

# ARTICLES

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## Positive Fault Requirements in EU Criminal Law

### ABSTRACT

*This essay endeavours to illustrate the existing system of positive fault requirements in EU criminal law. The suggested model is based on the present EU legislation, including preparatory works, and the essential case law of the CJEU. Despite certain significant obscurities, the EU legislator seems to have generated a relatively consistent way of providing legislation, concerning positive fault requirements. The outcome may be characterized as a continental system with certain Anglo-Saxon<sup>1</sup> nuances. The broader aim of this essay is to participate in the discussion about the general part of EU criminal law. In this respect, the essay highlights certain disconcerting criminal political progressions in the field of positive fault requirements in EU criminal law.*

**Keywords:** general part of criminal law; positive fault requirements; intention; recklessness; negligence

### 1. INTRODUCTION

Every branch of law has its own characteristics and traditions. In the field of criminal law, the most representative nuances are derived both from fierce sanctions and labels, which are passed by means of criminal law, and also from the close relationship of criminal law's principles and general moral standards and ethics. Consequently, it is easy to understand why criminal law has customarily been connected to the State's sovereignty. The EU has accepted this special character of criminal law. Concerning criminal legislation, article 67(1) TFEU, which emphasizes the respect for the different legal systems and traditions of the Member States when constituting a European area

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<sup>1</sup> In this essay the term 'Anglo-Saxon' refers to the legal system which applies in England and Wales.

of freedom, security and justice, is supplemented with mechanisms such as the emergency brake procedure and a lowered threshold on the so-called early warning system.<sup>2</sup> This is in accordance with the general principle of subsidiarity recognized in Article 5(3) TEU as well as respect for national identity (Article 4(2) TEU) and cultural diversity (Article 3(3) TEU).<sup>3</sup>

Criminal law's status as an essential component of 'national identity'<sup>4</sup> has caused certain difficulties regarding the legal integration process of the EU. In brief, the problem is this: the reconciliation of certain highly national principles and doctrines between the Member States has proven to be an almost impossible task. At the same time it is obvious that leaving these matters to national legislators (or judges) results in heterogeneity in the contours of criminal liability across the Union. This is especially true with respect to the so-called general part of criminal law.

In his relatively recently published doctoral thesis<sup>5</sup>, *Jeroen Blomsma* has endeavoured to ease this problem by illustrating a pan-European criminal justice system, considering *mens rea* and defences. Concerning the former, Blomsma presents a pan-European system of positive fault requirements, which he proposes to be taken as the basis for EU criminal law. What Blomsma does not do, however, is to present the current state of the positive fault requirements in EU criminal law. In this essay I attempt to construct the existing system of these positive fault requirements in EU criminal law from the basis of EU (criminal) legislation, preparatory works of the legislative organs of the union and CJEU's case-law.<sup>6</sup>

I am arguing that the EU already has a certain system of positive fault requirements, which is also quite firmly followed in EU criminal legislation. The vague parts, or

- 2 About the emergency brake procedure, see articles 82(3) and 83(3) TFEU and also *André Klip*, European Criminal Law: An Integrative Approach (Cambridge 2<sup>nd</sup> ed., 2012), p. 36. About the lowered threshold see article 7(2) of the 2. Protocol on the Application of the Principles of Subsidiarity and Proportionality and *Federico Fabbrini and Katarzyna Granat*, 'Yellow Card, but no foul': The role of the national parliaments under the subsidiarity protocol and the Commission proposal for an EU regulation on the right to strike (50 Common Market Review, 2013), p. 118 as well as *Sakari Melander*, EU-rikosoikeus (Helsinki, 2015), p. 166.
- 3 See e.g. Commission Communication: Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, 20 September 2011 COM (2011) 573 final (later '2011 Commission Communication'), p. 3. A Manifesto on European Criminal Policy by European Criminal Policy Initiative (first published in *Zeitschrift für Internationale Strafrechtsdogmatik* 2009, p. 697–747), updated in *European Criminal Law Review* 2011, p. 86–103 (later 'Manifesto I') also refers to the principle of subsidiarity (p. 709).
- 4 *Manifesto I*, p. 709. About the special characteristics of criminal law see also *Merita Kettunen*, Legitimizing the Use of Transnational Criminal Law: The European Framework (Helsinki 2015), p. 50–57.
- 5 *Jeroen Blomsma*, Mens rea and defences in European criminal law (Cambridge 2012).
- 6 The preparatory works (or the *travaux préparatoires*) have recently been recognized as valid tools of interpreting also the EU Treaties by the CJEU (see *Samuli Miettinen and Merita Kettunen*, *Travaux to the EU Treaties: Preparatory Work as a Source of EU Law* (Cambridge Yearbook of European Legal Studies, volume 17, p. 148–167 (published online 3 August 2015))). In respect of the secondary instruments of EU legislation, the preparatory works have customarily been used to assist the interpretation, although the CJEU has possibly not felt especially tempted to do so (*Klip* (fn. 1), p. 148–150).

‘blind spots’, of this system of EU legislation are, however, the definitions of different generally used concepts of fault. In this respect, the EU legislator seems to be especially sensitive towards national legal traditions.

## 2. BACKGROUND – THE SYSTEM OF FAULT REQUIREMENTS

Positive fault requirements deal with the subjective culpability of the actor – *mens rea*, as opposed to *actus reus* –, which deals with the objective aspects of the act. Various criminal justice traditions use various systems of fault requirements. By a system of fault requirements I refer to a more or less coherent set of terms which mark different kinds of individual fault. For example, intentional deprivation of life is generally considered more culpable than causing death by negligent conduct. Thus, intention may be considered a more culpable kind of fault than negligence. The system of fault requirements illustrates how a given system of criminal justice deals with culpability, and above all how it attends to criminal liability in respect of the (actor’s) culpability.

In order to clarify this, I will represent two theoretical illustrations of different systems of fault requirements, which act as an example and thus support the later observations on EU criminal law. These examples are taken from Anglo-Saxon criminal law (applied in England and Wales) and from the Finnish legal system. The former represents the common law tradition and the latter the civil law tradition. Hence, these criminal law traditions provide examples from quite different premises, which, notwithstanding, are both part of the EU.

### 2.1 Anglo-Saxon fault requirements

The Anglo-Saxon criminal law uses varying terms considering the fault requirements, or mental states as they are also called.<sup>7</sup> Terminology, and also the definitions of different terms, may also vary depending on the context. There is also a certain tendency to deliberately avoid the use of general terms.<sup>8</sup> However, there are three fault requirements, which rise above others in Anglo-Saxon criminal law. These core terms are intention, recklessness and negligence. Therefore, the Anglo-Saxon system of fault requirements has widely been understood as a tripartite system.<sup>9</sup> This may clearly be ob-

7 E.g. *Andrew Simester, John Spencer, Robert Sullivan and Graham Virgo*, Simester and Sullivan’s Criminal Law (Oxford, 5<sup>th</sup> ed., 2013), p. 126 names the following: purpose, intention, recklessness, wilfulness, knowledge, belief, suspicion, reasonable cause to believe, maliciousness, fraudulence, dishonesty, corruptness and negligence.

8 In Moloney [1985] Lord Bridge mentions as ‘a golden rule’ that a judge should avoid any elaboration or paraphrase of what is meant by intent, when directing a jury on the mental element necessary in a crime of specific intent. (unless the judge is convinced that some further explanation or elaboration is strictly necessary to avoid misunderstanding) (p. 926). In Woollin [1999] Lord Steyn emphasizes that ‘intent’ does not necessarily have precisely the same meaning in every context of criminal law (p. 90).

