

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

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## Abstract

Considering the European Union's efforts 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. Instead, this Article finds that the EU approach to corporate financial crime has actually not evolved that much over the past two decades. Moreover, this Article demonstrates that EU law still fails to sufficiently take into account the specific features of corporate entities (as opposed to individuals), as well as to fully exploit the potential strengths of a criminal law approach, as opposed to an administrative or civil law approach. In the author's view, the EU should more carefully consider the objectives and strengths of different kinds of enforcement mechanisms and adopt a more coherent approach, particularly with respect to corporations. Furthermore, when it comes to corporate punishment, the EU seemingly lacks ambition and creativity. EU legal instruments focus strongly on fines while insufficiently exploring 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 frequently committed in business settings. Considering the efforts of the EU to tackle various forms of financial crime<sup>1</sup>—efforts which have definitely intensified since the 2008 financial crisis—it would not come as a surprise that the EU had also sought to strengthen its grip on national law in order to combat corporate (financial) crime.

In addition to important regulatory efforts<sup>2</sup> primarily aimed at prevention and compliance, the deterrence and punishment of corporations—or “legal persons,” which is the term preferred by the EU legislator—are prominent concerns for the EU legislator. Recent examples 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 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, despite the clearly growing trend otherwise.<sup>3</sup>

Yet, as demonstrated later in this Article, Member States’ discretion in applying the label of their choice is not unlimited. Certain EU legal instruments set forth detailed rules on corporate liability as well as certain punishment objectives and/or specific types of sanctions. Hence, even if a Member State decides to label the corporate liability regime as

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<sup>1</sup> 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 & 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 & Vanessa Franssen eds., 2017).

<sup>2</sup> For a critical analysis of the EU’s regulatory approach in the field of financial crime see generally 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, 52 (2015).

<sup>3</sup> For instance, it is interesting to observe the evolution between 2000 and 2012. Whereas the authors of *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 offen[s]es, significant differences still exist in the approach developed in the member states.” MIREILLE DELMAS-MARTY & JOHN A. E. VERVAELE, *THE IMPLEMENTATION OF THE CORPUS JURIS IN THE MEMBER STATES* 74–75 (2000); GERT VERMEULEN, WENDY DE BONDT & CHARLOTTE RYCKMAN, *LIABILITY OF LEGAL PERSONS FOR OFFENCES IN THE EU* 10 (2012).

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.<sup>4</sup>

This Article demonstrates that, despite efforts to combat financial crime more effectively, the EU approach to corporate financial crime has not evolved significantly over the past two decades. Moreover, it will argue that EU law still does not sufficiently take into account the specific features of 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. It is this author’s view that the EU should more carefully consider the objectives and strengths of different kinds of enforcement mechanisms and adopt a more coherent approach,<sup>5</sup> particularly with respect to corporations.

Furthermore, when it comes to corporate punishment, the EU lacks ambition and creativity. EU legal instruments focus strongly on fines while insufficiently exploring other, potentially more adequate sanctions to achieve certain punishment goals. Ultimately, this likely undermines the effectiveness of the EU’s fight against corporate financial crime.

This Article will be structured as follows. To begin, Section B contains a general overview of the legal framework on corporate crime at the EU level—finding that since the Amsterdam Treaty entered into force, 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 examines more closely the existing EU provisions on the liability of and sanctions for legal persons. This is accomplished by first analyzing the nature of the liability regime imposed by the EU and investigating whether the EU’s approach 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 is paid to the EU’s method of taking into account the particular characteristics of corporate offenders. This analysis questions whether the EU’s approach is sufficiently tailor-made. Subsequently, the present requirements of the EU with respect to sanctions are scrutinized, as are some astonishing gaps in the current legal framework and striking differences with EU punitive administrative law. Section D concludes that, although the EU legal framework on corporate financial crime seems firmly established, there is considerable room for improvement—not

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<sup>4</sup> 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).

<sup>5</sup> See also, e.g., Michael Faure & 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).

only with respect to the nature of and criteria for corporate liability, but also 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 strongly focuses on corporate crime.

Before outlining a few prime examples of EU law in this area, it is important to note that financial crime is 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 other type of organization creates particular problems and challenges. What happens inside an organization is likely to be a "black box" for the outside world. As argued elsewhere,<sup>6</sup> this complicates the investigation of corporate crime and pushes legislators and investigating authorities toward new investigative methods, including an increasing reliance on whistleblowers and leniency programs<sup>7</sup> and the adoption of other negotiated justice strategies.<sup>8</sup> This "black box" phenomenon also partly explains the growing importance of compliance<sup>9</sup> and monitoring programs<sup>10</sup> as both preventive and reactive tools against corporate crime, even if the collateral consequences of corporate prosecutions often play a considerable role too.<sup>11</sup> Moreover, the black box of an organization also renders the attribution of criminal liability difficult, and calls into doubt the adequacy and effectiveness of certain sanctions.<sup>12</sup>

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<sup>6</sup> Ligeti & Franssen, *supra* note 1.

<sup>7</sup> For a critical analysis see generally Christopher 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 (Katalin Ligeti & Vanessa Franssen eds., 2017).

<sup>8</sup> See, e.g., ANTHONY S. BARKOW & 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 (2013).

<sup>9</sup> 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 (Katalin Ligeti & Vanessa Franssen eds., 2017).

<sup>10</sup> See, e.g., Vikramaditya Khanna, *Reforming the Corporate Monitor?*, in ANTHONY S. BARKOW & RACHEL E. BARKOW, *PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT* 226. (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 (Katalin Ligeti & Vanessa Franssen eds., 2017).

<sup>11</sup> Khanna, *supra* note 10, at 227–88.

<sup>12</sup> Vanessa Franssen, *European Sentencing Principles for Corporations* 260–70 (Jun. 15, 2013) (Ph.D. dissertation, KU Leuven).

