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Received: 29 April 2022 | Revised: 28 September 2022 | Accepted: 7 October 2022

DOI: 10.1111/eulj.12447

SPECIAL ISSUE ARTICLE

WILEY

Old wine in a new bottle: Shaping the foundations of EU criminal law through the concept of legal interests (*Rechtsgüter*)

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Abstract

Ever since the establishment of EU competence to legislate in criminal matters, legal scholarship has been devoting a fair amount of attention to the scope of these powers as well as to their proper exercise. The many scholarly contributions this has led to make a commendable and laudable body of knowledge with respect to the matter at hand. Yet, as will be argued, its capacities to shape the normative foundations of EU criminal law remain limited, with the main reason being that normative limits of EU-level criminalisation have so far predominantly been articulated in terms of *principles*. For the reasons set out below, this article proposes to supplement the ongoing debate with another conceptual lens, i.e., the lens of *legal interests* (*Rechtsgüter*). The purpose of this article is to substantiate the point of view that the concept of legal interests offers essential opportunities to further shape the normative foundations of EU criminal law.

1 | INTRODUCTION

Ever since the establishment of EU competence to legislate in criminal matters, legal scholarship has devoted a fair amount of attention to the scope of these powers as well as to their proper exercise. The issue has received increased attention over the past decade, most likely to respond to the reshaped, extended criminalisation powers under the current EU legal framework, which provides for both express and implied competences. The many scholarly contributions this has led to make a commendable and laudable body of knowledge with respect

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to the matter at hand.[1] Yet, as will be argued, its capacities to shape the normative foundations[2] of EU criminal law remain limited, with the main reason being that normative limits of EU-level criminalisation have so far predominantly been articulated in terms of *principles*. For the reasons set out below, this article proposes to supplement the ongoing debate with another conceptual lens with which to view this area, i.e., the lens of *legal interests* (*Rechtsgüter*).[3] The purpose of this article is to substantiate the point of view that the concept of legal interests offers essential opportunities to further shape the normative foundations of EU criminal law.[4]

To that end, this article starts with an overview of what legal scholarship dealing with normative justifications for EU action in the field of substantive criminal law has already brought, but also what is still missing in terms of theory building and sophistication on the exercise of criminalisation powers and the limits thereto in the EU context (Section 2). To address the missing link, it will subsequently be described what the concept of legal interests entails and what it has to offer for building the normative foundations of EU criminal law (Section 3). The follow-on section has a confined scope, looking ahead at the possible methods to apply as well as sources to rely on for the purpose of identifying which legal interests are worthy of protection through EU criminal law (Section 4). This article concludes with some final remarks on the way forward in shaping the normative foundations of EU criminal law through the lens of legal interests (Section 5).

2 | LEGAL SCHOLARSHIP ON THE NORMATIVE FOUNDATIONS OF EU-LEVEL CRIMINALISATION: STATE OF THE ART AND MISSING LINK

As indicated, the scope of EU powers and how to properly exercise them has been thought through quite extensively, especially in the past decade. Scholarly works on the matter relate mainly to the EU legal framework currently in force, that is to say since the entry into force of the Lisbon Treaty in 2009. Under this legal framework, Article 83 of the Treaty on the Functioning of the European Union (TFEU) envisages express criminalisation powers, both in a number of specified areas of crime, also known as Euro-crimes (such as terrorism, sexual exploitation, arms trafficking, money laundering) and in previously harmonised policy areas which are less obviously linked to the criminal sphere (such as environmental protection, maritime safety, migration, market integrity), but where criminal prohibitions are considered 'essential' to ensure the effective implementation of harmonised policies.[5] The prevailing view is that, in addition to the express powers under Article 83 TFEU, a legal basis for EU-level criminalisation in the specific area of EU fraud has implicitly been laid down in Article 325(4) TFEU.[6] It has, furthermore, been argued that several other Treaty provisions may serve, too, as legal bases for the adoption of EU-level criminal prohibitions,

[1]To mention only a few: I. Wieczorek, *The Legitimacy of EU Criminal Law* (Hart Publishing, 2020); J. Öberg, *Limits to EU Powers: A Case Study of EU Regulatory Criminal Law* (Hart Publishing, 2017); S.S. Buisman, 'The Future of EU Substantive Criminal Law: Towards a Uniform Set of Criminalisation Principles at the EU Level', (2022) 30 *European Journal of Crime, Criminal Law and Criminal Justice*, 161–187; N. Peršak, 'EU Criminal Law and Its Legitimation: In Search for a Substantive Principle of Criminalisation', (2018) 26 *European Journal of Crime, Criminal Law and Criminal Justice*, 20–39; S. Coutts, 'Supranational Public Wrongs: The Limitations and Possibilities of European Criminal Law and a European Community', (2017) 54 *Common Market Law Review*, 771–804.

[2]Throughout this article, the term 'normative' is used according to its most common meaning in criminal law scholarship, i.e., referring to how things *should be*, irrespective of what prevailing, codified legal provisions or case-law stipulates.

[3]As will be demonstrated in Section 3, the concept of legal interests has not been entirely absent in EU law-making and EU legal scholarship, but the use of the concept has so far remained rather fragmentary and as such differs fundamentally from the approach proposed in this article.

[4]This paper is part of an individual research project, entitled 'The Moral Limits of EU Criminal Law: A *Rechtsguts*-theory for the European Union', funded by the Alexander von Humboldt Stiftung through a Humboldt Research Fellowship for Experienced Researchers, which was awarded to the author in 2020.

[5]The difference between both types of criminalisation powers (i.e., powers in specified crime areas *versus* the so-called regulatory criminalisation powers in harmonized policy areas) has respectively been expressed as 'securitised criminalisation' *versus* 'functional criminalisation'; see V. Mitsilegas, 'EU Criminal Law Competence After Lisbon: From Securitised to Functional Criminalisation', in D. Acosta Arcarazo and C.C. Murphy (eds.), *EU Security and Justice Law After Lisbon and Stockholm* (Hart Publishing, 2014), 110.

[6]See, first, the European Commission's viewpoint in its communication 'Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law', 20 September 2011, COM(2011) 573 final, 6. This viewpoint has, secondly, been supported by legal scholars, such as Mitsilegas, above, n. 5, 12; P. Asp, *The Substantive Criminal Law Competence of the EU* (Skrifter utgivna av juridiska fakulteten vid Stockholms universitet, no. 79, 2012), 137; H. Satzger, *International and European Criminal Law* (Hart Publishing, 2012), 56, 81.

mostly in relation to specific areas of EU competence (these potential legal bases have to a far lesser extent been the objects of 'criminalisation research').[7]

From the entry into force of the Lisbon Treaty onwards, the express criminalisation powers laid down in Article 83 TFEU have been employed multiple times.[8] Fresh on the table is the Commission's legislative proposal to extend criminal prohibitions in the field of environmental protection.[9] Moreover, it is currently being discussed within the European Parliament, upon a Commission proposal, whether the exhaustive list of crime areas in Article 83(1) TFEU should be extended by adding hate speech and hate crime.[10] A legislative initiative resolution from the European Parliament, furthermore, includes a recommendation to identify gender-based violence as such an area of crime as well.[11]

2.1 | State of the art: Emphasis on normative principles

Both the frequent use of criminalisation powers and the topicality or their actual enlargement underscore the importance of fundamental reflections on the necessary limits of (exercising) such powers. As will be demonstrated below, such reflections have up to now almost exclusively been presented in terms of governing and guiding *principles*, that is to say: principles that should in one way or another govern the exercise of EU criminalisation powers. These principles concern both EU-level imperatives and so-called criminalisation principles. It is not uncommon that both categories of principles overlap, as will be shown in the following.[12]

Among the first category of principles—EU-level imperatives—are obviously the general principles of EU law that, as such, impose a number of significant restraints on the exercise of EU powers. Being a shared competence (Article 4 TFEU), the exercise of criminalisation powers is only permitted 'if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States' (subsidiarity principle, Article 5, para. 3, Treaty on European Union, TEU). Legislative action in this area is further limited by the requirement that its 'content and form' does 'not exceed what is necessary to achieve the objectives of the Treaties' (principle of proportionality, Article 5, para. 4, TEU).