9 *Joel Feinberg*, Doing & Deserving: Essays in the Theory of Responsibility (Princeton 1970), p. 192–195 and *Blomsma* (fn. 4), p. 137 and 139–140.

served when reading the textbooks of Anglo-Saxon criminal law, which content themselves with dealing with these three core terms.<sup>10</sup>

In Anglo-Saxon criminal law, the core content of intention contains deliberate actions (or omissions) which are committed in order to cause certain consequences.<sup>11</sup> This ‘basic’ form of intention is usually supplemented with actions (or omissions) committed with knowledge of virtual certainty relating to the occurrence of a certain consequence or the existence of a certain circumstance. This ‘extended’ form of intention is, nonetheless, somewhat controversial.<sup>12</sup> However, in Anglo-Saxon criminal law, intentional conduct is customarily separated into direct and oblique intention, the former referring to volitional and deliberate conduct, and the latter to cognitive certainty.<sup>13</sup>

By recklessness and negligence the Anglo-Saxon criminal law refers to conduct which contains an unreasonable degree of risk which a reasonable person would not accept. The difference between recklessness and negligence is drawn by means of the awareness of the risks. Recklessness requires subjective awareness about the risks from the actor.<sup>14</sup> Negligence, on the other hand, involves just an objective assessment of an objectively recognizable risk.<sup>15</sup> When recklessness asks what the actor knew, negligence asks what the actor should have known. This may be defined as the general line of Anglo-Saxon criminal law. As with the direct and oblique intention, there has also

10 These core terms have been seen to provide a framework for understanding also all the other fault terms (*Andrew Ashworth*, *Principles of Criminal Law* (Oxford, 6<sup>th</sup> edition, 2009), p. 190–191). See also *Simester and Sullivan*’s (fn. 6), p. 126–171, *David Ormerod*, *Smith & Hogan Criminal Law* (Oxford, 11<sup>th</sup> ed., 2005), p. 93–110, *Michael Allen*, *Textbook on Criminal Law* (Oxford, 7<sup>th</sup> ed., 2003), p. 50–114 and *Cecil Turner*, *Kenny’s Outlines of Criminal Law* (Cambridge, 19<sup>th</sup> ed., 1966), p. 36–40.

11 ‘Acting in order to bring about the result’ (e.g. *Mohan* [1976] p. 8). In relation to circumstances which may also be subject of intention, it might be more appropriate to use the terms hope or desire.

12 It seems that the decision of relating the latter *oblique intention* to the former *direct intention* is left for the jury to decide in individual cases (*Smith & Hogan* (fn. 9), p. 94 and *The Law Commission*, *Murder, Manslaughter and Infanticide* (No. 304, 2006), p. 58–59). In the light of case law it is uncertain whether oblique intention is an independent form of intention or just a consideration referring to direct intention (*Woollin* [1999] seems to speak on behalf of the former (p. 82), *Nedrick* [1986], on the other hand, seems to prefer the latter (p. 268 and 271). See also *Gerard Coffey*, *Codifying the Meaning of Intention in the Criminal Law* (*Journal of Criminal Law*, 73(5), October 2009), p. 402–405).

13 This separation seems to be presented in the 1989 draft of the Criminal Code (*The Law Commission*, Report and Draft Criminal Code Bill (No. 177, 1989), clause 18(b)). In the late 1700s *Jeremy Bentham* separated direct and oblique intention in his book *Introduction to the Principles of Morals and Legislation* (*Ashworth* (fn. 9), p. 172). For example *Duff* uses the terms narrower and broader notions of intention (*Anthony Duff*, *Intention, Agency and Criminal Liability. Philosophy of Action and the Criminal Law* (Oxford 1990), p. 27).

14 Term ‘adventurous recklessness’ is also used. This term relates to the famous *Cunningham* case [1957] (*Ashworth* (fn. 9), p. 178). See also *The Law Commission* (fn. 12), clause 18(c).

15 *Simester and Sullivan*’s (fn. 6), p. 151–152.

been certain confusion about drawing the line between recklessness and negligence.<sup>16</sup> The evaluation and separation of recklessness and negligence seems to be equally somewhat contextual.<sup>17</sup>

When examining the Anglo-Saxon fault requirements, it should be borne in mind that these fault requirements are not decisive for criminal liability. In offences imposing a so-called strict liability, the prosecution is not required to prove any kind of *mens rea* relating to *actus reus*. In principle, this means that the defendant without any kind of fault may be convicted.<sup>18</sup> Hence, the strict liability means significant deflection from the principle of guilt, one of the fundamental principles in criminal law. In certain legal systems of the common law tradition, strict liability has been ruled out from offences which might lead to prison sentences. In case-law there has also been some tendencies to adopt the possibility of certain due diligence defences. However, the courts in England and Wales have been reluctant to make these kinds of mitigations.<sup>19</sup>

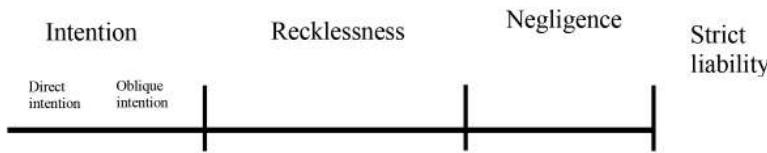
16 In 1982 the House of Lords gave two adjudications where also unconscious risk-taking was considered as recklessness (Caldwell [1982], especially p. 353–354 and Lawrence [1982], especially p. 526–527). This objectivist definition of recklessness faced fierce critics. In 2004 the House of Lords seems to have abandoned the objectivist definition and returned to subjectivism (G [2004], e.g. p. 1066. See also *Simester and Sullivan's* (fn. 6), p. 143–144, *Ashworth* (fn. 9), p. 182 and *Kumaralingam Amirthalingam*, Caldwell Recklessness is Dead, Long Live Mens Rea's Fecklessness (Modern Law Review, 67(3) May 2004), p. 491–493). About the stress of the subjectivism in Anglo-Saxon criminal law see *The Law Commission*, Legislating the Criminal Code, Involuntary Manslaughter (No. 237, 1996), p. 28–41.

17 See *Findlay Stark*, It's Only Words: On Meaning and Mens Rea (Cambridge Law Journal 72(1), March 2013), p. 159–160. For example the definition of recklessness in section 2(2) Uranium Enrichment Technology Regulations 2004 seems to use Cunningham-recklessness (2(a)(i)), Caldwell-recklessness (2(a)(ii)) and Anthony Duff's so-called practical indifference theory (2(b)) (Duff (n 12), p. 157–167). In the context of sexual offences, many judges seem to consider that recklessness also encompasses the so-called 'could not care less attitude', which extends the contours of recklessness more or less to inadvertent conduct (*Home Office*, Setting the Boundaries: Reforming Law on Sex Offences (Volume I, July 2000), p. 23).

18 *Simester and Sullivan's* (fn. 6), p. 173, *Larry Alexander*, Culpability, in: John Deigh and David Dolinko (eds.), *The Oxford Handbook of Philosophy of Criminal Law* (Oxford 2011), p. 230 and *Allen* (fn. 9), p. 99. The number of offences based on strict liability is remarkable in Anglo-Saxon criminal law. E.g. the majority of roughly 10,000 criminal offences known in English law impose strict liability (*Ashworth* (fn. 9), p. 136–137 and 189–190). See also *Blomsma* (fn. 4), p. 214.

19 *Allen* (fn. 9), p. 113.

The Anglo-Saxon system of positive fault requirements is illustrated in the following figure:



Different terms have been arranged on a line so that the most culpable form of fault, (direct) intention, is most left, and the least culpable form of fault, negligence, is most right. Recklessness is in the middle, which encompasses a relatively large area of fault; it concerns all kinds of conduct committed with an awareness of unreasonable risk. Strict liability has been separated off from these forms of fault, because it basically means the absence of any fault.