The financial crisis triggered 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. Such instruments include those related to insider dealing and market manipulation—in short, market abuse<sup>13</sup>—money laundering,<sup>14</sup> the counterfeiting of the euro,<sup>15</sup> and most recently, the protection of the Union's financial interests.<sup>16</sup> Each of these new instruments stresses the importance of corporate (criminal) liability and contains definitions on criminal offenses, aggravating circumstances, accomplice liability and attempt, and certain procedural provisions—e.g. on jurisdiction<sup>17</sup>, investigative measures,<sup>18</sup> or even on prescription<sup>19</sup>—that specifically address the liability of and sanctions for legal persons.

Such 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.”<sup>20</sup> At first glance, those provisions seem to have

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<sup>13</sup> Regulation 596/2014, of the European Parliament and of the Council of 16 Apr. 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, 2014 O.J. (L 173) 1 [hereinafter Market Abuse Regulation]; Directive 2014/57/EU, of the European Parliament and of the Council of 16 Apr. 2014 on Criminal Sanctions for Market Abuse, 2014 O.J. (L 173) 179 [hereinafter Market Abuse Directive].

<sup>14</sup> Directive 2015/849, of the European Parliament and of the Council 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, 2015 O.J. (L 141) 73 [hereinafter The 4<sup>th</sup> 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.

<sup>15</sup> Directive 2014/62/EU, of the European Parliament and of the Council of 15 May 2014 on the Protection of the Euro and Other Currencies Against Counterfeiting by Criminal Law, and Replacing Council Framework Decision 2000/383/JHA, 2014 O.J. (L 151) 1 [hereinafter Euro Counterfeiting Directive].

<sup>16</sup> Directive 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the Fight Against Fraud to the Union's Financial Interests by Means of Criminal Law, 2017 O.J. (L 198) 29 (EU) [hereinafter: PIF Directive].

<sup>17</sup> See *id.* art. 11; Market Abuse Directive, *supra* note 13, art. 10; Euro Counterfeiting Directive, *supra* note 15, art. 8.

<sup>18</sup> See, e.g., Euro Counterfeiting Directive, *supra* note 15, art. 9; PIF Directive, *supra* note 16, art. 10.

<sup>19</sup> See, e.g., PIF Directive, *supra* note 16, art. 16.

<sup>20</sup> See Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts art. 2, Oct. 2, 1997, 1997 O.J. (C 340) 1. Further telling is that

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

hardly evolved over the past two decades, which in itself is somewhat surprising. This would suggest that the questions raised in the aftermath of the financial crisis did not require an adjustment to those provisions. Such an inference would seem especially true for the provision on corporate liability, which, apart from some very minor differences, has remained unchanged and is copy-pasted from one legal instrument into another one.

Comparatively, the provisions on the sanctions for legal persons have undergone incremental changes over time. For instance, the Environmental Crime Directive of 2008<sup>21</sup> merely 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”.<sup>22</sup> A similar provision can be found in the Ship-Source Pollution Directive, as amended in 2009.<sup>23</sup> The Directives adopted in the aftermath of the financial crisis, however, demonstrate increasing precision with respect to the minimum requirements for sanctions for legal persons:

Member States shall take the necessary measures to ensure that a legal person held liable pursuant to [the liability of legal persons as set forth in] Article 6 is subject to effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions such as

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

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cooperation in criminal matters and by preventing and combating racism and xenophobia.

*Id.* art. 29.

<sup>21</sup> Directive 2008/99/EC, of the European Parliament and of the Council of 19 Nov. 2008 on the Protection of the Environment Through Criminal Law, 2008 O.J. (L 328) 28 [hereinafter Environmental Crime Directive].

<sup>22</sup> See *id.* at art. 7.

<sup>23</sup> Directive 2009/123/EC, of the European Parliament and of the Council of 21 Oct. 2009, Amending Directive 2005/123/EC on Ship-Source Pollution and on the Introduction of Penalties for Infringements, 2009 O.J. (L 280) 52 [hereinafter Ship-Source Pollution Directive]. 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.

<sup>24</sup> See, e.g., Euro Counterfeiting Directive, *supra* note 15, art. 7.

One might be tempted to conclude that the additional requirements imposed by the EU—although neither stringent nor specific, as explained below—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 harmonized approach throughout the Union. But, concluding as much would be far too expeditious and would not take into account the constitutional framework of the Union.

In fact, going back in time, one will find various legal instruments in the field of EU criminal law that already contain more precise requirements. Such instruments include those related to former Framework Decisions on fraud and counterfeiting of non-cash means of payment,<sup>25</sup> corruption in the private sector,<sup>26</sup> terrorism,<sup>27</sup> and organized crime<sup>28</sup>—which already 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<sup>29</sup> were adopted under the former First Pillar in the wake of a

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<sup>25</sup> See Council Framework Decision 2001/413/JHA of 28 May 2001, Combating Fraud and Counterfeiting of Non-Cash Means of Payment, art. 8, 2001 O.J. (L 149) 1 [hereinafter Framework Decision Fraud Non-Cash Means of Payment].

<sup>26</sup> See Council Framework Decision 2003/568/JHA of 22 July 2003 on Combating Corruption in the Private Sector art. 6, 2003 O.J. (L 192) 54 [hereinafter Framework Decision Corruption].

<sup>27</sup> See Council Framework Decision 2002/475/JHA of 13 June 2002 on Combating Terrorism art. 8, 2002 O.J. (L 164) 3. This Framework Decision has been replaced by Directive 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA, 2017 O.J. (L 88) 6. Nonetheless, 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.

<sup>28</sup> See Council Framework Decision 2008/841/JHA of 24 Oct. 2008 on the Fight Against Organized Crime art. 6, 2008 O.J. (L 300) 42. Organized crime is now 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 & Orsetta Giolo eds., 2017).