Other EU-level restraints are to be found in Treaty provisions that specifically envisage criminalisation competences. Article 83 TFEU, for instance, requires in the first paragraph dealing with Euro-crimes that the considered conduct concerns 'particularly serious crime' that, besides, has 'a cross-border dimension'. The adoption of criminal prohibitions under the second paragraph of Article 83 TFEU must meet the requirements of previous harmonisation ('in an area which has been subject to harmonisation measures') as well as necessity ('proves essential to ensure the effective implementation of a Union policy').

For the further interpretation of these EU-level imperatives, as well as supplementing them, scholars have proposed various aspects and angles that the EU legislature should take into account in considering whether and how

[7]Article 79, para. 4 TFEU (on the EU's competence to develop a common immigration policy), for example, has been interpreted as a legal basis for the development of criminal prohibitions in the areas of human trafficking and illegal stay. Regarding this and other Treaty provisions, see, amongst others, J. Ouwerkerk, 'Criminalization Powers of the European Union and the Risks of Cherry-Picking Between Various Legal Bases: The Case for a Single Legal Framework for EU-Level Criminalization', (2017) 23 *Columbia Journal of European Law*, 504–550; Satzger, above, n. 6, 56, 81; Asp, above, n. 6, 142–154.

[8]For a 2019 overview, see the Note from the Romanian Presidency to the Council of the EU, 'The future of EU substantive criminal law—Policy debate', 28 May 2019, Council document 9726/19, 5–6.

[9]Commission, 'Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC', COM (2021) 851 final.

[10]Commission, 'Communication from the Commission to the European Parliament and the Council. A More inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime', COM (2021) 777.

[11]European Parliament, 'Resolution of 16 September 2021 with recommendations to the Commission on identifying gender-based violence as a new area of crime listed in Article 83(1) TFEU', P9_TA(2021)0388, para. 67. Without that being the case yet, the Commission's proposal for a Directive on combating violence against women and domestic violence has been brought under the scope of 'sexual exploitation', one of the crime areas explicitly mentioned in Article 83(1) TFEU, COM (2022) 105 final.

[12]This section in essence gives a translation and update of Section 2.2 of a Dutch-language article I have written, dealing with the topic the current paper deals with: J. Ouwerkerk, 'Op zoek naar de morele grenzen van Uniestrafrecht: De potentie van het rechtsbelangenconcept', in J. Altena, J. Cnossen, J. Crijns, P. Schuit and J. ten Voorde (eds.), *In onderlinge samenhang. Liber Amicorum Tineke Cleiren* (Boom juridisch, 2021), 394–397.

to design EU-level criminal prohibitions. These aspects and angles have also predominantly been presented in terms of principles. Scholarly contributions of the last decade and a half have shown a noticeable concurrency, which can concisely be summarised as follows.

Amongst the most comprehensive contributions is the 2009 Manifesto on European Criminal Policy in which criminal law scholars from across the EU presented their view on a 'balanced and coherent concept of criminal policy'.[13] The Manifesto takes an approach based on six principles, alternately referred to as 'fundamental principles' and 'criminal law principles'. They concern: (1) the requirement of a legitimate purpose; (2) the *ultima ratio* principle; (3) the principle of guilt (*mens rea*); (4) the principle of legality[14]; (5) the principle of subsidiarity; and (6) the principle of coherence. Whereas criminal lawyers are familiar with most of these principles, this may not apply for the first and the last ones. It appears that the first one, namely the requirement of a legitimate purpose, must be interpreted as being linked to the EU-level principle of proportionality: the requirement of a legitimate purpose is aimed at guaranteeing that criminal prohibitions serve the fundamental interests of citizens in the EU and that such interests must be derived from the primary law of the EU.[15] The last principle, that of coherence, means to safeguard that the body of substantive criminal law in its entirety reflects the values of the society involved and the individuals living therein. According to the authors of the Manifesto, this requires in an EU context both coherence at the EU level and coherence at the level of each Member State ('inner coherence').[16]

The principled approach adhered to in the Manifesto has been followed and further developed in legal scholarship with considerable frequency—on occasion from the same general perspective[17]—but oftentimes zooming in on one or more of the aforementioned principles in particular. There has been, for example, much attention paid to the limiting potential of the subsidiarity principle,[18] as to which several authors have drawn the conclusion that the actual limiting effect of the subsidiarity principle is quite restricted.[19] Another principle that has been much commented on due to its assumed significance for the adoption of EU-level criminal prohibitions concerns the *ultima ratio* principle (or principle of last resort).[20] On other occasions, authors have discussed a single principle in the assessment of newly proposed criminal prohibitions or adopted ones, in particular in the area of market abuse.[21]

Altogether, it constitutes principles that the average criminal law scholar will be very familiar with; they are clearly recognisable as a mixture of fundamental rights, fundamental principles of criminal law and criminalisation criteria, justifiably to be qualified as commonly accepted imperatives.

[13]P. Asp et al., 'A Manifesto on European Criminal Policy (European Criminal Policy Initiative)', (2009) *Zeitschrift für Internationale Strafrechtsdogmatiek*, 707–716. The Manifesto has been slightly amended in 2011; see P. Asp et al., 'The Manifesto on European Criminal Policy in 2011', (2011) 1 *European Criminal Law Review*, 86–103.

[14]Here, the Manifesto explicitly mentions the sub-principles of *lex certa*, the requirement of non-retroactivity, *lex mitior* and *nulla poena*; Asp et al., 'A Manifesto on European Criminal Policy', above, n. 13, 708–709.

[15]Ibid., 707.

[16]Ibid., 709.

[17]Such as Peršak, above, n. 1; M. Kaiafa-Gbandi, 'The Importance of Core Principles of Substantive Criminal Law for a European Criminal Policy Respecting Fundamental Rights and the Rule of Law', (2011) 1 *European Criminal Law Review*, 7–34; E. Herlin-Karnell, 'What Principles Drive (or Should Drive) European Criminal Law?', (2010) 11 *German Law Journal*, 1115–1129.

[18]For instance: P. Asp, 'The Importance of the Principles of Subsidiarity and Coherence in the Development of EU Criminal Law', (2011) 1 *European Criminal Law Review*, 44–55; E. Herlin-Karnell, 'Subsidiarity in the Area of Justice and Home Affairs Law—A Lost Cause?', (2009) 15 *European Law Journal*, 351–361.

[19]Generally regarding subsidiarity in EU law: J. Öberg, 'Subsidiarity as a Limit to the Exercise of EU Competences', (2017) 36 *Yearbook of European Law*, 391–420; G.A. Moens and J. Trone, 'The Principle of Subsidiarity in EU Judicial and Legislative Practice: Panacea or Placebo?', (2015) 41 *Notre Dame Journal of Legislation*, 65–102; G. Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time', (2006) 43 *Common Market Law Review*, 63–84. Specifically with regard to the operation of subsidiarity in the context of EU substantive criminal law, see Herlin-Karnell, above, n. 18, 354.