## 2.2 Finnish fault requirements

The Finnish system of fault requirements is based on the separation of *dolus* and *culpa*, which is characteristic of the Continental legal traditions. The dichotomy of fault requirements has led to the adoption of the relatively broad concept of *dolus*, which encompasses much more than its Anglo-Saxon equivalent, intention. According to Section 6 of the third Chapter of the Criminal Code of Finland,<sup>20</sup> the concept of '*tahallisuus*' (intention) covers not only the situations of direct and oblique intention in the Anglo-Saxon system, but also situations where the perpetrator has considered a certain consequence to be a 'quite probable' result of his or her actions. This form of *dolus eventualis* would be considered recklessness in the Anglo-Saxon system. It should be noted that the abovementioned legal definition of *tahallisuus* covers only the fault relating to consequences. The Finnish Supreme Court has, however, consistently also used the same definition in relation to circumstances over the last decade.<sup>21</sup>

*Culpa*, '*tuottamus*' (negligence), signifies the conduct in which the perpetrator violates the duty to take care called for in the circumstances and required of him or her, even though he or she could have complied with this duty (Section 7(1) of the third

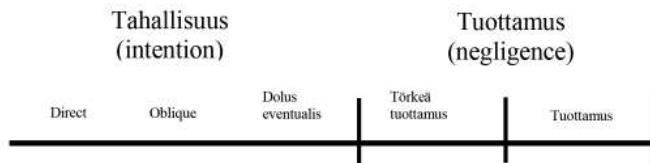
- 20 By the 'third package' of the Finnish Criminal Code Reform (515/2003), considering the general part of the Criminal Code, the Finnish legislator included legal definitions for general positive fault requirements to the Criminal Code. See HE 44/2002 vp, p. 15–16 and 69–99.
- 21 After the aforementioned Criminal Code Reform, the Supreme Court has delivered the following judgments: KKO 2015:66, 2014:54, 2013:55, 2013:17, 2012:66, 2010:88, 2009:87, 2006:64 and 2006:37. In every single case the Supreme Court has applied the aforementioned *theory of probability*.

Chapter of the Criminal Code of Finland). Despite a slightly different wording, the content of the Finnish *tuottamus* is basically similar to the Anglo-Saxon negligence. The most significant difference is that *tuottamus* includes both conscious and unconscious risk-taking, while the Anglo-Saxon system considers the former to be recklessness and the latter negligence.

The Criminal Code of Finland also recognizes nowadays a special form of *tuottamus*, namely '*törkeä tuottamus*', gross negligence. According to Section 7(2) of the third Chapter of the Criminal Code, the separation of gross and ordinary negligence is based on an overall assessment. Since the 1990s a special feature of Finnish criminal law has been its relatively strong growth in the use of this fault requirement.<sup>22</sup> Therefore, it may be considered an independent fault requirement in the Finnish system.

The Finnish system does not recognize strict liability to be an appropriate basis for criminal liability. According to Section 7(3) of the third Chapter of the Criminal Code, an act which is deemed to have occurred more through accident than through negligence is not punishable.

*The Finnish system of positive fault requirements is illustrated in the following figure:*



## 2.3 Concluding remarks about positive fault requirements

Positive fault requirements are a significant component of the general part of criminal law as they apply to several different offences. Positive fault requirements, and especially the definitions given to them, are fundamental to any criminal justice system. In cooperation with crime definitions of special part of criminal law, positive fault requirements illustrate the contours of criminal liability.

Although the understanding of the culpability and blameworthiness of different states of mind in relation to others is quite similar, at least in all Western societies, there may be significant differences in the gradation of the variables of culpability. This has been illustrated by the examples considering the Finnish and Anglo-Saxon systems of positive fault requirements.

<sup>22</sup> Nowadays approximately 10% of the criminal offences defined in the Criminal Code of Finland utilize the concept of *törkeä tuottamus* (Juho Rankinen, *Törkeä tuottamus – suomalaisen syyksiluettavuuden tertium quid?: tutkimus törkeän tuottamuksen roolista suomalaisessa syyksiluettavuuden järjestelmässä* (Master's thesis 27.4.2015, University of Helsinki), p. 53–54).

But now let us turn our attention to EU criminal law. My goal is to illustrate a corresponding figure of positive fault requirements in EU criminal legislation as I did concerning the Finnish and Anglo-Saxon systems.

### 3. EU CRIMINAL LAW AND POSITIVE FAULT REQUIREMENTS

#### 3.1 Different fault requirements applied by the EU legislator

EU legislation contains a growing number of legal instruments that include different sorts of crime definitions. To be exact, these definitions do not define criminal conduct directly, but merely the contours of obligations for the Member States to criminalize certain types of conduct. In this respect, EU criminal legislation is indirect in nature. However, when defining the conduct which the Member States are obliged to criminalize, the EU legislator uses the same techniques as the national legislator who sets the final criminalizations. These include the use of subjective and objective requirements of criminal liability, *mens rea* and *actus reus*. Hence, when defining the contours of criminal liability, the EU legislator operates *inter alia* with positive fault requirements.

##### 3.1.1 Intention

Without any doubt, the key term relating to positive fault requirements in EU criminal law is intention. Every (direct) instrument of substantive EU criminal law includes specifically the criminalization of intentional conduct. Only in some cases does criminalization stretch to other kinds of fault.<sup>23</sup> According to the 2009 Council conclusions on model provisions, which guide the Council's criminal law deliberations, EU criminal legislation should, as a general rule, only prescribe penalties for acts which have been committed intentionally. For example, negligent conduct should, thus, be criminalized only as an exception in cases of serious negligence which endangers human life or causes serious damage.<sup>24</sup> The EU Parliament has adopted a similar view on its 2012 resolutions on an EU approach to criminal law.<sup>25</sup>

23 2011 Commission Communication, p. 9. This statement may be questioned as quite a narrow perspective on 'instruments of criminal law'. This thematic will be considered more closely in section 3.1.4.

24 Council conclusions on model provisions, guiding the Council's criminal law deliberations, 2979<sup>th</sup> JUSTICE and HOME AFFAIRS Council meeting Brussels, 30 November 2009 (later '2009 Council Conclusions'), p. 3. The Commission, however, was not willing to commit themselves to these model provisions because of the prematurity of these provisions (Draft Council conclusions on model provisions, guiding the Council's criminal law deliberations 27 November 2009 16798/09 JAI 886 DROIPEN 163, p. 3).

25 European Parliament resolution of 22 May 2012 on an EU approach to criminal law (2010/2310(INI)) (later '2012 Parliament Resolution'), letter J and point 4. The three aforementioned documents are often considered to be EU criminal policy documents (*Kettunen* (fn. 3), p. 194, *Helmut Satzger*, International and European criminal law (München 2012),

Overall, the EU legislator seems to follow quite precisely certain forms and choices of words in relation to intentional conduct. Recently, the most common formulation used in the Articles of Union instruments containing definitions of crimes, obliges the Member States to criminalize the conduct defined in the following paragraphs ‘when committed intentionally’.<sup>26</sup> This is the choice of words that was suggested particularly on the set of model provisions which were combined with the abovementioned Council conclusions.<sup>27</sup> Other commonly used structures refer to ‘following intentional acts’ or ‘intentional conduct’.<sup>28</sup> The factual content of these phrases is undoubtedly the same.

In addition to the abovementioned general requirement of intention, presented in the enacting clauses of Articles, various EU instruments specify the required quality of intention in the actual definitions of conduct which Member States should prohibit. In this regard, the terminology varies quite a lot. First of all, the Union legislator may re-

p. 82–83, *Paul de Hert and Irene Wieczorek*, Testing the principle of subsidiarity in EU criminal policy: The omitted exercise in the recent EU documents on principles for substantive European criminal law (New Journal of European Criminal Law, Vol. 3, No. 3–4, 2012), p. 395–396).

26 This kind of formatting is used in Article 3(1) of Directive 2014/62/EU of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replaces the Council Framework Decision 2000/383/JHA, OJ 2014 L 151/1, Articles 3(1), 4(1) and 5(1) of Directive 2014/57/EU 16 April 2014 on criminal sanctions for market abuse, OJ 2014 L 173/179, Articles 3 and 9 of Directive 2013/40/EU 12 August 2013 on attacks against information systems and replaces the Council Framework Decision 2005/222/JHA, OJ 2013 L 218/8 and Article 9(1) of Directive 2009/52/EC 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally resident third-country nationals, OJ 2009 L 168/24. This formatting also includes Article 3 and 4 of the Commission’s proposal for a Directive on the fight against fraud to the Union’s financial interests (COM (2012) 363 final). The recent fourth Directive considering money laundering (Article 1(3) of Directive 2015/849/EU 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) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, OJ 2015 L 141/73) also uses this formatting, although the Directive only obliges the Member States to ‘prohibit’ (not to criminalize) certain conduct.

27 2009 Council Conclusions, p. 4.