<sup>29</sup> Case C-176/03, *Commission v. Council*, 2005 E.C.R. I-7879 (annulling Framework Decision 2003/80/JHA of 27 Jan. 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 Court of Justice of the European Union (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.” See Case C-440/05, *Commission v. Council*, 2007 E.C.R. I-9097, para. 70. This case law subsequently led to the adoption of paragraph two of article 83 of the TFEU. For an analysis of this provision see 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 & Christopher Harding eds., 2017).

significant institutional battle concerning the division of competences between the former European Community and the European Union.<sup>30</sup> 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 of the European Union (CJEU) ever since the so-called “Greek Maize” case.<sup>31</sup>

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, the EU made limited progress in the way in which it 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 conclude that those requirements are now firmly established. This warrants a closer and critical analysis of such requirements as well as the underlying objectives pursued by the EU legislator. Such analysis will lead to 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 on the liability of legal persons is as follows:

1. Member States shall take the necessary measures to ensure that legal persons can be held liable for offences referred to in [these] Articles . . . committed for their

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<sup>30</sup> See, e.g., Grazia Maria Vagliasindi, *The EU Environmental Crime Directive*, in ENVIRONMENTAL CRIME IN EUROPE 36 (Andrew Farmer, Michael Faure & 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*, EUR. ENERGY AND ENVTL. L. REV. 256, 257–58 (2010).

<sup>31</sup> Case C-68/88, *Commission v. Hellenic Republic*, 1989 E.C.R. 339, paras. 23–4 (emphasis added). 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

*[W]hilst 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.*

*Id.* para. 24 (emphasis added).



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 [these] Articles . . . 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 [these] Articles . . .<sup>32</sup>

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,”<sup>33</sup> and in several legal instruments, the ending of paragraph 2 varies between “by a person under its authority”<sup>34</sup> or “by a natural person under its authority.”<sup>35</sup> While the precise reasons for these minor distinctions between different iterations of the standard clause are not entirely clear, in

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<sup>32</sup> See, e.g., PIF Directive, *supra* note 16, art. 6; Council Directive 2013/40/EU of 12 Aug. 2013 on Attacks Against Information Systems and Replacing Council Framework Decision 2005/222/JHA, art. 10, 2013 O.J. (L 218) 8; Council Framework Decision 2008/841/JHA of Oct. 24 2008 on the Fight Against Organized Crime art. 5, 2008 O.J. (L 300) 42.

<sup>33</sup> Framework Decision Fraud Non-Cash Means of Payment, *supra* note 25, art. 7.

<sup>34</sup> See, e.g., *id.*; Environmental Crime Directive, *supra* note 21, art. 6; Euro Counterfeiting Directive, *supra* note 15, art. 6; Market Abuse Directive, *supra* note 13, art. 8. In the pending proposal for a Directive replacing the latter Framework Decision, the excerpt will be deleted. See *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*, art. 9, COM (2017) 489 final (Sept. 13, 2009).

<sup>35</sup> See, e.g., Ship-Source Pollution Directive, *supra* note 23, art. 8b; The 4<sup>th</sup> Money Laundering Directive, *supra* note 14, art. 60 paras. 5–6.

essence, the language of corporate liability remains the same across all instruments that compel Member States to adopt criminal offenses and sanctions for certain types of misconduct.

### 1. *Criminal or Non-Criminal?*

One of the first features that stands out when taking a closer look at the corporate liability regime imposed by the EU 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. The EU indeed only provides that “legal persons can be held liable” for the criminal offenses defined or targeted by the legal instrument at hand. In other words, while the underlying conduct is criminal in nature, the legal person for whose benefit the offense was committed could potentially also be held civilly or administratively liable.

In this respect, and notwithstanding the fact that many Member States have accepted the principle of corporate criminal liability, the EU’s position remains unchanged from the one set forth 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.”<sup>36</sup>

Member States that are reluctant to adopt corporate criminal liability are thus not forced to do so by the EU. In this sense, EU law only imposes minimum rules, and grants Member States a wider margin of discretion for legal persons as compared to natural persons. This difference has everything to do with the persisting lack of consensus over corporate criminal liability among Member States, especially in light of the remaining theoretical objections of some Member States.<sup>37</sup> For instance, under German law, corporations can only be held liable under administrative law, despite the argument that such administrative liability is basically criminal liability according to Articles 6 and 7 of the European Convention of Human Rights (ECHR).<sup>38</sup> Italy, whose legal tradition in criminal law is closely linked to Germany’s for historical reasons, has created a *sui generis* regime of administrative liability with some

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<sup>36</sup> 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.

<sup>37</sup> 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* 275–77 (Katalin Ligeti & Stanislaw Tosza eds., 2018).

<sup>38</sup> See generally Dieter Dölling & 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* 25 (Stanislas Adam, Nathalie Colette-Basieczq & Marc Nihoul eds., 2008); Marc Engelhart, *Corporate Criminal Liability and Compliance in Germany*, in *CORPORATE CRIMINAL LIABILITY AND COMPLIANCE PROGRAM* 168–69 (Antonio Fiorella & Alfonso Maria Stile eds., 2011).

characteristics of criminal liability.<sup>39</sup> Finally, in Sweden, corporate criminal liability has also not been introduced, but the Criminal Code provides for corporate fines ranging up to approximately one million euro, which are, formally speaking, not considered criminal sanctions but, like forfeiture and seizure of property, “special consequences of crime defined by law.”<sup>40</sup>

Nevertheless, even if EU law does not formally oblige Member States to adopt rules on corporate criminal liability, Member States are not entirely free to choose their own liability regime. For one, Member States must still ensure that domestic law meets the standard of “effective, proportionate and dissuasive sanctions.” 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 liability and corresponding 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.”<sup>41</sup>

Therefore, if a Member State provides for corporate criminal liability for similar offenses under national law, it is obliged to apply an equivalent liability regime to the offenses 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 “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.”<sup>42</sup>

Meanwhile, Recital (15) of the PIF Directive sets that “[i]n order to ensure equivalent protection of the Union’s financial interests throughout the Union by means of measures

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<sup>39</sup> 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 et al. eds., 2015). For a more extensive analysis see, e.g., Fabrizio Cugia di Sant’Orsola & Silvia Giampaolo, *Liability of Entities in Italy: Was it Not Societas Non Delinquere Potest?*, 2 NJECL 59, 59–74 (2011).

<sup>40</sup> 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 & 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 469–74 (Antonio Fiorella ed., 2012).

<sup>41</sup> Case C-68/88, *Commission v. Hellenic Republic*, 1989 E.C.R. 339, para. 24.

<sup>42</sup> Market Abuse Directive, *supra* note 13, recital (18).

