.* GERT VERMEULEN, WENDY DE BONDT and CHARLOTTE RYCKMAN *supra* note 3 at 11.

[79] *See* Vanessa Franssen, *Daderschap en toerekening bij rechtspersonen*, *Nullum Crimen* 227 (2009), at 232 and 241; Raf Verstraeten and Vanessa Franssen, *Collective Entities as Subjects of Criminal Law. The Case of Belgium and the Netherlands*, *in* CORPORATE CRIMINAL LIABILITY AND COMPLIANCE PROGRAMS 254 (Antonio Fiorella and Alfonso Maria Stile eds., 2012).

[80] For a critical analysis of the identification theory under English law and the problems it causes in practice, *see* JAMES GOBERT and MAURICE PUNCH, RETHINKING CORPORATE CRIME 62-69 (2003). For the strong similarities between the identification theory and the French system of indirect liabiilty, *see* PHILIPPE CONTE and PATRICK MAISTRE DU CHAMBON, DROIT PÉNAL GÉNÉRAL 214-215 (2004).

[81] *See, e.g.,* JAAP DE HULLU, MATERIEEL STRAFRECHT 164-170 and 209 (2003) ; Eelke Sikkema, *De strafrechtelijke verantwoordelijkheid van leidinggevenden in Nederland*, *in* DE STRAFRECHTELIJKE VERANTWOORDELIJKHEID VAN LEIDINGGEVENDEN - IN DE ECONOMISCHE CONTEXT 36-58 (Nederlands-Vlaamse Vereniging voor Strafrecht ed., 2010).

[82] For an in-depth analysis of accomplice liability and functional perpetratorship, *see, e.g.,* JAN VANHEULE, STRAFBARE DEELNEMING 905ff (2010).

legal basis as the "material" or "direct" offender, *i.e.*, the person who physically committed the offence targeted by the EU legal instrument, neither on the basis of the legal provisions concerning accomplice liability; a self-standing legal basis for the functional perpetrator's criminal liability thus seems indispensable.[83] As the liability of the legal person is based on the criminal liability of the functional perpetrator, one may argue that the legal person, too, is a kind of functional perpetrator.

It results from the above analysis that the rules on corporate liability imposed by the EU mark a strong dependence on the individual's liability. This holds true for both layers of liability. This emphasis on individual liability is also expressed by paragraph 3 of the EU standard provision on corporate liability, stating that the legal person's liability "shall not exclude criminal proceedings against natural persons who are involved as perpetrators, inciters or accessories." Arguably, the EU criteria for corporate liability do not particularly well take into account the particular features of corporations.

For instance, an important disadvantage of a vicarious liability regime is that it usually leaves the corporation with few possibilities to defend itself against situations where criminal offences are committed by individuals acting on their own initiative and for their own benefit in a corporate setting and create, directly or indirectly, a benefit for the corporations, yet without the corporation "intending" to obtain such benefit(s). For instance, if an individual having a leading position would abuse his or her position for private enrichment by committing VAT fraud or an act of corruption, the slightest (even purely theoretical) benefit for the legal person could be enough to expose the latter to liability claims, even if the decision of the individual cannot be regarded as a decision emanating from the corporation, taken in the corporation's interest.[84] This threat of abuse is by no means illusory or hypothetical, as the practice of US corporate criminal liability shows. Under US federal law, a corporation "may be held criminally liable for the acts of any of its agents [who] (…) commits a crime (…) within the scope of employment (…) with the intent to benefit the corporation."[85] Yet, in practice, "the last two requirements are almost meaningless."[86] For instance, US courts have accepted corporate criminal liability even for conduct that "was specifically forbidden by corporate policy" and when the corporation "made good faith efforts to prevent the crime."[87] Therefore, some American scholars conclude that "respondeat superior is grossly overbroad,"[88] arguing that

> [a] rule deeming virtually all crimes committed by institutional agents in institutional settings to be institutional crimes is easy to apply but plainly does not fit with any persuasive account of the relationship between institutional effects and individual conduct.[89]

In order to counterbalance the breadth of the corporate criminal liability, US prosecutors enjoy great prosecutorial discretion, considered excessive by some authors,[90] and the existence of an effective compliance

[83] It should be noted, though, that some legal systems, like the Belgian one, tend to apply a very broad notion of perpetratorship, including also functional perpetrators, without a clear legal basis. For a further analysis, *see* Vanessa Franssen *supra* note 79 at 228-229. *See* also CHRISTIANE HENNAU and JACQUES VERHAEGEN, DROIT PÉNAL GÉNÉRAL 268-274 (2003).