28 E.g. Art. 3(1), 4(1), 5(1) and 6(1) of Directive 2011/92/EU 13 December 2011 on combatting the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, OJ 2011 L 335/1, Article 2(1) of Directive 2011/36/EU 5 April 2011 on preventing and combatting trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ 2011 L 101/1, Article 1(1) of the Framework Decision 2008/913/JHA 22 July 2003 on combatting corruption in the private sector, OJ 2003 L 192/54, Article 3(2) of the Framework Decision 2008/919/JHA 28 November 2008 amending Framework Decision 2002/475/JHA on combatting crime, OJ 2008 L 330/21, Article 2(1) of the Framework Decision 2004/757/JHA 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, OJ 2004 L 335/8 and Article 2(1) of the Framework Decision 2003/568/JHA 22 July 2003 on combatting corruption in the private sector, OJ 2003 L 192/54.

quire a certain volitional aspect, for example ‘sexual’ or ‘gainful purposes’.<sup>29</sup> The definition for offence may also require, for example, ‘fraudulent uttering’ or ‘fraudulent receiving’.<sup>30</sup> Secondly, there are also numerous instruments which impose particular cognitive requirements for the prohibited conduct. This can mean, for example, knowledge that a certain person is a victim of trafficking in human beings, or knowledge that certain substances are to be used in or for the illicit production or manufacture of drugs.<sup>31</sup> Such ‘sharpened’ requirements considering intention are also common in national criminal legislations. For some crimes these requirements may be defined as characteristic. For example, the nature of terrorist offences stems from a particular terrorist intention which relates to e.g. volition in intimidating people or destroying fundamental social structures.<sup>32</sup>

Despite the substantive role of intention as a positive fault requirement in Union legislation, the EU legislator does not provide any clear definition on what intention actually means. Nor does this kind of definition appear in the preparatory works of Union legislation. The legislative organs of the EU seem to be consistently wary of taking any stand on the question, although the problem relating to the undefined concept of intention in Union legislation has long been known. The only exception seems to be the European Economic and Social Committee, which has demanded clear definitions of the terms ‘knowingly’ and ‘intentional’ with respect to sexual abuse and the exploitation of children and child pornography.<sup>33</sup> Any other document available at Eur-Lex concerning the legislative process of the Directive in question does not take any stand on the Committee’s demand. Apparently, the issue has been quietly passed over in later law drafting.

Despite the lack of definition of intentional conduct, the EU legislator seems to provide some guidelines for the assessment of intention. Concerning the abovementioned Directive dealing with the sexual abuse and exploitation of children, it is expressed in the Directive’s preamble that the intentional nature of the offence may notably be de-

- 29 E.g. articles 3(2, 3) and 4(2, 3) of Directive 2011/92/EU require sexual purpose. Gainful purposes were required e.g. in the already repealed Title I(b)(a, b) of Joint Action 97/154/JHA 24 February 1997 concerning action on combatting trafficking in human beings and sexual exploitation of children, OJ 1997 L 63/2.
- 30 Article 3(1)(a, b, d) of Directive 2014/62/EU require fraudulent making or uttering and Article 2(b) of the Framework Decision 2001/413/JHA 28 May 2001 combating fraud and counterfeiting of non-cash means of payment, OJ 2001 L 149/1 require fraudulent making or receiving.
- 31 Article 1(d) of Directive 2009/52/EC refers to the knowledge of the status of the victim and Article 2(1)(d) of the Framework Decision 2004/757/JHA refers to knowledge concerning the purpose of the use of certain substances.
- 32 Article 1(1) of the Framework Decision 2002/475/JHA. See also Commission staff working paper Annex to the Report from the Commission based on Article 11 of the Council Framework Decision of 13 June 2002 on combatting terrorism (SEC (2004) 688, p. 4), where specific terrorist intent is considered a fundamental subjective element of the terrorist offences.
- 33 Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on combatting the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA (CESE/2010/1173), p. 8.

duced from the fact that it is recurrent or that the offence was committed via a service in return for payment.<sup>34</sup> Such guidelines are not, though, common in Union legislation concerning criminal law. There are more such provisions from other areas of Union legislation.<sup>35</sup>

On certain occasions the Union legislator also mentions that knowledge, intent or purpose required as an element of criminal activities may be inferred from objective factual circumstances.<sup>36</sup> This statement has received some criticisms. In the Manifesto on European Criminal Policy, the European Criminal Policy Initiative criticizes Article 1(4) of the Convention on the protection of the European Communities' financial interests as a shaky foundation, which may easily be circumvented.<sup>37</sup> However, the criticisms and the meaning of the Article remain somewhat unclear. The problem is that the whole statement concerning the use of objective circumstances to infer a certain mental element is ambiguous. One might understand it as a self-evident reference to the judicial proceedings, which, on behalf of the factual issues, including the mental state of the defendant, is always dependent on the evaluation of the (objective) facts. On the other hand, the statement may also be understood as a reference to some kind of automatic procedural presumptions of the mental element. The latter would be quite a problematic provision to several Member States, whose process laws do not recognize these kinds of presumptions. In the background of the abovementioned EU instruments, there are obviously certain international conventions, which contain similar formations.<sup>38</sup> These provisions have apparently been adapted to EU instruments without further consideration.

With respect to intention, especially the EU Parliament seems to have sought to adhere to certain general principles relating to culpability. The Parliament has declared its willingness to add a new Recital 9a to the Commission's proposal for a Directive on

34 Recital 18 of the preamble of Directive 2011/92/EU.

35 See e.g. Article 1(1)(j) of Directive 2010/13/EU 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, OJ 2010 L 95/1 and Article 1(j) of Directive 2007/65/EC 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ 2007 L 332/27. Both Articles state quite similarly as in the Directive concerning sexual offences, that a certain act shall be considered intentional if it is done in return for payment or for similar consideration.

36 See Article 1(4) of the Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests (95/C 316/03), OJ 1995 L 316/48) and Article 1 of Directive 91/308/EEC 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, OJ 1991 L 166/77. A similar formation has also been adopted for the new Directive concerning money laundering (Article 1(6) of Directive 2015/849/EU).

37 *Manifesto I*, p. 711.

38 Article 6(2)(c) of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (CETS No. 141) and Article 5(2) of the United Nations' Convention against Transnational Organized Crime (General Assembly resolution 55/25 of 15 November 2000, Annex I)).

the protection of the financial interests of the European Union by criminal law. In the case of natural persons the Recital 9a would regulate that it would be necessary to establish intent with respect to all elements comprised in the offence.<sup>39</sup> The proposed supplement Recital seems to represent the so-called referential principle, fundamental to the legal doctrine concerning criminal culpability. According to the referential principle, the subjective element of the crime must relate to all objective elements of the offence definition. *Mens rea* must correspond with *actus reus*.<sup>40</sup> There have also been some preceding references that the Union law would require intention to relate to all subsequent elements of the provision.<sup>41</sup>

The Parliament has also stressed another fundamental principle concerning criminal fault. In respect of the Directive on the protection of the environment through criminal law (2008/99/EC), the Parliament emphasized that intentionality or negligence should be determined by reference to the time when the perpetrator became aware, or should have been aware, of the facts constituting the offence and not to the time when the perpetrator commenced his or her activity.<sup>42</sup> The statement seems to represent the so-called principle of contemporaneity, another fundamental principle relating to criminal fault, alongside the referential principle.<sup>43</sup>

The Parliament has also emphasized on several occasions that provisions criminalizing instigation, aiding and abetting may be applied only in acts which are committed intentionally.<sup>44</sup> *Frank Zimmermann*, for example, welcomes this solution. Extending

39 Parliament's legislative resolution TA/2014/427/P7. See also the Commission's latest proposal (Commission Staff Working Paper Impact Assessment (Part I) accompanying the document Proposal for a Directive of the European Parliament and of the Council on the protection of the financial interests of the European Union by criminal law SWD (2012) 195 final), which does not contain such a provision.

40 E.g. *Simester and Sullivan's* (fn. 6), p. 196–198, *Blomsma* (fn. 4), p. 208–209 and *Ashworth* (fn. 9), p. 76–77 and 155. Obviously, slightly different interpretations and applications of the referential principle occur in different Member States.