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.”<sup>43</sup>

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,<sup>44</sup> one may nonetheless wonder whether a non-criminal approach for legal persons can actually fulfill 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 soon after the entry into force of the Lisbon Treaty.<sup>45</sup> This policy statement leaves no doubt about one of the most important goals of EU criminal law: To ensure the effective implementation of EU policies.<sup>46</sup> According to that policy statement, EU criminal law seeks “to prevent and sanction serious offences against EU law in important policy areas.”<sup>47</sup> 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.”<sup>48</sup> Criminal sanctions “may [thus] 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.”<sup>49</sup>

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, criminal sanctions

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<sup>43</sup> PIF Directive, *supra* note 16, recital (15).

<sup>44</sup> TEU Art. 4(1).

<sup>45</sup> *Towards an EU Criminal Policy: Ensuring the Effective Implementation of EU Policies Through Criminal Law*, COM (2011) 573 final (Sept. 20, 2011).

<sup>46</sup> For a critical assessment of the EU's effectiveness approach in the field of criminal law see Franssen, *supra* note 29.

<sup>47</sup> *Towards an EU Criminal Policy: Ensuring the Effective Implementation of EU Policies Through Criminal Law*, COM (2011) 573 final (20 September 2011), at 5.

<sup>48</sup> *Id.* at 11.

<sup>49</sup> *Id.*

are required for more serious infringements of the law.<sup>50</sup> This shows that EU criminal law pursues prevention through deterrence and retributive denunciation, thereby appealing to the expressive function of criminal law and emphasizing the importance of the underlying social or moral norms.<sup>51</sup>

Furthermore, considering the principles of subsidiarity and proportionality as laid down in Article 5 of the Treaty on European Union (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.<sup>52</sup> 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 that the Commission was so explicit about its overall objectives in the field of criminal law, the objectives as such were not at all new. One can locate similar arguments in policy papers and legal instruments adopted before the Lisbon Treaty entered into force.

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<sup>50</sup> *Id.*

<sup>51</sup> The term “retributive denunciation” refers to a specific account of retributivism, according to which punishment is “the emphatic denunciation by the community of a crime.” John Cottingham, *Varieties of Retribution*, 29 PHIL.Q. 238, 245 (1979). By giving the offender what he deserves, punishment expresses social and moral disapproval of his culpable behavior. 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, in this Article’s view, be easily applied to corporations too—their punishment being society’s way to express strong public disapproval of the corporation’s behavior, whether this behavior is really immoral or simply wrong as infringing essential social norms. For a further analysis, see Franssen, *supra* note 12, at 32–3, 254–60.

<sup>52</sup> *Towards an EU Criminal Policy: Ensuring the Effective Implementation of EU Policies Through Criminal Law*, COM (2011) 573 final (20 September 2011), at 7. See also, e.g., Petter Asp, *The Importance of the Principles of Subsidiarity and Coherence in the Development of EU Criminal Law*, 1 EUR. CRIM. L. REV. 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 EUR. CRIM. L. REV. 7 (2011); Marc S. Groenhuijsen & Jannemieke W. Ouwerkerk, *Ultima ratio en criteria voor strafbaarstelling in Europees perspectief*, in ROOSACHTIG STRAFRECHT: LIBER amicorum THEO DE ROOS 249 (Marc S. Groenhuijsen, Tijs Kooijmans & 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 176–81 (Chloé Brière & Anne Weyembergh eds., 2018).

By 2004, the European Commission had already published a Green Paper on the approximation and mutual recognition of criminal sanctions,<sup>53</sup> which was itself 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 correspond closely to the aforementioned post-Lisbon objectives and, to some extent, were even more all-encompassing than the latter. First, the existence of common offenses 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.<sup>54</sup> The approximation of penalties would also give the people in the EU "a shared sense of justice,"<sup>55</sup> 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 thus profit from so-called safe havens.<sup>56</sup> Interestingly, the risk of offenders relocating to jurisdictions where they expect lower sentences *or* a lower probability of detection and punishment seems particularly relevant to corporate behavior.<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup> And last but not least, the approximation of penalties would ensure a more effective implementation of substantive EU law, particularly in harmonized areas,<sup>60</sup> so as to ensure "a high level of security."<sup>61</sup>

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<sup>53</sup> *Commission Green Paper on the Approximation, Mutual Recognition and Enforcement of Criminal Sanctions in the European Union*, COM (2004) 334 final (Apr. 30, 2004) [hereinafter Green Paper].

<sup>54</sup> *Id.* at 9.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 9–10, 47.

<sup>57</sup> *Cf. id.* 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.

<sup>58</sup> *Id.* at 10.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 47.

Furthermore, some specific legal instruments in the broader field of economic crime,<sup>62</sup> such as the Environmental Crime Directive, highlight that:

[T]he 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.*<sup>63</sup>

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.<sup>64</sup>

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 that need to be able to rely on the authenticity of euro notes and coins.<sup>65</sup> For this reason, common definitions of criminal offenses are necessary “to act as a deterrent”<sup>66</sup> and, for individuals, imprisonment will serve as a strong deterrent for potential criminals.<sup>67</sup>

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<sup>62</sup> Although the definition of the term “economic crime” varies, there is growing consensus on the inclusion of environmental crime. See Ligeti & Franssen, *supra* note 1, at 3–4. Moving beyond the terminological discussion, environmental crime undeniably has an important impact on the economy’s sustainability. See, e.g., Andrew Farmer, Michael Faure & Grazia Maria Vagliasindi, *Environmental Crime in Europe: State of Affairs and Future Perspectives*, in ENVIRONMENTAL CRIME IN EUROPE 320, 330 (Andrew Farmer, Michael Faure & Grazia Maria Vagliasindi eds., 2017).

<sup>63</sup> Environmental Crime Directive, *supra* note 15, recital (3) (emphasis added).

<sup>64</sup> Ship-Source Pollution Directive, *supra* note 23, recital (3) (emphasis added).

<sup>65</sup> Euro Counterfeiting Directive, *supra* note 15, recitals (2), (15).

<sup>66</sup> See, e.g., *id.* at recital (10).