[20]For instance: M.S. Groenhuijsen and J.W. Ouwerkerk, 'Ultima ratio en criteria voor strafbaarstelling in Europees perspectief', in M.S. Groenhuijsen, T. Kooijmans and J.W. Ouwerkerk (eds.), *Roosachtig strafrecht. Liber Amicorum Theo de Roos* (Kluwer, 2013), 249–279; S. Melander, 'Ultima ratio in European Criminal Law', (2013) 3 *European Criminal Law Review*, 45–64; J.W. Ouwerkerk, 'Criminalisation as a Last Resort: A National Principle under the Pressure of Europeanisation?', (2012) 3 *New Journal of European Criminal Law*, 228–241. E. Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (Hart Publishing, 2012), 124–128.

[21]This has, for instance, been done from the perspective of necessity, as required under Article 83, para. 2 TFEU: M. Miglietti, 'The First Exercise of Article 83(2) TFEU Under Review: An Assessment of the Essential Need of Introducing Criminal Sanctions', (2014) 5 *New Journal of European Criminal Law*, 5–25; J. Öberg, 'Is it "Essential" to Imprison Insider Dealers to Enforce Insider Dealing Laws?', (2014) 14 *Journal of Corporate Law Studies*, 111–138.

It is therefore no surprise that the importance of most of these principles has also been acknowledged by the EU law-making institutions, as witnessed by their various policy documents on the matter. One of these documents is the European Commission's 2011 Communication in which it outlines an EU criminal policy, although limited to the use of Article 83, para. 2, TFEU. Its answer to the question 'which principles should guide EU criminal law legislation?' includes respect for subsidiarity, fundamental rights, *ultima ratio*, necessity and proportionality, legal certainty and the tailoring of sanctions to the crime.[22] The European Parliament, too, chooses principles for marking the limits of EU-level substantive criminal law. Next to the principles of subsidiarity, proportionality, *ultima ratio*, fundamental rights and coherence,[23] the resolution mentions the principles of individual guilt (*nulla poena sine culpa*), *lex certa*, non-retroactivity, *lex mitior*, *ne bis in idem* and the presumption of innocence.[24] On comparison, it is striking that the European Parliament's resolution gives much more attention to specific *criminal law* aspects that, moreover, partly concern *procedural* aspects (in the EU context oftentimes referred to as 'procedural rights', such as the presumption of innocence); it remains unclear to me what exact role these procedural aspects should play in the adoption of EU-wide criminal prohibitions. Leaving this aside, no further thoughts or details have been given to the limiting principles in documents drafted within the Parliament's co-legislature, i.e., the Council; a 2019 note from the Romanian Presidency merely states the importance of 'giving due attention *inter alia* to the principles of *ultima ratio*, proportionality and subsidiarity' in the exercise of criminalisation powers under Article 83 TFEU.[25] Nothing new under the sun.

2.2 | Missing link: Defining the outer limits of EU criminal law

The importance of the aforementioned principles is undisputed, and so is the need for the EU legislature to take them into account when considering either new criminal prohibitions or decriminalisation. Yet, the capability of these principles to shape the normative foundations of EU criminal law is limited, because they fail to delineate, content-wise, the outermost limits of EU criminal law. This conclusion emerges from the following observations.

The first observation is that the various restraints and imperatives that are couched in terms of principles predominantly serve to reflect and shape the division of competences between the EU and its Member States. This is particularly noticeable in the application of EU-level restraints, such as the governing principles of subsidiarity and proportionality. It is the very aim of these principles to safeguard the optimal distribution of powers. The requirement of crime with a 'cross-border dimension' (Article 83, para. 1, TEU) as well as the requirement of necessity (Article 83, para. 2, TFEU) primarily serve a similar purpose, for such requirements should prevent the adoption of EU-level criminal prohibitions that overly interfere in national sovereignty. In part this also applies to some of the other restraints, namely those that directly follow from EU-level imperatives or are closely related to them. One could, for instance, think of the *ultima ratio* principle that is often bracketed with the subsidiarity principle.[26]

The second observation relates to the first one. All principles that primarily serve the optimal division of powers between the EU and its Member States only fulfil their valuable role in a process in which the very existence of a criminalisation competence in a specific area of crime has already been accepted (mainly because such a competence follows from an explicit legal basis, such as Article 83 TFEU). In this process, the main question obviously is whether and to what extent the actual exercise of a *given* competence would be justified—and it makes absolute sense that in

[22]Commission, above, n. 6, Section 2, 6–8.

[23]European Parliament, 'Resolution of 22 May 2012 on an EU approach to criminal law', [2013] OJ C264E/7, paras. D, H, I and Q.

[24]Ibid., paras. J, K and Q.4.

[25]Note from the Presidency to the Council, 'The future of EU substantive criminal law—Policy debate', Council document 9726/19, 8. Little more than this can be found in the Council's older conclusions on model provisions, intended to guide the Council's criminal law deliberations, Council document 16,542/2/09.

[26]See, for instance, Herlin-Karnell, above, n. 20, at 124.

this process, the governing principles as well as the more traditional criminalisation principles are well suited to fulfil their limiting role, not solely in view of optimal division of competences, but also in order to define specific criminal prohibitions considering normative limits such as *lex certa*.

The third and final observation in fact follows logically from the previous observations. Whereas the aforementioned principles are clearly serving the EU legislature, they largely fail to guide the national legislators as well as national courts in their duties to implement, apply and interpret EU-level criminal prohibitions. Moreover, due to the lack of extensive explanatory memoranda (such as those common in the context of national law-making), a tradition has grown in which relatively little guidance is being given to the relevant national authorities—whereas important questions may arise, such as with regard to the precise content and scope of an EU-level definition of an offence, or about whether the definition can be considered sufficiently covered by a specific national definition of an offence. Such questions may obviously arise during legislative implementation processes, but also in individual criminal cases. In the latter situations both national judges and—pursuant to a preliminary reference—the European Court of Justice (ECJ) can be duty bound to interpret elements of offence definitions. These could be, for instance, the interpretation of terms such as 'exploitation' or 'position of vulnerability' (appearing in Article 2 (1–3) of the EU Directive on Human Trafficking[27]), the exact interpretation of which has a significant impact on the scope of human trafficking as a crime. But what are the points of reference that judges should take into account for the correct interpretation of such essential terms? A clear answer to that question has not been provided in the applicable directive or preceding international conventions.[28]

One could also think of situations in which a national criminal code defines prohibited conduct in broad terms, whereas in specific circumstances a narrow interpretation is preferred in the courtroom—for instance because in fact a single theft was committed and it would be considered unreasonable and unjust to also convict the thief of acquisition and possession of property that derives from criminal conduct, i.e., money laundering.[29] In such a situation it is highly relevant whether the underlying EU-level provisions on money laundering[30] indicate a broad, or rather a restrictive, interpretation in cases of so-called self-laundering. However, to solve such and similar issues of legal interpretation, the aforementioned sets of normative principles are not, or at best hardly, helpful.

To conclude, while the value of normative principles for a rational body of EU criminal law is undisputed, their capacities remain limited. True as it is that they do facilitate taking decisions on whether to act in the areas in which a criminalisation competence has been given, and while they do to some extent help to shape the precise scope of EU-level criminal prohibitions, normative principles do not address the first and primary question of which areas criminalisation of conduct should be a Union competence at all, and hence fail to determine the *outer limits* of criminalisation of conduct at the EU level.