41 See *Blomsma* (fn. 4), p. 209 and references. In joined cases 100-103/80 the CJEU seems to extend the requirement of intention even to unlawfulness of the conduct (paras 111–112). *Blomsma* e.g. criticizes this kind of combination of intention and *dolus malus* (*Blomsma* (fn. 4), p. 85 and 235). Also the AG Sir Gordon Slynn seems to abandon this kind of evaluation (Opinion of Advocate General Sir Gordon Slynn delivered on 8 February 1983, p. 1952).

42 Session document A6/2008/154, p. 8–9.

43 *Blomsma* (fn. 4), p. 250–258.

44 The Parliament added the requirement of intention to the Directive 2009/123/EC 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements, OJ 2009 L 280/52 (new Article 5b) justifying this by a general principle that these kinds of participation cannot occur when the criminal offence occurs through mere recklessness or serious negligence (Session document, A6/2009/80, p. 11). See also Session document A6/2008/154, p. 17 concerning Directive 2008/99/EC 19 November 2008 on the protection of the environment through criminal law, OJ 2008 L 328/28, where the issue has already been noticed by the Committee on Civil Liberties, Justice and Home Affairs in its opinion (p. 48).

the abovementioned forms of participation to negligent conduct would have caused serious problems for several legal orders in the Member States.<sup>45</sup>

### 3.1.2 Recklessness

Despite the primacy of intention as a fault requirement, the EU legislator also occasionally relies on other fault requirements. These requirements fall below the intention discussed above when measured according to blameworthiness. Thus, it is a question which concerns somewhat milder offences than those committed with intent.

The term recklessness is used on three separate occasions in the substantive criminal law of the EU. In the preamble of the Directive on criminal sanctions for market abuse (2014/57/EU), it is mentioned that the Member States may provide stricter criminalizations such as market manipulation committed recklessly or by serious negligence. The Directive itself obliges the Member States to criminalize only intentional conduct.<sup>46</sup> In the Directive on combatting the sexual abuse and sexual exploitation of children and child pornography (2011/92/EU) one of the aggravating circumstances, mentioned in Article 9, is deliberately or recklessly endangering the life of the child. The former Framework Decision contained a similar provision.<sup>47</sup> The only legislative act where recklessness is used directly for outlining the contours of criminal liability is the Directive on ship-source pollution (2009/123/EC). Articles 4(1) and 5a(3) oblige the Member States to criminalize certain conduct committed intentionally, recklessly or with serious negligence. The preceding Directive (2005/35/EC) used a similar wording.<sup>48</sup> The Commission's proposal for the first ship-pollution Directive referred only to intention and gross negligence. However, the press release concerning the new di-

45 *Frank Zimmermann*, Evaluation of the Directive 2008/99/EC on the protection of the environment through criminal law on the basis of the Manifesto for a European Criminal Policy (2008, available at <http://www.crimpol.eu/other-publications/evaluations/>).

46 Recital 20 of the preamble of Directive 2014/57/EU. This provision was added because of the Parliament's desire (Parliament's legislative resolution of 4 February 2014 on the proposal for a directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation (TA/2014/57/P7)) and was not part of the original provision of the Commission (Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation (COM (2011) 654 final).

47 Article 9(f) of Directive 2011/92/EU and Article 5(2b) of the Framework Decision 2004/68/JHA. The Council's press release (PRES/2010/262) uses the words 'deliberately or by gross negligence', which seem to demonstrate a certain wavering in terminology. The preceding Joint Action 97/154/JHA did not mention anything about recklessness or negligence.

48 Directive 2009/123/EC and Article 4 of Directive 2005/35/EC. The latter Directive also contained certain regulations concerning exceptions to liability. For example, discharge into the sea of oil or oily mixtures resulting from damage to a ship or its equipment did not remove responsibility if the owner or the master acted either with intent to cause damage, or recklessly and with knowledge that damage would probably result. These regulations were taken to the Directive from the United Nation's so-called Marpol 73/78 Convention (The International Convention for the Prevention of Pollution from Ships 2 November 1973 and supplemented by the Protocol of 17 February 1978, Annex I and II).

rective also contains the term recklessness.<sup>49</sup> The preparatory works available at Eur-Lex do not reveal the motive for the amendment.

As was the case with intention, the EU legislator does not define what the term recklessness means. It seems to be obvious that recklessness refers to a fault which falls below intention when measured in terms of culpability and blameworthiness. In any case, the precise contours of recklessness remain vague.

With respect to the *Intertanko* case, which is dealt with more detail in the following section, the Advocate General *Juliane Kokott* contemplated the definition of recklessness in the 2005 Directive on ship-source pollution. According to Kokott, Article 4 of the Directive in question adopted its terminology from the so-called Marpol 73/78 Convention. Because of this, the term ‘recklessly’ was intended to incorporate the standard of liability in Marpol 73/78 for unintentional acts.<sup>50</sup> Under Marpol 73/78, two features characterize the liability for unintentional discharge: the knowledge that damage would probably result, and recklessness. The awareness of the probable damage is therefore, according to Kokott, required for the conduct to be reckless.<sup>51</sup> In the background of this interpretation there is a survey, undertaken by the Research and Documentation Service of the Court, which shows that thus defined, recklessness is treated in many legal systems as a form of serious negligence.<sup>52</sup> The definition, adopted by the Advocate General, seems to come close to the abovementioned Finnish notion of the bottom line of intention. One should, however, be cautious in drawing conclusions on the basis of the abovementioned AG’s opinion. The CJEU did not take a stand on the interpretation of recklessness.

### 3.1.3 Serious and gross negligence

The terms serious or gross negligence are to some extent more common in EU legislation concerning substantive criminal law than the term recklessness, discussed above. Serious and gross negligence may seem synonyms, but during the legislative process some attention has, however, been paid to the distinction between these two terms. In the 2005 Directive on ship-source pollutions, the Committee on Transport and Tourism recommended that the Parliament replace the term ‘serious negligence’ with ‘gross negligence’, which the Committee considered an internationally accepted term as opposed to serious negligence. The Committee justified its opinion by invoking the

49 Proposal for a Directive of the European Parliament and of the Council on ship-source pollution and on the introduction of sanctions, including criminal sanctions, for pollution offences (COM (2003) 92 final), p. 6, 8, 9 and 27 and the Council’s Press release PRES/2004/176.

50 Opinion of Advocate General Kokott delivered on 20 November 2007, para 98.

51 *Ibid.*, paras 100–101.

52 *Ibid.*, para 109.

principle of legal certainty.<sup>53</sup> Despite the Committee's recommendation, EU legislation concerning substantive criminal law primarily uses the concept of serious negligence.

As mentioned before, the Directive on criminal sanctions for market abuse (2014/57/EU) refers to serious negligence in its preamble, permitting the Member States to criminalize market manipulation also committed, in addition to the intentional conduct, recklessly or by serious negligence. In two Directives, serious negligence directly outlines the contours of criminal liability. Both are linked to environmental protection. The already mentioned Directive on ship-source pollution (2009/123/EC) refers to intention, recklessness and serious negligence. The Directive on the protection of the environment through criminal law (2008/99/EC) obliges the Member States to criminalize certain conduct when committed intentionally or at least serious negligence.<sup>54</sup>

The term gross negligence is used only in the Directive on preventing and combatting trafficking in human beings and protecting its victims (2011/36/EU), where endangering the life of the victim deliberately or by gross negligence is one of the aggravating circumstances mentioned in Article 4(2).<sup>55</sup> It is worth mentioning that, as opposed to legislation directly relevant for substantive criminal law, the other branches of Union legislation seem to use the concept of gross negligence more often.<sup>56</sup>