[84] *See, e.g.,* Pamela Bucy, *Corporate Criminal Liability: When Does It Make Sense?*, 46 AM. CRIM. L. REV. 1437 (2009), arguing that the current standard for corporate criminal liability is overly broad, rendering the corporation criminally liable "whenever one of its agents (…) commits a crime related in almost any way to the agent's employment (…)," "even when the corporation received no actual benefit from the offense and no one within the corporation knew of the conduct at the time it occurred."

[85] Pamela Bucy, *supra* note 84, at 1440 and the reference mentioned there.

[86] *Id.* at 1440.

[87] *Id.* at 1441, giving the example of *United States v. Hilton Hotels Corp.*, in which the corporation was convicted of antitrust violations committed by a purchasing agent contrary to explicit corporate policy. *See also* Andrew Weissmann, *A New Approach to Corporate Criminal Liability*, 44 AM. CRIM. L. REV. 1319 (2007).

[88] Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473 (2006), 526. *See, e.g., also* Jennifer Arlen, *The Potential Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994), 838.

[89] *Id.* at 526.

[90] *See, e.g.,* Andrew Weissmann *supra* note 87, at 1320ff. For a more mitigated analysis, *see* Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481 (2009), at 1491-1493.

programme can be taking into account as a mitigating circumstance at the sentencing level.[91] In sum, the US example clearly shows that vicarious liability does not adequately deal with agency problems, *i.e.*, the misalignment of the interests of the corporation (and its owners) and those of the agents of the corporation, and may lead to undesirable outcomes.

Moreover, liability based on the *respondeat superior* theory or the identification theory, in principle, requires that the individual who committed the offence can be identified because it is this person's criminal liability that triggers the liability of the legal person. Considering that the corporate decision-making process is often a black box for outsiders, especially in larger business organisations, if only for the simple fact that some decisions are taken by a collegial body, it can be quite difficult in practice to identify the responsible individuals.[92]

In conclusion, rather than opting for a system of autonomous or direct corporate liability, which would fully recognize legal persons as subjects of (criminal) law and which would be better adjusted to more complex organisational situations,[93] the EU adheres to a mixed system of corporate liability, based on the *respondeat superior* theory, the identification theory and functional perpetratorship. When comparing this approach to the EU's rules on corporate *administrative* liability, there are some striking differences. For instance, under the Market Abuse Regulation, legal persons do have an express defence against potential abuse situations. Indeed, according to Recital (30),

> [w]here legal persons have taken all reasonable measures to prevent market abuse from occurring but nevertheless natural persons within their employment commit market abuse on behalf of the legal person, this should not be deemed to constitute market abuse by the legal person.

This leads to the paradoxical situation that legal persons are more likely to incur "criminal" liability than administrative liability if an individual commits an offence within the scope of their employment. Instead of imposing stricter criteria for "criminal" liability (such as the requirement to prove the corporation's criminal state of mind), as this is the type of enforcement which is to be preferred for more serious violations of law (*supra*), the EU thus in reality sets less strict standards for corporate "criminal" liability.[94] Once again, this raises the question about the real nature of corporate liability for criminal offences under EU law.