Locating these outer limits requires, in my view, a fundamental reflection on the question of what precisely the EU should/could wish to express through the body of EU criminal law it creates—a question that thus

[27]Directive 2011/36 of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L101/1.

[28]P.H.P.H.M.C. van Kempen and S.M.A. Lestrade, 'Limiting the Criminalisation of Human Trafficking: Protection Against Exploitative Labour versus Individual Liberty and Economic Development', in R. Haverkamp, E. Herlin-Karnell and C. Lernestedt (eds.), *What is Wrong with Human Trafficking? Critical Perspectives on the Law* (Hart Publishing, 2019), 217–238.

[29]This is a real-life example. According to its literal wording, Article 420bis of the Dutch Criminal Code covers all forms of so-called self-laundering (e.g., the acquisition or possession of property that derives from the suspect's *own* criminal activities). Consequently, ordinary crimes such as simple theft would automatically fall under this provision as well. To prevent this from happening, the Dutch Supreme Court has repeatedly held that the mere acquisition or possession of the proceeds of an individual's own crime could not be qualified as money laundering under Article 420bis of the Dutch Criminal Code. Subsequently, it was held that under these circumstances the same rule had to apply to the conversion, transfer or use of such criminal proceeds. See, e.g., the Supreme Court's rulings of 27 May 2014, ECLI:NL:HR:2014:1237 and 7 October 2014, ECLI:NL:HR:2014:2913. Consequently, dissatisfied with the Supreme Court's case-law on the matter, the Dutch legislator has now adopted new criminal prohibitions, separately criminalising the mere acquisition or possession of property that derives from an individual's own criminal activity; see Articles 420bis.1 and 420quater.1 of the Dutch Criminal Code.

[30]As laid down in, inter alia, Directive 2018/843 of 30 May 2018 amending Directive 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU [2015] OJ L156/43 (based on Article 114 TFEU) and Directive 2018/1673 of 23 October 2018 on combating money laundering by criminal law [2018] OJ L284/22 (based on Article 83 para. 1 TFEU).

requires a change of lens and to shift to an earlier stage of thinking, moving from principles (or criteria) to *objectives, interests and values*.[31] To that end, it will be proposed below to employ the concept of legal interests (*Rechtsgüter*).

3 | THE CONCEPT OF LEGAL INTERESTS AND WHAT IT HAS TO OFFER EU CRIMINAL LAW

The twofold aim of this section is to describe what the concept of legal interests entails and why and how this concept can address the gap remaining in EU-level criminalisation theory. Prior to that, it first needs to be mentioned that the need for a preliminary rule or standard has been acknowledged before and, moreover, that the concept of legal interests has not been entirely absent in EU law-making and EU legal scholarship. But as will follow, the case made in the following sections differs from previous ones in that it proposes the *exclusive* and *consistent* use of the concept of legal interests in the preliminary phase of the criminalisation process.

3.1 | The *Rechtsguts*-theory

The concept of legal interests finds its origin in German doctrinal legal scholarship. According to the *Rechtsgutslehre*, the sole legitimate purpose of the criminal law is the protection of 'legal interests' (*Rechtsgüter*), also referred to as 'legal goods'.[32] Therewith, the *Rechtsgutslehre* constitutes a significant limit to the legislature's latitude in prohibiting conduct through the criminal law. Not only does it compel the legislature to explicate for each criminal prohibition its wishes to adopt which legal interest(s) that criminal prohibition aims to protect; it moreover requires that the prohibited conduct, if committed, does or can violate the protected interest (*Verletzbarkeit*).[33] Consequently, a criminal prohibition that has been designed to protect something that is not considered a legal interest must be deemed illegitimate according to the 'current mainstream version' of the *Rechtsgutslehre*.[34]

The extent to which the conceptual framework of the *Rechtsgutslehre* is actually capable of limiting the scope of substantive criminal law obviously depends on the meaning and use of 'legal interest'. Ever since the concept was introduced, several distinct meanings have been developed and the concept has been used in various ways and for different, oftentimes complementary, purposes.[35] To a certain extent, the chosen content of the concept of legal interest correlates with the function(s) it ought to serve, and in particular with whether or not it is seeking to give the concept a critical function, perhaps even one that expressly aims to *limit* the scope of criminal law. In this regard, two main approaches can be distinguished.

[31]Coutts uses the term 'values' in this context as well, together with the terms 'normative choices' and 'public goods'; Coutts, above, n. 1, 787. Further on the connection between his work and the approach proposed in this article, see infra n. 47 and accompanying text.

[32]C. Roxin and L. Greco, *Strafrecht – Allgemeiner Teil. Band I. Grundlagen. Der Aufbau der Verbrechenslehre* (5th edn, C.H. Beck, 2020), 9 ff (§ 2). W. Hassemer and U. Neuman, *Nomos Kommentar zum StGB*, Vol. 1 (3rd edn., 2010), vor § 1, n. 108ff, 146ff.

[33]M. Böse, 'The Principle of Proportionality and the Protection of Legal Interests (*Verhältnismaßigkeit und Rechtsgüterschutz*) (2011), 1 *European Criminal Law Review*, 37.

[34]C.-F. Stuckenberg, 'The Constitutional Deficiencies of the German *Rechtsgutslehre*' (2013) 3 *Oñati Socio-Legal Series*, 35.

[35]Overviews on the origins and development of the *Rechtsguts*-theory have been provided by, e.g., P. Sina, *Die Dogmengeschichte des Strafrechtlichen Begriffs "Rechtsgut"* (Verlag Helbing und Lichtenhahn, 1962); A. Eser, 'The Principle of "Harm" in the Concept of Crime—A Comparative Analysis of the Criminally Protected Legal Interests', (1965–1966) 4 *Duquesne University Law Review*, 345–417; S. Swoboda, 'Die Lehre vom Rechtsgut und ihre Alternativen', (2010) 122 *Zeitschrift für die gesamte Strafrechtswissenschaft*, 24–50; M. Heinrich, 'Strafrecht als Rechtsgüterschutz—ein Auslaufmodell? Zur Unverbrüchlichkeit des Rechtsgutsdogmas', in *Festschrift für Claus Roxin zum 80. Geburtstag am 15. Mai 2011* (De Gruyter, 2011), 133–134.

It was Dubber who introduced the terms *positivism* and *normativism* to describe the two main approaches to the *Rechtsgutslehre*.[36] For *positivists*,[37] the concept of legal interests primarily offers a means to systematise criminal prohibitions and to interpret elements of crime definitions. To that end, positivists take a *formal* approach and follow the legislature in what it declares worthy of protection through criminal law; everything that has been declared as such worthy of protection, constitutes a legal interest.[38] For positivist scholars, the concept of legal interests serves, first, as a method for the systematisation of criminal law provisions and their distinctive elements. Secondly, it equips courts for the interpretation of (the elements of) criminal prohibitions.

In view of what we need for the further rationalisation of EU-level criminalisation in, *inter alia*, a preliminary stage, a pure positivist use of the concept of legal interests must be considered too thin. Instead, it makes better sense to deliberately employ the concept for a normative-critical purpose. After all, for those taking a *normative approach* to the concept of legal interests, the critical function of the concept constitutes its very essence and primary aim. Normativists therefore adopt a *material* concept of legal interests, assuming that the concept itself should be able to inform the legislature as to which behaviour it may legitimately prohibit and punish and which behaviour it should leave unprohibited and unpunished. In other words, for normativists the *Rechtsgutslehre* is primarily a means to mark the limits of a legitimate body of substantive criminal law (*gesetzgebungskritischen* or *systemkritischen* function).[39] Consequently, normativists aim to articulate which legal interests are and/or are not allowed to be protected through criminal law.[40] Amongst normativist scholars, it has broadly been accepted that, in addition to its main critical function, the concept of legal interests also performs functions in the *post* law-making stage: first, as an analytical tool or method to critically reflect on adopted criminal law provisions,[41] and, secondly, as a guide for the interpretation of criminal law provisions in courts.[42]

3.2 | Defining the outer limits of EU criminal law through the concept of legal interests: Why?