<sup>67</sup> See, e.g., *id.* at recital (17).

Similarly, the Market Abuse Directive<sup>68</sup> insists on the importance of market integrity and investor confidence, which are both undermined by market abuse.<sup>69</sup> In addition, the legislator 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.”<sup>70</sup>

To ensure such compliance, it is essential to provide for:

[C]riminal 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 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.<sup>71</sup>

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.”<sup>72</sup>

The text of the Directive that was eventually adopted continues to stress the idea of deterrence and strong dissuasion<sup>73</sup> but, interestingly, the emphasis on the reputational effect of criminal sanctions has disappeared.

Briefly summarized, the above legislative considerations suggest that criminal sanctions are considered necessary for two primary reasons. First, they express stronger social disapproval and have a stronger stigmatizing effect than other types of sanctions. Second, and related

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<sup>68</sup> For a further analysis of the justification for criminalizing market abuse see Franssen, *supra* note 46, at 95–8.

<sup>69</sup> Market Abuse Directive, *supra* note 13, recital (1).

<sup>70</sup> *Id.* at recital (5).

<sup>71</sup> *Id.* at recital (6) (emphasis added).

<sup>72</sup> *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 (July 11, 2012) (emphasis added).

<sup>73</sup> PIF Directive, *supra* note 16, recitals (15), (18), and (28).



to the first, criminal sanctions have a more deterrent effect than other sanctions, which in turn ensures a more effective enforcement of EU law.

Yet, if criminal sanctions are really of a qualitatively different nature, thereby 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 ultimately so unimportant as to be non-determinative with respect to corporations? Because if they were, surely, the EU would also require criminal sanctions for legal persons, or would it not?<sup>74</sup> Are the policy objectives different with respect to legal persons, or are criminal sanctions for legal persons not supposed to have the same characterizing features—strong deterrence and strong societal denunciation?

### *III. Criteria for Corporate Liability*

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

First, it targets criminal offenses 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, liability is only imposed where criminal offenses are committed for the legal person's benefit. Second, and in addition to that, liability is also extended to the legal person for criminal offenses that result from a lack of supervision or control by the above-described person with a leading position.

The aforementioned first layer of liability presents all characteristics of a system of vicarious liability. Vicarious liability—also referred to as indirect, derivative, or agency liability<sup>75</sup>—is based on the civil law theory of *respondet superior*, which a number of legal systems have transposed to the area of criminal liability. US corporate criminal liability is a prominent and

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<sup>74</sup> 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 & 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).

<sup>75</sup> 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 & Marc Nihoul eds., 2008).

well-established example thereof.<sup>76</sup> In the EU, countries like Spain<sup>77</sup> and France<sup>78</sup> have adopted corporate criminal liability on this basis. Under this theory, to hold a legal person liable, it suffices to establish that an individual within the legal person has committed an offense on behalf of the legal person. The material and mental element of the offense are thus established through the individual's involvement and subsequently attributed to the legal person on the basis of certain objective criteria, such as the fact that the offense has benefited 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,<sup>79</sup> because the natural person who commits the offense must be a person holding a leading position within the corporate organization.<sup>80</sup> Having a leading position is defined as having a power of representation of the legal person, or the authority to make decisions on behalf of the legal person, or to exercise control within that legal person. As argued elsewhere,<sup>81</sup> 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. Yet, in practice, the difference between this and indirect criminal liability seems fairly limited.<sup>82</sup>

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<sup>76</sup> 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 & Nelson Wagner, *Corporate Criminal Liability*, 44 AM. CRIM. L. REV. 337, 339–47 (2007); HARRY FIRST, BUSINESS CRIME: CASES AND MATERIALS 167 (1990).

<sup>77</sup> 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 & Antonio del Moral García, Spain, in INTERNATIONAL ENCYCLOPAEDIA OF LAWS: CRIMINAL LAW paras 256–61 (Frank Verbruggen, Roger Blanpain & Michele Colucci eds., 2012).

<sup>78</sup> 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 organizational model. In this respect, see Juliette Tricot, *Corporate Criminal Liability in France*, in CORPORATE CRIMINAL LIABILITY AND COMPLIANCE PROGRAM 135 (Antonio Fiorella & Alfonso Maria Stile eds., 2011).

<sup>79</sup> 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 222–29, and in particular 224 for the above quote (Antonio Fiorella & Alfonso Maria Stile eds., 2012).

<sup>80</sup> Cf. VERMEULEN, *supra* note 3, at 11.

<sup>81</sup> See Vanessa Franssen, *Daderschap en toerekening bij rechtspersonen*, NULLUM CRIMEN 227, 232, 241 (2009); Raf Verstraeten & 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 & Alfonso Maria Stile eds., 2012).

<sup>82</sup> For a critical analysis of the identification theory under English law and the problems it causes in practice see JAMES GOBERT & MAURICE PUNCH, RETHINKING CORPORATE CRIME 62–69 (2003). See also Gobert, *supra* note 79, at 224–

The second layer of liability of the EU clause on corporate liability is of a somewhat different nature. Essentially, it corresponds to situations where someone within the legal person is able to commit an offense due to a lack of supervision or control of the persons having leadership positions. The latter can be considered as “functional perpetrators,” a notion that is well-established under, for example, Dutch criminal law.<sup>83</sup> A functional perpetrator is someone who, due to his or her position, is liable for criminal behavior committed by other persons acting under his or her supervision or control. As such, he or she is not necessarily guilty of the same offense as the person(s) acting under their supervision or control. To elaborate, in the event of an intentional offense, the functional perpetrator does not necessarily—perhaps, only rarely—intentionally turn a blind eye to the criminal activity, but is simply negligent in performing his or her supervision tasks. A functional perpetrator can, to some extent, be compared to an accomplice, with the sole difference being that there is, in principle, no intent to participate in the commission of the offense.<sup>84</sup> Therefore, holding the functional perpetrator criminally liable on either the same legal basis as the “material” or “direct” offender, *i.e.*, the person who physically committed the offense targeted by the EU legal instrument, or on the basis of an accomplice liability theory, is usually impossible. A self-standing legal basis for the functional perpetrator’s criminal liability thus seems indispensable.<sup>85</sup> As the liability of the legal person is based on the criminal liability of the functional perpetrator, one may argue that the legal person is also a kind of functional perpetrator.