IV. Criminal or Non-Criminal Sanctions

Turning now to the sanctions provided for legal persons, one will immediately note a strong focus on fines. According to the aforementioned standard provision on the sanctions for legal persons (*supra*), the EU indeed only requires Member States to subject legal persons "to effective, proportionate and dissuasive sanctions, which *shall include criminal or non-criminal fines*."[95] While fines are definitely widely applied to legal persons, they are far from being a one-size-fits-all solution. Indeed, one should not overestimate the deterrent effect of fines, nor underestimate their spill-over effects to other innocent persons (such as employees, consumers, suppliers, etc.). To the extent they can be calculated in advance, they might simply be treated as a business cost. Moreover, a fine does not necessarily send out the right message to the persons in charge of the corporate decision-making process and able to change the corporation's behaviour in the future (corporate officials and shareholders, to

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[91] *See, e.g.,* Kendel Drew and Kyle A. Clark, *Corporate Criminal Liaiblity*, 42 Am. Crim. L. Rev. 277 (2005), 287ff. For an analysis and case-law based assessment of the US Sentencing Guidelines emphasis' on compliance programmes, *see, e.g.,* Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations : A Decade of Promoting Compliance and Ethics*, 87 IOWA L. REV. 697 (2002).

[92] For an in-depth analysis of the difficulties encountered by courts in England and Wales when applying the identification theory, *see, e.g.,* JAMES GOBERT and MAURICE PUNCH, RETHINKING CORPORATE CRIME 49-77 (2003). For a further analysis of the difficulties to identify (and punish) the responsible person in large corporate structures, *see* Vanessa Franssen, *supra* note 37, at … (to be completed – book soon to be published).

[93] *Id.* at 78ff. *See also* William S. Laufer, *The Missing Account of Progressive Corporate Criminal Law*, 14 NYU JOURNAL OF LAW & BUSINESS 71 (2017), 83 and 136-137, proposing the term "constructive corporate liability".

[94] To complete the picture, it is noteworthy that Article 9(1) of the Market Abuse Regulation defines under what circumstances the possession of inside information by a legal person should not be regarded as insider dealing or unlawful disclosure of inside information on the part of the legal person and thus constitutes legitimate behaviour.

[95] *See, e.g.,* Art. 9 PIF Directive, emphasis added.

the extent the latter are closely involved in the decision-making process (for instance, in closely-held corporations).[96]

In addition to (criminal or non-criminal) fines, the EU instruments encourage Member States to adopt other sanctions, such as the exclusion from entitlement to public benefits or aid, the temporary or permanent disqualification from the practice of commercial activities, the placing under judicial supervision, the judicial winding-up and the temporary or permanent closure of establishments which have been used for committing the offence. The PIF Directive has added to that list a new sanction, namely the "temporary or permanent exclusion form public tender procedures."[97] Nonetheless, these sanctions, which recall some of the recommendations made by the Council of Europe back in 1988 already,[98] are mere suggestions, not hard obligations. Therefore, it is perfectly conceivable that Member States meet the general standard of effectiveness, proportionality and dissuasiveness without applying such sanctions.

In short, Member States clearly enjoy a wide margin of appreciation under the current EU standard provision on sanctions for legal persons: they can choose between criminal fines and fines of a different nature (at least from a national perspective). In addition, they may apply other sanctions, whether these correspond to the EU's suggestions or not. History has taught us the CJEU rarely rules that the level of fines under national law is not effective, proportionate and dissuasive; only in flagrant cases will it come to that conclusion.[99] What is more, in evaluating whether national law meets that punishment standard set by the EU legislator, the CJEU will not just consider the level of fines, but also other penalties "imposed in respect of the same infringement."[100]

The minimum approach of the EU with respect to sanctions for legal persons greatly contrasts with the Union's efforts to approximate national rules on maximum terms of imprisonment applicable to individuals for the same offences.[101] The EU indeed does not set minimum levels for the (maximum) fines applicable to legal persons, nor does it determine how those fines should be calculated.