It is posited here that the concept of legal interests, if diverted to a normative-critical purpose, provides a suitable and helpful framework for the articulation of the outer limits of EU substantive criminal law. The first reason, obviously, is the belief that thinking in terms of legal interests offers content that the aforementioned principles and/or criminalisation criteria, for the causes given,[43] are unable to offer. Secondly, thinking in terms of interests logically connects with the common way of thinking about the EU and its functions, which usually takes place in terms of objectives and values. The following elaborates on both points.

In a stage preliminary to legislative action, the concept of legal interests serves to argue whether or not an area of crime qualifies as an area in which criminalisation competences should exist, and to what extent—that is to say

[36]M.D. Dubber, 'Theories of Crime and Punishment in German Criminal Law', (2005) 53 *The American Journal of Comparative Law*, 684ff. In fact, these terms correspond to the distinction Engländer has made between those who champion a formal concept of legal interest (*formellen Rechtsgutsbegriff*) and those who defend a material concept (*materiellen Rechtsgutsbegriff*); see A. Engländer, 'Revitalisierung der materiellen Rechtsgutslehre durch das Verfassungsrecht?', (2015) 127 *Zeitschrift für die gesamte Strafrechtswissenschaft*, 620–621.

[37]Among the representatives of this positivist approach are several influential scholars such as Binding (as follows from K. Binding, *Die Normen und ihre Übertretung* (Vol. 1, 4th edn, Leipzig, 1922), 353 ff.), Jescheck and Weigend (H.H. Jescheck and T. Weigend, *Lehrbuch des Strafrechts: Allgemeiner Teil* (5th edn, Duncker & Humblot, 1996), 7–8: 'Alle Strafvorschriften des geltenden deutschen Rechts lassen sich auf den Schutz eines oder mehrerer Rechtsgüter zurückführen'. This statement has been accompanied by a footnote arguing as follows: 'Ob sich bloße Moralwidrigkeiten under Strafe gestellt werden, ist eine Frage der Kriminalpolitik, die von sozialethischen Grundüberzeugungen bestimmt wird…').

[38]Dubber, above, n. 36, 685; Engländer, above, n. 36, 620–621.

[39]Dubber, above, n. 36, 685; Engländer, above, n. 36, 617, 620–621.

[40]To the most influential representatives of this normativist approach belong, amongst others, Roxin, Hassemer (see, e.g., W. Hassemer, *Theorie und Soziologie des Verbrechens* (Athenäum Fischer Taschenbuch Verlag, 1973) and Schünemann (B. Schünemann, 'Das Rechtsgüterschutsprinzip als Fluchtpunkt der verfassungsrechtlichen Grenzen der Straftatbestände under Ihren Interpretation', in R. Hefendehl et al. (eds.), *Die Rechtsgutstheorie. Legitimationsbasis des Strafrechts oder dogmatisches Glasperlengespiel?* (Nomos Verlagsgesellschaft, 2003), 133–154).

[41]This method has, for instance, been carried out in T. Hörnle, *Grob anstößiges Verhalten* (Klostermann, 2005).

[42]Roxin and Greco, above, n. 32, 28–29.

[43]See Section 2.2.

whether the area of crime at stake relates to conduct that, when committed, violates a legal interest that is worthy of protection through the adoption of criminal law provisions at the EU level. Furthermore, specifying the precise legal interest that is at stake offers relevant content at a later stage, namely *post* legislation. Knowing which legal interest a specific criminal law provision intends to protect provides guidance on the implementation, application and interpretation of criminal prohibitions in both law-making processes and in courts.

In order to get a sense of what content the perspective of legal interests provides and how this content differs from, and adds to, the substance that results from the application of the various principles that legal scholarship on the matter of criminalisation normally refers to, it works perhaps best to ask oneself which interests (or goods/values) one considers protected by criminal prohibitions (either existing ones or possible new ones) in a specific area. For instance: (a) What is, or should be, the legal interest protected through criminalisation of serious environmental wrongs? Is it the quality of the environment? Or is it public health?; (b) What is, or should be, the legal interest protected through criminalisation of human smuggling? Is it the protection of the EU's external borders? Or the sovereignty of Member States?; (c) What is, or should be, the legal interest protected through criminalisation of forms of gender-based violence? Is it safety of women? Or equality (in the sense of equal safety levels) for men and women? Or is it life and/or physical integrity? Clarity on these issues is very relevant, as is best shown by the very possible legal interest. The acceptance of life and physical integrity as legal interests that are worthy of protection through EU criminal law would, after all, raise the challenging question whether classical crimes against life and physical integrity (such as murder, manslaughter and rape) could also be held as types of crime in which the EU potentially could be given competences.

It recently transpired that the Commission already considered itself competent to legislate with regard to rape, bringing the offence under the area of 'sexual exploitation of women', listed in Article 83(1) TFEU.[44] Rigotti's critical assessment of this choice actually very well supports my claim that thinking in terms of legally protected interests offers additional content for defining the outer limits of EU competence as well as *post* legislation. Rigotti argues that by using the frame of sexual exploitation, the Commission's proposal fails to ensure equal protection against the harm caused by rape. In view of EU core interests (such as human dignity, Article 2 TEU) and based on a historical account of what counts as rape and what its causes are (they may go beyond imbalances in power relations between men and women only), it is argued that EU legislation in this area should ensure the protection of the sexual autonomy of *each* individual and must therefore be framed in gender-neutral terms.[45]

The argumentation of Rigotti confirms that it does indeed matter how a criminal prohibition is justified, i.e., which interests are chosen to be protected through that criminal prohibition. It is a next step to determine which interests can actually be held to deserve protection through EU criminal law, and why. As will be argued in Section 4, this step requires in various aspects a translation of the national law-based concept of legal interest into an EU-compliant concept that can fulfil a normative-critical purpose that fits into the EU context: old wine in a new bottle.

In fact, the previous exercise further shows that the concept of legal interest, whereas primarily equipped to determine EU criminalisation competence, secondarily also supports the determination of whether to exercise this competence. After all, an inbuilt demand of using the concept is that of *Verletzbarkeit*, requiring the legislator to ensure that targeted conduct does in fact violate the legal interest it wishes to protect by means of prohibiting it. Thus, the concept of legal interests has the potential to further fulfil its limiting role in the stage where it is the normative principles dealt with in Section 2 that predominate the determination of whether the EU should act. This strengthens the concept's potential for being employed in a consistent manner throughout the entire legislative process and beyond.

[44]Commission, 'Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence, COM (2022) 105 final, draft Article 5.

[45]C. Rigotti, 'A Long Way to End Rape in the European Union: Assessing the Commission's Proposal to Harmonise Rape Law, through a Feminist Lens' (2022) 13 *New Journal of European Criminal Law*, 153–179.