The above analysis suggests that the rules on corporate liability imposed by the EU are strongly dependent on the individual’s liability. This holds true for both layers of liability. This emphasis on individual liability is also expressed by paragraph three of the EU standard provision on corporate liability, which states 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 account for the particular features of corporations particularly well.

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229. For the strong similarities between the identification theory and the French system of indirect liability see PHILIPPE CONTE & PATRICK MAISTRE DU CHAMBON, *DROIT PÉNAL GÉNÉRAL* 214–15 (2004).

<sup>83</sup> See, *e.g.*, JAAP DE HULLU, *MATERIEEL STRAFRECHT* 164–70, 209 (2003); Eelke Sikkema, *De strafrechtelijke verantwoordelijkheid van leidinggevenden in Nederland*, in *DE STRAFRECHTELIJKE VERANTWOORDELIJKEID VAN LEIDINGGEVENDEN—IN DE ECONOMISCHE CONTEXT* 36–58 (Nederlands-Vlaamse Vereniging voor Strafrecht ed., 2010).

<sup>84</sup> For an in-depth analysis of accomplice liability and functional perpetratorship see, *e.g.*, JAN VANHEULE, *STRAFBARE DEELNEMING* 905 (2010).

<sup>85</sup> It should be noted, though, that some legal systems, like the Belgian one, tend to apply a very broad notion of perpetratorship, including that of functional perpetrators, without a clear legal basis. For a further analysis, see Franssen, *supra* note 81, at 228–29. See also CHRISTIANE HENNAU & JACQUES VERHAEGEN, *DROIT PÉNAL GÉNÉRAL* 268–74 (2003).

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 offenses are committed by individuals acting on their own initiative and for their own benefit in a corporate setting that creates a direct or indirect benefit for the corporations, without the corporation “intending” to obtain such benefit. For instance, if an individual with a leadership position abuses 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 individual’s decision cannot be regarded as a decision emanating from the corporation or taken on behalf of the corporation’s interest.<sup>86</sup> 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.”<sup>87</sup> Yet, in practice, “the last two requirements are almost meaningless.”<sup>88</sup> To elaborate, 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.”<sup>89</sup> Some American scholars have therefore concluded that “respondeat superior is grossly overbroad,”<sup>90</sup> 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.<sup>91</sup>

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<sup>86</sup> 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”).

<sup>87</sup> *Id.* at 1440 and accompanying references.

<sup>88</sup> *Id.*

<sup>89</sup> *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).

<sup>90</sup> Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 576 (2006). See also, e.g., Jennifer Arlen, *The Potential Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 838 (1994).

<sup>91</sup> *Id.* at 526.

In order to counterbalance the breadth of the corporate criminal liability, US prosecutors enjoy great prosecutorial discretion—considered excessive by some authors.<sup>92</sup> Furthermore, the existence of an effective compliance program can be taken into account as a mitigating circumstance at the sentencing level.<sup>93</sup> 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 with those of the agents of the corporation—and such may lead to undesirable outcomes.

Moreover, liability based on the *respondeat superior* theory or the identification theory, in principle, requires identification of the individual who committed the offense, 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 organizations—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.<sup>94</sup>

In conclusion, rather than opting for a system of autonomous or direct corporate liability that would fully recognize legal persons as subjects of criminal law and which would be better adjusted to more complex organizational situations,<sup>95</sup> 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 have an express defense against potential abuse situations. 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, [such] should not be deemed to constitute market abuse by the legal person.”<sup>96</sup>

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<sup>92</sup> See, e.g., Weissmann *supra* note 89, at 1320. For a more mitigated analysis see Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481, 1491–1493 (2009).

<sup>93</sup> See, e.g., Kendel Drew & Kyle A. Clark, *Corporate Criminal Liability*, 42 AM. CRIM. L. REV. 277, 287 (2005). For an analysis and case-law based assessment of the US Sentencing Guidelines' emphasis on compliance programs 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).

<sup>94</sup> 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 & MAURICE PUNCH, *RETHINKING CORPORATE CRIME* 49–77 (2003). For a further analysis of the difficulties in identifying and punishing the responsible person in large corporate structures, see Franssen, *supra* note 37, at 277.

<sup>95</sup> *Id.* at 78. See also William S. Laufer, *The Missing Account of Progressive Corporate Criminal Law*, 14 N.Y.U. J.L. & BUS. 71, 83, 136–37 (2017) (proposing the term “constructive corporate liability”).

<sup>96</sup> Market Abuse Regulation, *supra* note 13, recital (30).

This leads to the paradoxical situation that legal persons are more likely to incur “criminal” liability as opposed to administrative liability if an individual commits an offense within the scope of his or her employment. Instead of imposing stricter criteria for “criminal” liability for more serious violations of law—like the requirement to prove the corporation’s criminal state of mind—the reality is that the EU opts for less strict standards of corporate “criminal” liability.<sup>97</sup> Once again, this raises the question about the true nature of corporate liability for criminal offenses under EU law.

#### *IV. Criminal or Non-Criminal Sanctions*

Turning 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, the EU indeed only requires that Member States subject legal persons “to effective, proportionate and dissuasive sanctions, which *shall include criminal or non-criminal fines.*”<sup>98</sup> While fines are applied widely 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 that fines may be calculated in advance, they may simply be treated as a business cost. Moreover, a fine does not necessarily send the right message to those in charge of the corporate decision-making process that have the capacity to change the corporation’s behavior in the future—for instance, corporate officials or shareholders in closely-held operations to the extent that the latter are closely involved in the decision-making process.<sup>99</sup>

In addition to criminal or non-criminal fines, EU instruments encourage Member States to adopt other sanctions—such as excluding infringing entities from entitlements to public benefits or aid, temporarily or permanently disqualifying them from the practice of commercial activities, placing them under judicial supervision, or causing their judicial winding-up and the temporary or permanent closure of establishments which have been used for committing the offense. The PIF Directive adds a new sanction to that list: The “temporary or permanent exclusion from public tender procedures.”<sup>100</sup> Nonetheless, these sanctions, which recall some of the recommendations made by the Council of Europe back

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<sup>97</sup> 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 behavior.