- 53 Recommendation for a second reading on the Council common position for adopting a directive of the European Parliament and of the Council on ship-source pollution and on the introduction of sanctions for infringements (A6/2005/15), p. 7 and 9. The original Commission's proposal had also referred to 'gross negligence' (Article 6(1) and recital 5 of the preamble in the Proposal for a Directive of the European Parliament and of the Council on ship-source pollution and on the introduction of sanctions, including criminal sanctions, for pollution offences (COM (2003) 92 final)). However, the Commission's 2004 communication referred to 'serious negligence' (Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251 (2) of the EC Treaty concerning the common position of the Council on the adoption of a Directive of the European Parliament and of the Council on pollution caused by ships and the introduction in particular of criminal sanctions for infringements involving pollution (COM (2004) 676 final, p. 2)).
- 54 Article 3 Directive 2008/99/EC. The preceding Framework Decision 2003/80/JHA 27 January 2003 on the protection of the environment through criminal law, OJ 2003 L 29/55 contained a more cursory provision: Article 3 included offences which were committed 'with negligence, or at least serious negligence'.
- 55 Article 4(2)(c) of Directive 2011/36/EU. The preceding Framework Decision (2002/629/JHA) contains a similar provision (Article 3(2)(a)). These provisions are congruent with the wording in Article 24(a) of the Council of Europe's Convention on Action against Trafficking in Human Beings (CETS No. 197, Warsaw 16.5.2005, entry into force: 1.2.2008).
- 56 E.g. Articles 40(12) and 42(13) of Directive 2014/59/EU 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council, OJ 2014 L 173/190 and Article 59(2) and 61(2) of Directive 2007/64/EC 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC, OJ 2007 L 319/1.

As is customary, EU legislation does not define the meaning of serious or gross negligence. However, the CJEU has assessed the meaning of serious negligence in the context of the 2005 Directive on ship-source pollution, in the famous *Intertanko* case.<sup>57</sup> In this case the CJEU stated that serious negligence referred to an unintentional act or omission by which the person responsible commits a patent breach of the duty of care which he should and could have complied with in view of his attributes, knowledge, abilities and individual situation.<sup>58</sup> The Court also noted that despite the lack of a general definition of serious negligence in EU legislation, the use of this term did not breach the principle of legal certainty, because the concepts, used in the Directive, were fully integrated into and used in the Member States' respective legal systems. The Court observed that concepts like serious negligence have to be applied in an indeterminate number of situations.<sup>59</sup> This may be read as a justification for the use of more general wording concerning legal certainty, which is fundamental in criminal law.

Despite a fairly different approach, the Advocate General Kokott seems to have reached a fairly similar result with the definition of serious negligence. However, the Advocate General bluntly admits that the concept of serious negligence may take on significantly different meanings within the legal systems of the various Member States.<sup>60</sup>

- 57 Although the interpretation is strictly limited to the Directive in question, it can be expected that the Court will adopt the same interpretation of serious negligence when it is used in other EU legislation (*Blomsma* (fn. 4), p. 15).
- 58 C-308/06, *Intertanko and others v. Secretary of State for Transport* [2008] ECR I-4057, para 77. The formulation of the content of serious negligence may be seen as a groundbreaking action from the CJEU (*Sakari Melander*, Effectiveness in European Criminal Law (The New Journal of European Criminal Law 3/2014), p. 292 and *Valsamis Mitsilegas*, The Third Wave of Third Pillar Law. Which Direction for EU Criminal Justice? (European Law Review 2009, 34(4)), p. 560).
- 59 *Ibid*, paras 73–74. The claimants and the Greek Government had considered that the concept of serious negligence lacked clarity to such a degree that the persons concerned had been unable to ascertain the degree of severity of the rules to which they were subject, and hence the Directive breached the general principle of legal certainty (para 68). The European Economic and Social Committee had paid attention to the ambiguity of the term 'gross negligence' already in its opinion concerning the 2005 Directive on ship-source pollutions (Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on ship-source pollution and on the introduction of sanctions, including criminal sanctions, for pollution offences (CESE/2003/755), p. 5–7). According to the Committee, it was acknowledged that there was a different interpretation of gross negligence in the Member States (p. 3) (the original Commission's proposal used the term gross negligence, as noted in the footnote 67).
- 60 Opinion of Advocate General Kokott delivered on 20 November 2007, para 103. The approach differs from the Court's evaluation because the AG interprets the Marpol 73/78 Convention to mean that the Convention would limit the interpretation of serious negligence in other sea areas than territorial waters. The AG also refers to the concept of 'obvious negligence' in Article 239(1) of the Customs Code (Council Regulation (EEC) No 2913/92 12 October 1992 establishing the Community Customs Code, OJ 1992 L 302/1), and case-law (*C-48/98, Söhl & Söhlke v. Hauptzollamt Bremen* [1999] ECR I-07877, paras 56 and 60) referring to this.

### 3.1.4 Negligence

As mentioned in the Commission's communication about the EU criminal policy, seriously negligent conduct is the lowest limit where EU criminal law instruments draw the line of criminal liability.<sup>61</sup> This means that EU legislation does not oblige the Member States to criminalize merely (regular) negligent conduct. According to the 2009 Council conclusions and the 2012 Parliament resolution, negligent conduct should be criminalized only as an exception in cases of serious negligence.<sup>62</sup> This seems to exclude the regular negligence from the 'toolbox' of the EU legislator in criminal matters.

The preceding Framework Decision on the protecting of the environment through criminal law (2003/80/JHA) obliged the Member States to criminalize negligent offences defined in Article 3 'when committed with negligence, or at least serious negligence'. The Committee of the Environment, Public Health and Food Safety would have wanted to extend the fault requirement to intention, recklessness and (regular) negligence also in the 2009 Directive on ship-source pollution.<sup>63</sup> The bottom line of criminal liability was, however, considered to be serious negligence. EU legislation concerning the protection of the environment through criminal law was already amended by the 2008 Directive by clearly raising the minimum requirement of fault to serious negligence.

Mere (regular) negligence is used in various Union legal instruments which do not fall into the category of criminal law. For example, the Directive on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions (2014/91/EU) attaches the depositary's liability to UCITS and its investors to the negligent or intentional failure to properly fulfill the obligations laid down for the depositary. One of the so-called exclusion grounds for the economic operator, which the Directive on public procurement (2014/24/EU) enables, is negligent provision of misleading information.<sup>64</sup> The Council Regulation on the protection of the European Communities' financial interests (Regulation No 2988/95) provides a good example of EU legislation in the interface between administrative law and criminal law. Article 5(1) of the Regulation in question declares that certain intentional or negligent irregularities may lead to administrative penalties.<sup>65</sup> Be-

61 2011 Commission Communication, p. 9.

62 2009 Council Conclusions, p. 3 and 2012 Parliament Resolution, letter J and point 4.

63 Session document, A6/2009/80, p. 22.

64 Article 24(1) of Directive 2014/91/EU 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions, OJ 2014 L 257/186 and Article 57(4)(i) of Directive 2014/24/EU 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ 2014 L 94/65.

65 Article 5(1) of the Council Regulation (EC, EURATOM) No 2988/95 18 December 1995 on the protection of the European Communities' financial interests, OJ 1995 L 312/1.

cause of the so-called principle of assimilation, the abovementioned provision may also have a certain effect on criminal legislation in the Member States. The assimilation principle requires Member States to use the same or similar means of legislation both in actions which violate national and the Union's interests. This means, for example, that a Member State which has criminalized infringements mentioned in Article 5 of the Regulation, should also use criminal sanctions for corresponding Union fraud. The assimilation principle requires that the gap between the provisions concerning the violation of national interests may not be too large.<sup>66</sup> Hence, despite the administrative nature of the abovementioned Regulation, its provisions concerning intentional or negligent irregularities may have a certain effect in the area of criminal law of the Member States.

The Commission's proposal for a Directive on the Union legal framework for customs infringements and sanctions provides a more recent example of the thin line between administrative and criminal legislation. By means of this Directive, the Commission aims at harmonizing the different sanctioning systems concerning the infringements to the customs legislation existing in the Member States. After careful consideration, the Commission settled on approximating certain infringements and sanctions, which the Commission considered 'non-criminal' by nature. However, a survey established under the Customs 2013 Programme indicates that at least 8 Member States only apply criminal sanctions in the field of customs legislation. Furthermore, at least 16 Member States apply some kind of combination of both criminal and non-criminal sanctions.<sup>67</sup> It is quite probable that the Directive would also have a certain impact on the criminal legislation of various Member States, despite the formal limitation to non-criminal or administrative measures.