The general approach with respect to corporate offenders in the field of financial crime also differs significantly from the much more detailed rules (and guidelines), for instance, in the field of EU competition law[102] and the administrative prong of EU market abuse law.[103] For sure, the difference in applicable instruments matters – a Regulation is usually more precise than a Directive – but the explanation for the diverging approach is definitely not confined to this technical difference. Incidentally, one may also note that the harsh "administrative" fines of the European Commission and some of the administrative sanctions provided by the Market Abuse Regulation are quite punitive and would definitely qualify as "criminal" sanctions under Articles 6 and 7 ECHR.[104] The general approach is above all a symptom of the unwillingness of Member States to further approximate their national rules in this respect. In a not so distant past, the European Commission made some attempts to go beyond the aforementioned general requirement, proposing in the field of ship-source pollution for fines based on the legal

[96] For a more in-depth analysis, *see* Vanessa Franssen *supra* note 12, at 260-270 and the references mentioned there.

[97] *See* Art. 9(b) PIF Directive.

[98] Art. 7 Recommendation No. R (88) 18 of 20 October 1988 concerning liability of enterprises having legal personality for offences committed in the exercise of their activities.

[99] *See*, e.g., Case C-68/88, *Commission v. Hellenic Republic*, 1989 E.C.R. 2965, paras 24-27. In fact, in this case, the problem was more deeply rooted than the mere levels of fines provided for by law and due to complete lack of enforcement. Greece had failed to fulfil its obligations under EU law "by omitting to initiate all the criminal or disciplinary proceedings provided for by national law against the perpetrators of the fraud and all those who collaborated in the commission and concealment of it." (para. 22).

[100] Case C-262/99, *Louloudakis v. Greece*, 2001 E.C.R. I-5547, para. 69.

[101] *See, e.g.,* Art. 7 PIF Directive; Art. 7 Market Abuse Directive; Art. 5 Euro Counterfeiting Directive.

[102] *See* Art. 23(2) and (3) Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 4 January 2003, O.J. (L 1) 1; Guidelines on the method of setting fines imposed pursuant to Article 23(2) (a) of Regulation 1/2003, 1 September 2006, O.J. (C 210), 2.

[103] *See* Art. 30(2) (j) Market Abuse Regulation.

[104] For a further analysis of whether cartel fines qualify as criminal sanctions, *see* Vanessa Franssen *supra* note 12, at 307-314.

person's turnover or the assets it owns, to the example of the fines applicable under EU competition law. Nevertheless, this proposal utterly failed to convince the Member States.[105]

Furthermore, apart from the general character of the requirements set by the standard provision on sanctions for legal persons in the field of financial crime, there are a couple of remarkable gaps in the list of sanctions required and suggested by the EU.

First, the list of sanctions does not include the confiscation of illegal proceeds, even if this sanction appears particularly fit for legal persons, especially considering that their liability is based on the "benefit" of the underlying criminal offence committed by an individual occupying a leading position in the corporate organisation (*supra*), and even more so for corporate financial crime, which is typically profit-driven.

One possible explanation for this "gap" could have been that the (freezing and) confiscation of instrumentalities and proceeds of crime is regulated by a separate Directive.[106] The Freezing and Confiscation Directive, however, only obliges Member States to enable confiscation of instrumentalities and proceeds "subject to a final conviction for a criminal offence" and in some limited cases where criminal proceedings eventually did not lead to a criminal conviction.[107] Considering the fact that the EU does not impose criminal liability for legal persons, the application of this Directive to legal persons thus essentially depends on the choice made by the Member State at hand. There is one exception though: the rules on third-party confiscation (i.e., the situation where the illegal proceeds have been transferred to or acquired by a third party, potentially a legal person)[108] should, in any event, extend to both individuals and legal persons.[109] Furthermore, in some legal instruments, confiscation (and freezing) of the instrumentalities and illegal proceeds of crime is targeted by a separate provision, which seems to be applicable to individuals and legal persons without distinction.[110]

Another explanation for this gap might be the lack of consensus among Member States on non-conviction based confiscation of the proceeds of crime, which could be applied regardless of the possibility to prosecute and convict a legal person. Indeed, the Freezing and Confiscation Directive does not contain a real obligation in this respect, and is far from proposing a kind of civil or non-criminal forfeiture typical of some common law systems.[111]

Whatever may be the explanation, the absence of a general obligation to ensure the confiscation of the instrumentalities and illegal proceeds for legal persons in the field of financial crime remains puzzling. This strikingly differs from some EU financial regulations. For instance, the Market Abuse Regulation entails an obligation to provide for the "disgorgement of profits" as an administrative sanction.[112] Admittedly, the idea of disgorgement is not entirely absent from the Market Abuse Directive, which states that

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[105] For a more detailed analysis of the Commission's Proposal for a Council Framework Decision to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution (COM (2003) 227 final, 2 May 2003), *see* Vanessa Franssen *supra* note 12, at 220-222.