<sup>98</sup> See, e.g., PIF Directive, *supra* note 16, art. 9 (emphasis added).

<sup>99</sup> For a more in-depth analysis see Franssen *supra* note 12, at 260–70 and the accompanying references.

<sup>100</sup> See PIF Directive, *supra* note 16, art. 9(b).

in 1988,<sup>101</sup> are mere suggestions and 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 discretion 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.<sup>102</sup> Moreover, in evaluating whether national law meets that punishment standard set by the EU legislator, the CJEU will not only consider the level of fines, but also other penalties “imposed in respect of the same infringement.”<sup>103</sup>

The minimum approach taken by 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 offenses.<sup>104</sup> The EU 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, for instance, from the much more detailed rules and guidelines in the field of EU competition law<sup>105</sup> and the administrative prong of EU market abuse law.<sup>106</sup> The difference in applicable instruments matters—a Regulation is usually more precise than a Directive. But, the explanation for the diverging approach cannot be confined to this technical difference. One may also note that the harsh “administrative” fines of the

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<sup>101</sup> Recommendation No. R (88) 18 of 20 Oct. 20, 1988 Concerning Liability of Enterprises Having Legal Personality for Offenses Committed in the Exercise of their Activities, art. 7.

<sup>102</sup> See, e.g., Case C-68/88, *Commission v. Hellenic Republic*, 1989 E.C.R. 339, paras 24–7. 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 fulfill 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.” *Id.* para. 22.

<sup>103</sup> Case C-262/99, *Louloudakis v. Greece*, 2001 E.C.R. I-5547, para. 69.

<sup>104</sup> See, e.g., PIF Directive, *supra* note 16, art. 7; Market Abuse Directive, *supra* note 13, art. 7; Euro Counterfeiting Directive, *supra* note 15, art. 5.

<sup>105</sup> See Council Regulation 1/2003 of 16 Dec. 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty art. 23(2), (3), 2003 O.J. (L 1) 1 (EC); Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2) (a) of Regulation 1/2003, 2006 O.J. (C 210), 2.

<sup>106</sup> See Market Abuse Regulation, *supra* note 13, art. 30(2)(j).

European Commission and some administrative sanctions provided by the Market Abuse Regulation are quite punitive and would qualify as “criminal” sanctions under Articles 6 and 7 of the ECHR.<sup>107</sup> The general approach is, above all, a symptom of the unwillingness of Member States to further approximate their national rules in this respect. In the not so distant past, the European Commission attempted to go beyond the aforementioned general requirement in the field of ship-source pollution, proposing additional fines based on the legal person’s turnover or the assets it owns, thereby following the example of the fines applicable under EU competition law. Nevertheless, this proposal utterly failed to convince the Member States.<sup>108</sup>

Furthermore, apart from the general character of 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 offense committed by an individual occupying a leadership position in the corporate organization. This gap is all the more pronounced when one considers that corporate financial crimes are typically pursued for profits.

One possible explanation for this gap is that the freezing and confiscation of instrumentalities and proceeds of crime is regulated by a separate Directive.<sup>109</sup> 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 offense” and in limited circumstances even where criminal proceedings ultimately do not lead to a criminal conviction.<sup>110</sup> Considering the fact that the EU does not impose criminal liability for legal persons, the application of this Directive to legal persons thus essentially rests with the respective Member State. Nevertheless, there exists one exception: The rules on third-party confiscation—*i.e.*, the situation where the illegal proceeds have been transferred to or

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<sup>107</sup> For a further analysis of whether cartel fines qualify as criminal sanctions, see Franssen *supra* note 12, at 307–14.

<sup>108</sup> 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 (May 2, 2003), see Franssen *supra* note 12, at 220–22.

<sup>109</sup> Directive 2014/42/EU, of the European Parliament and of the Council of 3 Apr. 2014 on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union, 2014 O.J. (L 127) 39 [hereinafter Freezing and Confiscation Directive].

<sup>110</sup> *Id.* art. 4(1), (2). For a further analysis, see, e.g., Katalin Ligeti & 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 7 (Katalin Ligeti & Michele Simonato eds., 2017).



acquired by a third party, potentially a legal person<sup>111</sup>—should, in any event, extend to both individuals and legal persons.<sup>112</sup> Furthermore, in some legal instruments, confiscation and freezing of the instrumentalities and illegal proceeds of crime is targeted by a separate provision, which appears applicable to individuals and legal persons, without distinction.<sup>113</sup>

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 of prosecuting and convicting a legal person. Indeed, the Freezing and Confiscation Directive does not contain a real obligation in this respect and far from proposes a kind of civil or non-criminal forfeiture typical of some common law systems.<sup>114</sup>

Whatever the explanation may be, 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 differs strikingly from other EU financial regulations. For instance, the Market Abuse Regulation entails an obligation to provide for the “disgorgement of profits” as an administrative sanction.<sup>115</sup> Admittedly, the idea of disgorgement is not entirely absent from the Market Abuse Directive, which states that:

Without 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

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<sup>111</sup> Freezing and Confiscation Directive, *supra* note 109, art. 6(1).

<sup>112</sup> *Id.* at recital (24).

<sup>113</sup> See, e.g., PIF Directive, *supra* note 16, art. 10. 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 this author’s view, this could include the hypothesis of a legal person being held administratively liable for one of those offenses.

<sup>114</sup> Ligeti & Simonato, *supra* note 110, 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 25. (Katalin Ligeti & 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 77. (Katalin Ligeti & Michele Simonato eds., 2017).