Not only has the concept of legal interests much to offer EU law content-wise, it is also the case that using the perspective of interests naturally fits into the EU, being an organisation that is built upon, and functions within the boundaries of written objectives and values (such as the objective to establish an internal market or to promote values, such as the value of gender equality[46]). These aspects provide a natural and solid basis further build on, for the aim of identifying EU legal interests and arguing which of these interests deserve protection through EU criminal law. Support for this claim can be found elsewhere, for instance in the work of Coutts, who has been exploring which values and interests the EU has so far been expressing, or been trying to express, in exercising its criminal law competences. Despite his observation that EU legislative action in the area of substantive criminal law has a limited ability to communicate values, due to the ancillary and instrumental wordings of the Union's current criminalisation competences, he does conclude that EU criminal law unavoidably does express values and normative choices, albeit in a limited and oftentimes implicit manner. Coutts has found traces of what he depicts as 'common European public goods' and 'European public values'—notions that were developed by him on the basis of Duff's view of the criminal law as the expression of a normative community—here obviously at an EU level.[47] It apparently concerns notions that, according to this author, also work well in an EU context, witness the connections he has made between these notions, on the one hand, and EU objectives, essential interests (environment, internal market, financial system) and core values (Article 2 TEU), on the other.[48] True, in the same pursuit of stronger normative foundations of EU criminal law, I do not (unlike Coutts) depart from prevailing criminalisation competences and enacted criminal prohibitions, but this cannot alter the support it offers for the position taken in this article that the perspective of legally protected interests is a logical fit for the EU.

It is precisely because of what precedes why—as far as I am concerned—the concept of legal interests has more to offer EU law than the principle of harm. As already mentioned at the beginning of this section, the need for a preliminary rule or standard in the field of substantive criminal law has been acknowledged before, for instance by Peršak, who has been searching deliberately for a preliminary principle of *substantive* nature—a search that led her to the classical 'harm principle'. The harm principle prescribes that the criminal law should only be invoked in cases where the unwanted conduct at hand constitutes harm, in the sense of 'a wrongful setback to an interest'.[49] In Peršak's work, the harm principle is intended to fulfil its function in a preliminary stage, i.e., prior to the stage in which the aforementioned principles (which she characterises as '"formal" principles') would be applied. The question of whether conduct causes harm therefore comes first; fulfilment of the harm principle gives a 'good prima facie reason' for criminalisation. Harm is not yet a sufficient reason to adopt criminal prohibitions, though; the next step of the criminalisation process requires the application of the so-called 'formal' limiting principles.[50] Peršak's case for using the harm principle as a prima facie principle thus shows the importance of adding a preliminary, substantive principle for criminalisation to the other governing principles. After all, prior to dealing with the question of whether the EU legislature should actually invoke the criminal law in a specific area of crime/unwanted conduct, it must be considered in which specific areas the EU should act at all by means of criminal law intervention.

Indeed, in order to determine the scope of the criminal law, the principle of harm is in itself capable of functioning as a preliminary standard as it provides 'content for criminalisation',[51] hence serves to filter out conduct for which the criminal law should not be invoked at all[52]—and it may equally do so in the context of EU law-making. Besides, it has been questioned to what extent the notion of harm actually differs from the notion of legal interest at all: what constitutes harm is a wrongful setback to an *interest*, the reason why the notions of harm and legal interests

[46]Article 3 TEU.
[47]Coutts, above, n. 1.
[48]Ibid., 787–793.
[49]Peršak, above, n. 1, 23.
[50]Ibid., 23–24.
[51]Ibid., 23.
[52]In her significant book on the harm principle (which does not by the way deal with EU criminal law), Peršak uses the term 'channel of criminalisation'; see N. Peršak, *Criminalising Harmful Conduct: The Harm Principle, its Limits and Continental Counterparts* (Springer, 2007), 22.

have been labelled similar.[53] It has even been argued that both notions could be merged or combined.[54] Yet in the context of EU law, I would like to argue that using the perspective of legal interests as well as its principal terminology ultimately provides a better fit.

The predominant reason to prefer the concept of legal interests over the harm principle is that the former is a much more useful tool in the *post* legislation phase than the latter can ever be, for it is better attuned to feed not only the legislature, but also courts. Whereas the harm principle may have some impact, for instance on decisions whether or not to prosecute, or on sentencing,[55] the protected legal interest has the potential to provide much clearer, specific guidance on the desired scope of criminal prohibitions as well as on the circumstances in which their application is justified, namely when the protected legal interest has (allegedly) been violated.[56] The second reason to prefer the concept of legal interest over the harm principle is, admittedly, softer than the previous one. It concerns the viewpoint—perhaps more a kind of feeling though, or even a matter of personal taste—that compared to thinking in terms of 'harm', thinking instead in terms of 'legal interests' links more naturally with the very nature of the EU. As pointed out earlier, being an organisation built upon written objectives and values which inherently put limits on the powers of the EU—i.e., limits that have never been placed on the powers of nation-states in a similar way—gives a logical and strong connection with the question of which goods or values a society or community wishes to reflect through its body of criminal law, hence with the concept of legal interests, for it is this very question that is inherent to the concept too. It is therefore perhaps mainly the *terminology* of the legal interests doctrine that gives it a stronger distinguishing power than other doctrines, such as the harm principle.

In order to fulfil the twofold function described above (i.e., as a preliminary standard as well as *post* adoption of EU-level criminal prohibitions), it is essential to employ the concept of legal interests in a consistent manner, rather than the fragmentary use we have seen to date. Indeed, the notion of legal interests has not been entirely absent in EU legal scholarship and in EU law-making. But concerning legal scholarship, for example, the limited number of references to (the potential value of) the *Rechtsgutslehre* for the determination of the scope of EU criminal law have been worded in general terms only,[57] staying far from offering consistent or comprehensive frameworks on the legitimate scope of EU criminal law. It is, however, only the consistent and comprehensive use of the concept of legal interests that is capable of further completing and advancing a rational body of EU substantive criminal law.

4 | A LOOK AHEAD AT THE IDENTIFICATION OF EU LEGAL INTERESTS: THOUGHTS ON KEY CHALLENGES AND OPPORTUNITIES

In the application of the concept of legal interests to EU criminal law, the next step obviously comprises the identification of those interests that can be qualified as interests that deserve protection through EU criminal law. Looking

[53]Peršak, above, n. 1, 24–25.

[54]A. von Hirsch, 'Der Rechtsgutbegriff und das "Harm Principle"' in R. Hefendehl, A. von Hirsch and W. Wohlers (eds.), *Die Rechtsgutstheorie. Legimitationsbasis des Strafrechts oder dogmatisches Glasperlenspiel?* (Nomos Verlagsgesellschaft, 2003), 13–25; W. Hassemer, 'The Harm Principle and the Protection of "Legal Goods" (*Rechtsgüterschutz*): A German Perspective', in A.P. Simester, A. Du Bois-Pedain and U. Neuman (eds.), *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Bloomsbury, 2014), 187–204; K. Ambos, 'The Overall Function of International Criminal Law: Striking the Right Balance Between the Rechtsgut and the Harm Principles. A Second Contribution Towards A Consistent Theory of ICL' (2015) 9 *Criminal Law and Philosophy*, 301–329; Peršak, above, n. 52, 105–106; S. Buisman, *Contract, Tort & Crime: Criminalisation of Breaches of Sales Contracts under Dutch and EU Law* (Tilburg University, 2019), 23–24.

[55]Peršak, above, n. 52, at 73, where it is at the same time recognised that the reasonability of such decisions is oftentimes already governed by other principles, such as opportunity and proportionality.