[106] Directive 2014/42/EU of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, 29 April 2014, O.J. (L 127) 39 (hereinafter: Freezing and Confiscation Directive).

[107] Art. 4(1) and (2) Freezing and Confiscation Directive. For a further analysis, *see, e.g.,* Katalin Ligeti and Michele Simonato, *Asset Recovery in the EU: Towards a Comprehensive Enforcement Model beyond Confiscation ? An Introduction*, *in* CHASING CRIMINAL MONEY. CHALLENGES AND PERSPECTIVES ON ASSET RECOVERY IN THE EU 7ff (Katalin Ligeti and Michele Simonato eds., 2017).

[108] Art. 6(1) Freezing and Confiscation Directive.

[109] Recital (24) of the Preamble to the Freezing and Confiscation Directive.

[110] *See, e.g.,* Art. 10 PIF Directive. This provision does not require a criminal conviction, but simply refers to "instrumentalities and proceeds from the criminal offences" on which are covered by the Directive. Therefore, in our view, this could include the hypothesis of a legal person being held administratively liable for one of those offences.

[111] Katalin Ligeti and Michele Simonato *supra* note 107, at 8-10. For a more in-depth analysis of the concept of non-conviction based confiscation and civil forfeiture, *see, e.g.,* Michele Panzavolta, *Confiscation and the Concept of Punishment: Can There be a Confiscation Without a Conviction?*, *in* CHASING CRIMINAL MONEY. CHALLENGES AND PERSPECTIVES ON ASSET RECOVERY IN THE EU 25ff (Katalin Ligeti and Michele Simonato eds., 2017); Colin King, *Civil Forfeiture in Ireland: Two Decades of the Proceeds of Crime Act and the Criminal Assets Bureau*, *in* CHASING CRIMINAL MONEY. CHALLENGES AND PERSPECTIVES ON ASSET RECOVERY IN THE EU 77ff (Katalin Ligeti and Michele Simonato eds., 2017).

[112] Art. 30(2) (b) Market Abuse Regulation.

> [w]ithout prejudice to the general rules of national criminal law on the application and execution of sentences in accordance with the concrete circumstances in each individual case, the imposition of sanctions should be proportionate, *taking into account the profits made or losses avoided by the persons held liable* as well as the damage resulting from the offence to other persons and, where applicable, to the functioning of markets or the wider economy.[113]

Still, it is one thing to say that that the profit made by the liable persons should be taken into account to make sure that the sanctions applied are proportionate; it is yet another to require the adoption of a specific sanction aimed at disgorging the illegal proceeds of crime obtained by the liable person.[114] The only legal instrument in the field of financial crime setting this requirement for legal persons so far is the PIF Directive (*supra*). It remains to be seen whether the Directive marks a new trend or remains a one-time shot.

Second, another important missing sanction is the compensation of victims and restoration of the former state. This is all the more surprising considering that corporate crime tends to cause wide-spread, diffuse and long-term harm to private and public goods, affecting both private and institutional victims (*e.g.,* other corporations or government entities).[115] Therefore, when harm does occur, restoration and compensation should be key sentencing goals with respect to corporations. According to some, "to remedy harm (…) should be the first goal of criminal prosecution of an organization."[116] In addition, there is also a very pragmatic argument for adding this sanction to sanctioning arsenal for legal persons, based on the *deep pockets assumption*. One of the downsides of individual criminal liability is indeed that individuals are often unable to restore the situation to its former state and/or to pay for the damage caused by the corporate offence. The corporation assumedly has deeper pockets, making it an attractive defendant.[117]