During the preparations of the new legislation concerning EU fraud, the Commission seems to have considered closely whether to adjust the criminal liability both to intentional and negligent conduct, or simply to intentional conduct. In this respect the

<sup>66</sup> The principle of assimilation was recognized by the CJEU in the so-called *Greek maize* case (C-68/88, *Commission v. Greece* [1989] ECR 2965). The Court held that Greece had violated its obligations under the Treaties when national authorities had not proceeded, with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws, in analogous conditions (paras 22–28). See also *Klip* (fn. 1), p. 69–74 and *Melander* (fn. 1), p. 372–379.

<sup>67</sup> Proposal for a Directive of the European Parliament and of the Council on the Union legal framework for customs infringements and sanctions, COM (2013) 884 final, p. 2–3. It is also noteworthy that the thresholds to decide on the nature of the customs infringements vary significantly between the Member States. According to the survey, the financial thresholds vary between 266 EUR and 50,000 EUR (p. 2). The proposal includes Articles concerning customs infringements committed by negligence (Article 4) and intention (Article 5), but also infringements irrespective of any element of fault (Article 3), which refers to strict liability. The Commission has also made an effort to chart the definitions of the abovementioned fault requirements in different Member States. For this purpose the Commission has carried out a survey generating heterogeneous answers. See Commission Staff Working Document Impact Assessment (SWD (2013) 514 part 1, p. 59 and part 2, annex 2). These largely general and approximate answers demonstrate how these concepts may be approached from different perspectives.

Commission has also evaluated the utility of sanctioning merely negligent conduct. The Commission has concluded that criminalizing negligence may have a ‘warning sign effect’ which would increase awareness of risks of illegality in decisive moments of a given activity, thus reducing the likelihood of the undesired illegal outcome materializing. However, the Commission finds the indiscriminate application of negligence to all offence types, with the same sanction levels as for intentional conduct, contrary to the principle of proportionality of criminal offences and penalties ensured in Article 49(3) of the EUCFR.<sup>68</sup> The preparatory works leave it somewhat unclear whether the Commission is talking about serious or regular negligence. However, the final conclusions seem to be in accordance with the aforementioned guidelines of EU criminal policy, which would restrict the use of criminal law in specifically grave breaches committed through serious negligence.

As a conclusion it may be said that current EU criminal legislation limits the criminal liability to serious negligence. However, because of a certain obscurity that exists between the criminal and administrative law, the contours of liability from negligent conduct remain somewhat blurred.

### 3.1.5 Strict liability

There are significant differences between the Member States in attitudes towards the use of so-called strict liability in the field of criminal law. As noted before, the Finnish criminal law (like other criminal justice systems strongly influenced by the German tradition) unequivocally excludes strict liability from the criminal law.<sup>69</sup> In the common law tradition, on the other hand, strict liability is an ordinary part of the criminal justice.

The significant differences between the Member States also seem to have affected EU law. The EU legislator does not impose strict liability in the field of substantive EU criminal law. For example, the Council conclusions on model provisions, guiding the Council’s criminal law deliberations, and the Parliament resolution on an EU approach to criminal law exclude the possibility of using strict liability in the field of criminal law in EU legislation.<sup>70</sup> However, strict liability is quite common in other fields of EU law which may be quite close to criminal justice.

<sup>68</sup> See the Commission Staff Working Paper SWD (2012) 195 final, p. 25 and 30. The Commission seems to end up setting minimum definitions of offences and permitting the Member States to expand criminal liability, for instance by adding serious cases or liability for negligent conduct (Commission Staff Working Document Executive Summary of the Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on the protection of the financial interests of the European Union by criminal law (SWD (2012) 196 final), p. 5–8).

<sup>69</sup> Strict liability is also known in Finland in the field of tort law. E.g. the Product Liability Act (694/1990) and the Act on Compensation for Environmental Damage (737/1994) are based on strict liability.

<sup>70</sup> As mentioned before, both documents restrict the use of criminalizations to acts or omissions committed through serious negligence. The Council conclusions particularly state that

The heterogeneity of the Member States has also evidently influenced the case law of CJEU as the Court seems to have been pronounced cautious with interpretations concerning the use of strict liability in different branches of law. The CJEU seems to have accepted the use of strict liability in Member States also in the context of 'offences' already in the 1980s.<sup>71</sup> However, the Court has not been willing to oblige the Member States to use strict liability in criminal matters,<sup>72</sup> long before the abovementioned criminal political statements of the Union's legislative organs. In the relatively recent *Urbán* case the Court has evaluated the proportionality of the use of strict liability in the light of the aims and advantages reached by means of it.<sup>73</sup>

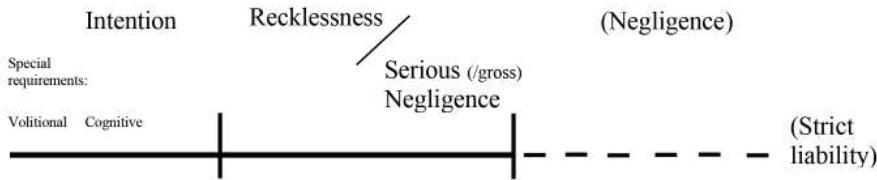
The rather careful and subtle attitude over interpretations concerning strict liability is more than understandable. One of the aspects which makes the topic even more complicated relates to certain differences in the division of different branches of law in the Member States. The Hungarian penal system related to social legislation infringes concerning road transport, which was evaluated in the *Urbán* case, utilizes administrative fines.<sup>74</sup> The corresponding Finnish legislation, however, criminalizes these kind of infringements.<sup>75</sup> The same statutes of EU law may have been implemented by essentially divergent means by various Member States. Because of this, incautious statements of the CJEU may have various and also unpredictable consequences in different Member States.

### 3.2 The system of fault requirements in EU criminal law

On the basis of the previous observations, the positive fault requirements, used by the EU legislator, can be illustrated by the following figure:

strict liability should not be prescribed in EU criminal legislation (2009 Council Conclusions, p. 3).

- 71 C-157/80, *Criminal proceedings against Siegfried Ewald Rinkau* [1981] ECR 1395 and C-326/88, *Anklagemyndigheden v. Hansen and Søn I/S* [1990] ECR I-2911. In the latter case, the Court stated that a system of strict liability penalizing a breach of regulation was not in itself incompatible with Community law (paras 16 and 19).
- 72 In C-7/90, *Criminal proceedings against Paul Vandevenne and others* [1991] ECR I-4371, the Court concluded that Regulation (EEC) No 3820/85 (20 December 1985 on the harmonization of certain social legislation relating to road transport, OJ 1985 L 370/1) neither required Member States to introduce a system of strict criminal liability for the purpose of ensuring compliance with the obligations laid down by the regulation, nor precluded them from doing so (para 18).
- 73 C-210/10, *Urbán* ECLI:EU:C:2012:64, paras 47–52.
- 74 Ibid, para 14.
- 75 Criminalization is provided in the Road Traffic Act 105a § (401/2005), which requires intention (*tahtallisuuks*) or gross negligence (*törkeä tuottamus*) as the subjective element of the offence.



Intention represents the most severe form of fault in EU criminal law. In many cases, crime definitions provide various special requirements concerning intention. These special requirements may be divided into volitional and cognitive requirements. However, EU criminal legislation lacks the general definition of intention, which makes it difficult to draw a sharp line between intention and lower forms of fault.

Recklessness and serious negligence are notably more unusual terms in EU criminal legislation than intention. These forms of positive fault requirements mainly occur in criminal legislation which aims to protect the environment. The relation of recklessness and serious negligence is somewhat vague. In the Directive on ship-source pollution (2009/123/EC) the EU legislator mentions intention, recklessness and serious negligence as forms of sufficient fault. In the Directive on the protection of the environment (2008/99/EC) the EU legislator mentions only intention and serious negligence. With regard to the content of these terms, recklessness and serious negligence seem to overlap. Both of them seem to deal with unreasonable risk-taking. In the common law tradition, at least in Anglo-Saxon criminal law, from which the concept of recklessness has most likely been adopted into EU legislation, the main difference between these forms of fault is the fact that recklessness requires consciousness about the risk.<sup>76</sup> Serious negligence, on the contrary, covers both conscious and unconscious risk-taking.<sup>77</sup> Thus, recklessness seems to position itself somewhere between intention and (unconscious) serious negligence. By criminalizing certain actions or omissions committed intentionally or with serious negligence, the Directive on the protection of the environment also encompasses actions or omissions committed by recklessness.