[56]K. Amelung, 'Der Begriff des Rechtsguts in der Lehre vom strafrechtlichten Rechtsgüterschutz', in Hefendehl et al., above, n. 54, 156. Compare also C.P.M. Cleiren and J.M. ten Voorde, 'Harmonising Legal Interests: Legal Interests under Criminal Law in a Multilevel Legal Order', in J.W. Ouwerkerk, J. Altena, J. Öberg and S. Miettinen (eds.), *The Future of EU Criminal Justice Policy and Practice: Legal and Criminological Perspectives* (Brill/Nijhoff, 2019), 121–142.

[57]Previously mentioned already: Peršak, above, n. 1, 24–25. See, also, M. Kaiafa-Gbandi, above, n. 17, 12–14; Asp et al., 'A Manifesto on European Criminal Policy', above, n. 13, 707 (where the 'requirement of a legal purpose', put forward as one of the fundamental principles for EU-level criminalisation, could be taken as an implicit reference to the *Rechtsguts*-theory).

ahead at how such interests could be identified, and why, the aim of this section is confined to presenting some challenges and opportunities facing the identification of those interests.

A first challenge relates to the issue of whether there is a need to *translate* the national law-based concept of legal interests into an EU law-fitting one (old wine in a new bottle). There are several reasons why such a translation is indeed demanded, the most obvious being that the EU is not a nation-state but an organisation with restricted powers which were democratically designed for the aim of pursuing specific, well-defined objectives and the safeguarding of well-chosen values (such as fundamental rights). The logical consequence is that the number of legal interests that qualify for protection through EU criminal law should be smaller than those possible at the level of national legal orders, and that only those interests can be accepted that clearly relate to one of the EU objectives and values. EU criminal law competences should therefore be prevented from becoming as broad as that found in national legal orders, covering also the very classical crimes (such as murder, rape, theft) without requiring any EU dimension. Such a translation is certainly challenging, but constitutes therefore also an important opportunity to address the wide unease—amongst criminal law scholars in particular—with the very idea of EU competences in such classical areas of crime, and to reconsider whether, and to what extent, such unease is still justified. Should EU criminal law indeed be restricted to the protection of transnational or supranational legal interests—as one would tend to argue—or should there be room for the protection of national legal interests as well, and if so, under what conditions? The question must be openly debated, especially in order to avoid artificial, or unconvincing reasonings on the assumed cross-border dimensions of criminal phenomena that are well known for lacking a cross-border dimension in the vast majority of cases. Worth noting is Coutts' suggestion to also accept what he calls 'shared wrongs', where national and supranational legal interests converge.[58] Further scholarly reflection is needed in order to determine under what conditions shared interests can be adopted as EU legal interests, but the point is taken that a sharp distinction between national versus EU interests may not always be tenable.

Underlying the concerns that EU substantive criminal law would expand too much is of course the legitimate goal of preventing overcriminalisation, a pursuit that the employment of a theory based on the concept of legal interests may help to achieve, but not necessarily so. One of the most significant lessons that can be drawn from national legal scholarship after all, is that the extent to which the concept fulfils a normative-critical purpose depends on the precise source(s) that must or may be relied on in order to select the legal interests that are worthy of protection through criminal law—and that issue brings a number of particular challenges.

In German legal scholarship, normativist scholars do not necessarily agree on this issue. It has, for instance, been argued that the contents of legal interests should follow from the natural law (*lex naturalis*) or from human rights, sources that, according to some, are closely connected with each other. Probably most widespread, however, is the viewpoint that the contents of legal interests must instead follow from constitutional law and/or constitutional principles.[59] Roxin was one of the first to argue this, and maintained this position throughout his career.[60] As a convinced proponent of the normative approach, the endeavour to put *legitimate* limits on the legislature's powers to enact criminal prohibitions, has led Roxin to the German constitution (*Grundgesetz*): the only authority that prevails over the legislature's powers to enact criminal prohibitions.[61] Roxin has been followed by several others, such as Schünemann,[62] Hörnle[63] and Sternberg-Lieben.[64]

[58]Coutts, above, n. 1, 797–800.

[59]This viewpoint must be distinguished from the viewpoints of Appel and Lagodny who consider the German constitution to be *the* source for determining the outer limits of the scope of substantive criminal law, though without this having been integrated in the *Rechtsgutslehre* that, according to both scholars, has proven incapable of providing useful guidelines for a legitimate criminal law. O. Lagodny, *Strafrecht vor den Schranken der Grundrechte* (JCB Mohr (Paul Siebeck) Tübingen, 1996), 154–163; I. Appel, *Verfassung und Strafe* (Duncker & Humblot, 1998), 340–356.

[60]Roxin and Greco, above, n. 32. See also C. Roxin, 'Zur neueren Entwicklung der Rechtsgutsdebatte', in U. Neumann and F. Herzog (eds.), *Festschrift für Winfried Hassemer* (C.F. Müller, 2010) 577ff.

[61]'Die einzige Instanz, die über dem Strafgesetzgeber steht, ist die Verfassung'; see Roxin, above, n. 60, 577.

[62]Schünemann, above, n. 40, 137.

[63]Hörnle, above, n. 41, 21, 41.

[64]D. Sternberg-Lieben, 'Rechtsgut, Verhältnismäßigkeit und die Freiheit des Strafgesetzgebers', in Hefendehl et al., above, n. 40, 67.

However, while some of them argue that the contents of legal interests must be *derived from* the constitution (e.g., Hörnle[65]), others consider the relationship between the concept of legal interest and the constitution in a different way, implying that adherence to the concept constitutes an unwritten constitutional principle (e.g., Roxin[66]).[67] Scholars defending the latter alternative have found support in the idea of the social contract (*den Lehre von Gesellschaftsvertrag*) that would exist between the government and the society it governs—and under which the government can act only if and insofar as its actions serve the free development of individuals (*freien Entfaltung des Individuums*).[68] Because the German constitution—like most constitutions in Europe—would be based on this idea of contractarianism, limits to criminalisation powers are to be derived from the constitution (therewith indirectly from the idea of the social contract). It is my impression that Hörnle's method to directly derive legal interests from the constitution has found more support than the other approach under which obedience to the concept of legal interests is considered an unwritten constitutional principle. But in both variants, human rights play a non-negligible role, for constitutional norms partly reflect rights that are known as human rights.

It is especially this latter observation that deserves attention, not least in an EU context. Which authoritative source, or authoritative sources should be chosen to rely on in order to assess whether occurring EU criminalisation initiatives cross the outer limits of legitimate EU substantive criminal law? In the absence of an EU constitution and because the EU cannot be characterised as a pure constitutional entity, a source equivalent to national constitutional principles is not immediately available. At the same time, it has been argued in EU legal scholarship that the acceptance of principles such as primacy and direct effect as well as the supported emergence of fundamental rights (now codified in the EU's own Charter of Fundamental Rights) have contributed to a so-called process of a thickening EU legal order in such a way that the EU can now justifiably be considered more akin to a constitutional entity than to a functional entity (even despite the remaining lack of *Kompetenz-Kompetenz*).[69] This raises the question whether EU-level fundamental, constitutional-like principles as well as fundamental rights may perhaps nonetheless serve as the authoritative sources from which EU legal interests can be derived. At least with regard to fundamental rights, Buisman seems to argue in the affirmative. It was recently suggested by her that 'human and fundamental rights' must be listed as an 'EU *Rechtsgut*' (among other legal interests, such as financial interests of the Union, the environment, etc.).[70] True, Buisman does also recognise the need to prevent criminalisation beyond the scope of '"core" EU criminal law', for instance through the requirement of a 'cross-border element'.[71] Still, caution is warranted here. As was pointed out earlier, the use of sources such as fundamental rights bears the risk of depriving the concept of legal interests from its normative-critical function, at least in a national context. Would the use of written fundamental principles and rights as sources of argumentation not—perhaps unintentionally—amount to a positivist approach to the concept, i.e., following the legislature in what it has already declared worthy of protection through the (criminal) law?[72] It requires to be thought through whether such a criticism would be of equal force in the context of the EU, being an organisation that is meant to have restricted powers, designed for the pursuit of specific objectives and the safeguarding of self-chosen values (such as fundamental rights). For seeking legal interests entirely outside these