A third type of sanction that appears to be lacking is the publication of the decision holding a legal person liable. Despite the vast literature on reputational sanctions[118] and the earlier mentioned 1988 Recommendations of the Council of Europe, the EU standard provision on sanctions for legal persons indeed does not include the suggestion to include the publication of the decision. By contrast, the publication of a sanctioning decision is one of the recurring administrative sanctions under EU financial regulations. For instance, Article 34 of the Market Abuse Regulation provides for the publication of decisions, unless it would be disproportionate to the nature of

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[113] Recital (24) Market Abuse Directive, emphasis added. In fact, this idea was already present in the former Market Abuse Directive of 2003, which did not include an obligation to criminalise certain forms of market abuse, as it required that "sanctions should be sufficiently dissuasive and proportionate to the gravity of the infringement *and to the gains realised* (…)."Recital (38) of the Preamble of Directive 2003/6/EC of 28 January 2003 on insider dealing and market manipulation, 12 April 2003, O.J. (L 96) 16. Based on this recital, the CJEU ruled that the "gains realised from insider dealing may constitute a relevant element for the purposes of determining a sanction which is effective, proportionate and dissuasive." *See* Case C-45/08, *Spector v. CBFA*, 2009 E.C.R. I-12073, para. 73.

[114] Admittedly, other legal instruments requiring administrative sanctions do not always require disgorgement of profits as a separate sanction either. For instance, under the Fourth Money Laundering Directive, Member States should take into account, when determining the type and level of administrative sanctions and measures, "the benefit derived from the breach by the natural or legal person held responsible, insofar as it can be determined." Art. 60(4) (d) Fourth Money Laundering Directive. This approach largely mirrors the European Commission's Guidelines on fines applicable to cartel offences. According to Point 31 of the 2006 Guidelines on fines, the gains obtained by the undertaking committing a cartel offence should be taken into account when the Commission determines the fine, provided that "it is possible to estimate that amount," and may lead to an increase of the fine in order to ensure deterrence.

[115] *See* Vanessa Franssen and Silvia Van Dyck, *Holsters op maat voor de bestraffing van ondernemingen? Eerst goed mikken, dan pas schieten*, *in* DE WET VOORBIJ. LIBER AMICORUM LUC HUYBRECHTS 525 (Filiep Deruyck, Marc De Swaef, Joëlle Rozie, Michel Rozie, Philip Traest and Raf Verstraeten eds., 2010).

[116] Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 AM. CRIM. L. REV. 1417 (2009), 1429.

[117] Of course, there will also be situations in which the corporation's financial resources are not sufficient to cover for restoration and compensation, for instance, because the corporation is relatively small or because its capital is intentionally kept low by its shareholders, or due to the enormous size of the harm caused by the offence.

[118] *See, e.g.,* BRENT FISSE and JOHN BRAITHWAITE, THE IMPACT OF PUBLICITY ON CORPORATE OFFENDERS (1983); Jonathan M. Karpoff and John R. Lott, Jr., *The Reputational Penalty Firms Bear from Committing Criminal Fraud*, 36 JOURNAL OF LAW AND ECONOMICS 757 (1993); X., S*hame, Stigma, and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law*, 116 HARV. L. REV. 2186 (2002-2003); Jonathan M. Karpoff, John R. Lott, Jr. and Eric W. WEHRLY, *The Reputational Penalties for Environmental Violations: Empirical Evidence*, 68 JOURNAL OF LAW AND ECONOMICS 653 (2005); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996).

the infringement or would cause disproportionate damage to the persons involved or would jeopardise the stability of financial markets or an ongoing investigation. Such publication is considered to have

> a dissuasive effect on the public at large (…) [and] an important tool for competent authorities to inform market participants of what behaviour is considered to be an infringement of this Regulation and to promote good behaviour amongst market participants.[119]

Put differently, the publication of the decision sends an important message that such behaviour is not tolerated and to prevent future infringements by potential offenders. Formally speaking, such publication is not a self-standing administrative sanction, but a kind of collateral consequence. Yet, considering its potential significant impact, it could nonetheless be considered as a (punitive) sanction.