<sup>115</sup> Market Abuse Regulation, *supra* note 13, art. 30(2)(b).

to other persons and, where applicable, to the functioning of markets or the wider economy.<sup>116</sup>

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 liable person from the illegal proceeds of crime.<sup>117</sup> The PIF Directive is the only legal instrument in the field of financial crime setting this requirement for legal persons. 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 that affect private and institutional victims (*e.g.*, other corporations or government entities).<sup>118</sup> 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.”<sup>119</sup> In addition, the *deep pockets assumption* presents a very pragmatic argument for adding this sanction to the sanctioning arsenal for legal persons. 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

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<sup>116</sup> Market Abuse Directive, *supra* note 13, recital (24) (emphasis added). In fact, this idea was already present in the former Market Abuse Directive of 2003, which did not include an obligation to criminalize certain forms of market abuse. Instead, 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 Jan. 2003 on Insider Dealing and Market Manipulation, 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.

<sup>117</sup> 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.” The 4th Money Laundering Directive, *supra* note 14, art. 60(4)(d). This approach largely mirrors the European Commission’s Guidelines on fines applicable to cartel offenses. According to Point 31 of the 2006 Guidelines on fines, the gains obtained by undertaking the commission of a cartel offense 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.

<sup>118</sup> See Vanessa Franssen & Silvia Van Dyck, *Holsters op maat voor de bestrafing van ondernemingen? Eerst goed mikken, dan pas schieten*, in DE WET VOORBIJ. LIBER AMICORUM LUC HUYBRECHTS 525 (Filiep Deruyck et al. eds., 2010).

<sup>119</sup> Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 AM. CRIM. L. REV. 1417, 1429 (2009).

damage caused by the corporate offense. The corporation assumedly has deeper pockets, making it an attractive defendant.<sup>120</sup>

A third type of sanction that appears to be lacking is the publication of the very decision that holds a legal person liable. Despite the vast literature on reputational sanctions<sup>121</sup> and the aforementioned 1988 Recommendations of the Council of Europe, the EU standard provision on sanctions for legal persons does not suggest any requirement to publicly publish the decision. In 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 doing so would be disproportionate to the nature of the infringement, cause disproportionate damage to the persons involved, or jeopardize the stability of financial markets or an ongoing investigation. Such publication is considered to have “a dissuasive effect on the public at large . . . [and be] an important tool for competent authorities to inform market participants of what behaviour is considered to be an infringement of [the] Regulation and to promote good behaviour amongst market participants.”<sup>122</sup>

Put differently, the publication of the decision sends an important message that such behavior is not tolerated and ideally prevents 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 to significantly influence the conduct of would-be offenders, it could nonetheless be considered as a punitive sanction.

Furthermore, it is worthwhile to note 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

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<sup>120</sup> Of course, there will also be situations in which the corporation's financial resources are not sufficient to cover 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 offense.

<sup>121</sup> See, e.g., BRENT FISSE & JOHN BRAITHWAITE, *THE IMPACT OF PUBLICITY ON CORPORATE OFFENDERS* (1983); Jonathan M. Karpoff & John R. Lott, Jr., *The Reputational Penalty Firms Bear from Committing Criminal Fraud*, 36 J.L. & ECON. 757 (1993); Note, *Shame, 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. & Eric W. WEHRLY, *The Reputational Penalties for Environmental Violations: Empirical Evidence*, 68 J.L. & ECON. 653 (2005); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996).

<sup>122</sup> Market Abuse Regulation, *supra* note 13, recital (73).

of liability or sanctions, with cross-reference to the Market Abuse Regulation,<sup>123</sup> but does not include this sanction in the ultimate provision containing sanctions for legal persons. Considering the importance that at least some legal persons attach to their reputation<sup>124</sup> as well as the market effect that a publicized sanctioning decision may have, such seems like an interesting option for Member States to explore in the future.

#### **D. Conclusion: Missed Opportunities and Potential for the Future**

A first preliminary key conclusion resulting from the foregoing analysis is that the EU has made little progress in the fight against corporate financial crime since the 2008 financial crisis. Surely, several new legal instruments have been adopted and the regulatory framework has been solidified. Nonetheless, when it comes to the EU's approach for corporate liability for the most serious financial offenses that have been harmonized at the EU level, it seems the policy assessments made in the wake of the financial crisis have hardly had any effect. Indeed, the legal provision on corporate liability is still the same standard provision that was previously used, 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 the sole difference being the addition of required fines and the encouragement of other sanctions. The lack of minimum rules with respect to those sanctions in conjunction with the nearly voluntary character of the approximation of national rules most clearly reveals the lack of consensus and unwillingness among Member States to step up against corporate crime and create a level playing field for legal persons throughout the EU.

Second, in addition to the nearly *status quo*, this Article has also shown a mismatch between the objectives pursued by the EU and the added value of criminal law enforcement, and the choice left to the Member States on whether to hold corporations criminally or otherwise liable. Admittedly, this mismatch is due, once more, to the persisting lack of consensus between the Member States, particularly with respect to the theoretical acceptability of corporate criminal liability. Yet, the result is quite unsatisfactory and sends a 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 because such 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 well adjusted to the corporate reality. On the one hand, because it adheres to a liability regime consisting of a mix of the *respondeat superior* theory and the identification theory. Notably,

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<sup>123</sup> Market Abuse Directive, *supra* note 13, recital (18).

<sup>124</sup> As some rightfully point out, it takes a good reputation to lose one. *See, e.g., Shame, Stigma, and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law*, *supra* note 121, at 2190.

both theories have proven their weaknesses at the national level. As far as the functional perpetratorship of legal persons is concerned, a further analysis of its implementation under national law is desirable to see exactly how corporate liability is regulated and applied to real-world cases. On the other hand, the EU essentially only requires Member States to provide for criminal or noncriminal 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<sup>125</sup>—are largely disregarded by the EU, or at the very least are not included in the current set of sanctions for legal persons. In this respect, the harmonization 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 reflection on proper organizational liability criteria and an appropriate arsenal of sanctions is desperately needed, notwithstanding the studies that the European Commission has ordered or funded in the recent past. On top of that, more willingness of Member States is critically required in order to move beyond the current legal framework. If the financial crisis has taught us one thing, it is definitely that corporate financial crime cannot be adequately fought by individual States. Such requires comprehensive, supranational, or even internationally coordinated action.

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<sup>125</sup> For an extensive analysis, see Franssen, *supra* note 12, at 276-280 and 393-394.