[65]Hörnle, above, n. 41, 41ff.
[66]Roxin, above, n. 60, 578.
[67]Engländer elaborates on this distinction; see above, n. 36, 624–633.
[68]See, e.g., Schünemann, above, n. 40, 137–142, with reference to several other scholars; also Roxin, above, n. 60, 578.
[69]A respectable number of distinguished scholars have convincingly been arguing this or something similar, especially since the entry into force of the Lisbon Treaty. Amongst others: J. Larik, 'From Speciality to a Constitutional Sense of Purpose: On the Changing Role of the Objectives of the European Union', (2014) 63 *International and Comparative Law Quarterly*, 935–962; A. von Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch', (2009) 16 *European Law Journal*, 95ff; F. Reimer, 'Ziele und Zuständigkeiten: Die Funktionen der Unionszielbestimmungen', (2003) *Europarecht*, 992.
[70]Buisman, above, n. 1, 171.
[71]Ibid., 171–172.
[72]Peršak, above, n. 52, 107–109, including references in footnotes.

borders of EU law intuitively feels at odds with the essence of the EU, opening the door to an endless range of broad criminalisation powers.[73]

5 | CONCLUDING REMARKS

It takes time to design the perfect new bottle for a good old wine. This article has attempted to make a convincing case for the consistent and comprehensive use of the old German law-rooted concept of legal interests for the purpose of the further enhancement of criminalisation debates in the context of EU law. Several reasons have been substantiated for why and how the concept of legal interests has the capability to define the outer limits of EU substantive criminal law. This has first been considered the case because the perspective of legal interests serves to argue in a stage preliminary to legislative action whether or not an area of crime qualifies as an area in which EU-level criminalisation could be justified, and to what extent. Secondly, knowledge on the precise legal interest a criminal prohibition intends to protect provides guidance *post* legislation, i.e., for the implementation, application and interpretation of criminal prohibitions in both national law-making processes and in courts.

The challenge will now be to determine the source(s) from which legal interests for EU criminal law can legitimately be derived as well as to articulate the precise legal interests that are worthy of protection through EU criminal law. It has been demonstrated that, on the one hand, important lessons and inspiration can be drawn from national law-based scholarship on the concept of legal interest, whereas, on the other hand, it is necessary to translate the concept to one fitting the needs and features of the EU context.

Recent developments make it the right time for the advancement of a comprehensive theoretical EU-level criminalisation framework based on the concept of legal interests. One of these developments has been mentioned earlier in this article. It concerns the Commission's submission of a draft Directive on combating violence against women and domestic violence, in which it has been proposed, among other things, to adopt a harmonised definition of rape committed against women only.[74] In the draft preamble that precedes the proposal, it has been put forward that female rape constitutes a serious breach of sexual integrity as well as a form of violence against women that *in se* must be qualified as gender-based violence, because it is 'rooted in gender inequality being a manifestation of structural discrimination against women'.[75] It is the latter aspect (female rape as a form of gender-based violence) that runs throughout both the draft preamble and the explanatory memorandum as the main thread justifying the adoption of a harmonised definition of female rape. Despite not being referred to in terms of legal interests, gender equality and non-discrimination of women can therefore be considered to serve as the primary legal interests that should be protected by means of criminalising rape across the EU, whereas the protection of sexual integrity seems to serve as a secondary legal interest that is aimed to be protected.

In the prevailing absence of a consistent employment of the concept of legal interests in EU criminal law, the reliance on the protection of gender equality, non-discrimination of women, and sexual integrity for the justification of criminalising rape against women demonstrates painfully clearly the unresolved and largely unaddressed issues in debating EU-level criminalisation so far—and which must be addressed for the concept of legal interests to be employed in a consistent manner. In closing this article, a few of them will be pointed out briefly. A first issue affirms the need, substantiated in the previous section, for the adjustment of the *Rechtsguts* theory into an EU-fitting one; and the demand to clarify whether EU legal interests should necessarily be supranational interests or can also include national interests, or both (i.e., shared interests). In the context of the Commission's proposal that is being discussed here, the question arises into which of these categories, for instance, sexual integrity actually falls? The question is

[73]Generally, on the pros and cons of fundamental rights-oriented criminalisation in the EU, see J.W. Ouwerkerk, 'Fundamental Rights-Oriented Repression in the EU? Exploring the Potential and Limits of an Impunity Rationale to Justify Criminalisation in the EU Legal Order', in L. Marin and S. Montaldo (eds.), *The Fight Against Impunity in EU Law* (Hart Publishing, 2020), 47–61.

[74]Commission, above, n. 44.

[75]Ibid., recital 13 of the draft preamble.

highly relevant for establishing where the outer limits of EU criminal actually lie; would sexual integrity be accepted to constitute a supranational legal interest, the outer limits are obviously wider than if sexual integrity would be considered, for example, a shared interest, for as a supranational legal interest it will be much more likely to cover also the classical crimes that were to date considered to fall outside EU competence.

A second issue expresses the need to determine from which source EU legal interests should legitimately be derived, and (applied to the discussed legislative proposal) which source has been relied on by the Commission in its choice of gender equality, non-discrimination of women and sexual integrity as the—implicit—legal interests it is trying to protect. With regard to sexual integrity, it makes sense to assume that it is based on the values enshrined in Article 2 TEU, i.e., human dignity as well as respect for human rights—which I consider confirmed by the Commission's explicit reference to both of them in the third recital of the draft preamble to the proposed directive.[76] However, this raises a serious issue under the same Article 2 TEU that, after all, qualifies 'equality between women and men' as another core value of the EU. To protect only female sexual integrity (in the sense of female dignity and women's fundamental rights) seems very much at odds with this core value of gender equality.

The previous remarks simultaneously illustrate, as a third and final issue mentioned here, the risk of relying on fundamental rights as the authoritative source from which legal interests can be derived, precisely because doing so seriously challenges the limiting potential of the concept of legal interests. It is one thing to strongly support the criminalisation of rape, committed against any individual—which I hope and expect everyone does—but it is another thing to advocate and find justifications for EU action on the matter. Thorough justifications must exist for that. They may well be found in EU objectives and values, but in order to define which of the interests derived from them could be, or could not be, held to legitimately qualify for protection through EU-level criminalisation requires further analysis, for instance of the precise position of criminal law and criminal justice in the institutional framework of the EU.

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How to cite this article: Ouwerkerk JW. Old wine in a new bottle: Shaping the foundations of EU criminal law through the concept of legal interests (*Rechtsgüter*). *Eur Law J*. 2022;1-15. doi:10.1111/eulj.12447

[76]Ibid., recital 3 of the draft preamble that reads as follows: 'Violence against women and domestic violence violate fundamental rights such as the right to human dignity, the right to life and integrity of the person, the prohibition of inhuman or degrading treatment or punishment, the right to respect for private and family life, personal data protection, and the rights of the child, as enshrined in the Charter of Fundamental Rights of the European Union'.