Furthermore, it is worthwhile noting that some EU institutions and authorities endowed with administrative sanctioning powers (such as the European Commission, the European Central Bank and the European Securities and Markets Authority) publish their sanctioning decisions on a regular basis.

Still, when it comes to corporate financial crime, this idea has yet to grow. Admittedly, the Preamble of the Market Abuse Directive refers to the option of publishing the final decision on liability or sanctions, with cross-reference to the Market Abuse Regulation,[120] but does not include this sanction in the ultimate provision containing sanctions for legal persons. Considering the importance at least some legal persons attach to their reputation[121] and the market impact a sanctioning decision may have, this seems like an interesting option for Member States to explore in the future, also in the criminal sphere.

D. Conclusion: Missed Opportunities and Potential for the Future

A first key conclusion resulting from the above analysis is that the EU has made little progress in the fight of corporate financial crime since the 2008 financial crisis. Surely, several new legal instruments have been adopted and the regulatory framework has been solidified, but when it comes to the EU's approach to corporate liability for the most serious financial offences that have been harmonized at EU level, it seems the policy assessments made in the wake of the financial crisis have had hardly any impact at all. Indeed, the legal provision on corporate liability is still the same standard provision used before, and the provision on sanctions for legal persons basically corresponds to the old mantra of the CJEU – sanctions must be effective, proportionate and dissuasive -, with that difference that the EU now, in addition, requires fines and makes some encouraging suggestions for other sanctions to the Member States. The lack of minimum rules with respect to those sanctions and nearly voluntary character of the approximation of national rules is most revelatory of the lack of consensus and unwillingness among Member States to step up against corporate crime and to create a level playing field for legal persons throughout the EU.

Second, in addition to the (nearly) *status quo*, this paper has also shown a mismatch between, on the one hand, the objectives pursued by the EU and the added value of criminal law enforcement, and the choice left to the Member States to hold corporations criminally or otherwise liable. Admittedly, this mismatch is due, once more, to the persisting lack of consensus of the Member States, in particular with respect to the theoretical acceptability of corporate criminal liability. Yet, the result is quite unsatisfactory and it sends a quite mixed message to legal persons across the EU. Moreover, the obstinacy of some Member States to qualify corporate liability as criminal is, to some extent, illusory as that liability may very well be defined as "criminal" by the European Court of Human Rights, which activates a considerable body of fundamental substantive and procedural rights.

Third, the analysis has demonstrated that the EU approach to corporate crime is not so well adjusted to the corporate reality. For one, because it adheres to a liability regime consisting of a mix of the *respondeat superior* theory and the identification theory, which have both at national level proven their weaknesses. As far as the functional perpetratorship of legal persons is concerned, a further analysis of its implementation under national

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[119] Recital (73) Market Abuse Regulation.

[120] Recital (18) Market Abuse Directive.

[121] As some rightfully point out, it takes a good reputation to lose one. *See, e.g.,* X., *Shame, Stigma, and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law*, 116 HARV. L. REV. 2186 (2002-2003), 2190.

law would be desirable to see how exactly corporate liability is regulated and applied in real-world cases. For another, the EU essentially only requires Member States to provide for (criminal or non-criminal) fines, even though the effectiveness and deterrent effect of fines is quite uncertain and depends on many variables. Other punishment objectives such as disgorgement, compensation and restoration, which are equally important with regard to legal persons, are largely disregarded by the EU, or at least not included in the current set of sanctions for legal persons. In this respect, the harmonisation of (punitive) administrative sanctions is more advanced and satisfactory.

To conclude, the current EU approach to corporate financial crime is marked by several missed opportunities, incoherence and inadequacy. A further reflexion on proper organisational liability criteria and an appropriate arsenal of sanctions is desperately needed, notwithstanding the studies that have been ordered or funded by the European Commission in the recent past. On top of that, in order to move beyond the current legal framework, more willingness of the Member States is equally required. If the financial crisis has taught one thing, it is definitely that corporate financial crime cannot be adequately fought by individual States and calls for a comprehensive, supranationally (or even internationally) coordinated action.