EU criminal law uses the term gross negligence only with respect to one of the aggravating circumstances regarding human trafficking. Despite the noteworthy position of gross negligence in other fields of EU law, in the respect of criminal law, the key term is particularly *serious* negligence.

The EU legislator does not rely directly on regular negligence or strict liability when outlining the contours of criminal liability. These are terms that do not occur in EU criminal legislation. The Commission refers particularly to *serious negligence* as the

76 See section 2.4.1. This is also in line with AG Kokott's opinion in *Intertanko* (see section 3.1.2).

77 In this respect, the CJEU has regarded as sufficient just the fact that the person *should* and *could* have complied with the duty of care (see section 3.1.3).

lower, but in some cases acceptable, positive fault requirement in EU criminal law.<sup>78</sup> The 2009 Council conclusions guiding criminal law deliberations and the 2012 Parliament resolution on an EU approach to criminal law state even more clearly that *serious negligence* should be recognized as the bottom line of criminal liability in EU criminal law, with respect to subjective fault.<sup>79</sup> The CJEU has even recognized strict liability as a valid form of criminal liability in Member States' national legislation. However, the Court has been cautious about statements which would encourage the use of this kind of strict liability.

Every instrument of subjective EU criminal law uses the same system of offence definitions. The proper material description of the prohibited objective conduct (*actus reus*) is provided before or after declaring the general positive fault requirement, which has to be fulfilled (*mens rea*). These general requirements are intention, recklessness and serious negligence. In this respect the EU legislator seems to have adopted rather consistent way to write the law.

The well-known *Spector Photo* case provides a good example of certain problems which EU criminal law may encounter if substantive criminal law is not systematically exercised. The case dealt with interpretation of Article 2 of Directive 2003/6/EC on insider dealing and market manipulation.<sup>80</sup> The Directive in question was not, in *stricto sensu*, part of EU criminal law, as the later Directive on criminal sanctions for market abuse (2014/57/EU) was. The aforementioned Article 2 objected to the Member States merely 'prohibiting' certain persons who possess inside information from using that information. However, the case is also relevant in many ways with respect to criminal law. The question was, *inter alia*, whether this Article, which defined insider dealing, presupposed that a deliberate decision had been taken to use inside information, or did the mere fact that a person possessed inside information and acquired or disposed of, or tried to acquire or dispose of, for his own account or for the account of a third party, financial instruments to which that inside information related, signified in itself that he made use of inside information. In other words the case handled the interpretation of the expression 'use of inside information'.<sup>81</sup>

The Court noted that Article 2(1) did not expressly set out the subjective conditions in relation to the intention behind material actions. The preparatory works also showed that the particular Article defined insider dealing objectively without the intention behind such dealing being referred to explicitly in its definition. This was done with a view to achieving uniform harmonization of the law of the Member States. The establishment of an effective and uniform system had led the Community legislature to adopt an objective definition of the constituent elements of prohibited insider dealing.<sup>82</sup>

78 2011 Commission Communication, p. 9.

79 2009 Council Conclusions, p. 3 and 2012 Parliament Resolution, letter J and point 4.

80 Directive 2003/6/EC 28 January 2003 on insider dealing and market manipulation, OJ 2003 L 96/16.

81 C-45/08, *Spector Photogroup NV* [2009] ECR I-12073, para 30.

82 Ibid, paras 32, 35 and 45.

According to the Court, the effectiveness of the prohibition would have been weakened if made subject to a systematic analysis of the existence of a mental element. The effective implementation of the prohibition on market transactions was thus based on a simple structure in which the subjective grounds of defence were limited. Once the constituent elements of Article 2(1) were satisfied, it was thus possible to assume an intention on the part of the author of that transaction. According to the Court, such a presumption did not infringe fundamental rights of the applicant, in particular the principle of the presumption of innocence.<sup>83</sup> Thus, the Court stated that 'the use of inside information' must be determined in the light of the purpose of the directive in question, which was to protect the integrity of the financial markets and to enhance investor confidence.<sup>84</sup>

The case illustrates the problems that an administrator of the law encounters when applying EU legislation which lacks the general part of criminal law. The CJEU seems to approach the problem from the purpose of the Directive, not from the basic principles of criminal law. The former turns the consideration to the effectiveness the latter would have required to pay attention to e.g. the *lex certa* requirement and the principle of guilt. The Courts decision to observe mainly effectiveness appears quite unfamiliar and even undesirable for a (Nordic) criminal lawyer.<sup>85</sup>

In his opinion, Advocate General Kokott compares different language versions of the Directive, stressing that the different versions must be uniformly interpreted. Kokott also ends up studying the drafting history of the Directive by means of teleological interpretation. Kokott comes to the conclusion that Article 2(1) should be interpreted as meaning the fact that a person who possesses inside information that he knows, or ought to have known, constitutes inside information and acquires or disposes of financial instruments to which that inside information relates, as a rule signifies in itself that he 'makes use' of the information. However, in a situation where it is clear *a priori* that inside information does not influence the action of a person, mere knowledge of inside information does not in itself imply use of that information.<sup>86</sup>

The main problem in the background of the *Spector Photo* case is the absence of the subjective element of an action in Article 2(1). The Court (and the AG) seems to have ended up in a sort of compromise: intention is part of prohibited conduct, but it may be assumed from the basis of the objective element. The current EU criminal legislation, including the new Directive on criminal sanctions for market abuse (2014/57/EU), does not encounter similar problems because of the regular use of general positive fault requirements in the offence definitions. The problems of current EU criminal law stem from the lack of definitions to these general positive fault requirements.

<sup>83</sup> Ibid, paras 37–39.

<sup>84</sup> Ibid, paras 61–62.

<sup>85</sup> In respect of the principle of effectiveness in EU criminal law see e.g. Melander (fn. 57).

<sup>86</sup> Opinion of Advocate General Kokott delivered on 10 September 2009, paras 48–53, 59–62 and 69.

#### 4. CONCLUSIONS

Despite the lack of general definitions of positive fault requirements, the EU legislator seems to have adopted a relatively clear method of writing the law, concerning fault in criminal legislation. In the Articles, containing offence definitions, the general fault requirement is separated from the description of the prohibited objective conduct. In addition to certain 'sharpened' requirements of intention, every crime definition in the substantive criminal law of the EU contains a general requirement considering fault. In this respect the Union legislator mostly utilizes two different concepts: intention and serious negligence. This dichotomy recalls the Continental system of fault requirements, which leans on the separation of *dolus* and *culpa*, intention and negligence. On certain occasions recklessness has also been recognized as a form of fault, which enriches the Continental dichotomy with an Anglo-Saxon nuance. However, both the Council and the Parliament, as well as the Commission, seem to have relied on the particular separation of intention and serious negligence in their recent political commitments.

The most evident ambiguity with respect to criminal fault in the EU criminal law relates to the definitions of different forms and concepts of positive fault requirements. The preparatory works of Union legislation do not provide much help with this problem. The tendency with the preparatory works seems to be to avoid any commitment to certain doctrines of fault requirements. For example, the abovementioned inclination towards the bipartite system could be taken as an indication of a broad definition of intention. However, in the absence of clear statements from the EU legislator, these kinds of assumptions remain pronouncedly uncertain.

The reluctance of the EU legislator to take a stand on these kinds of questions undoubtedly stems from the ambition to respect the various legal systems of the Member States. However, this kind of discretion results in heterogeneity in the contours of criminal liability across the Union. For example, in Finland the concept of intention, *tahallisuus*, is much broader than in the Anglo-Saxon system in England and Wales. The aforementioned problem is compensated for, with respect to intention, with the plentiful use of special intent requirements in several of the Union's legal instruments. On the other hand, the CJEU has defined the meaning of serious negligence in the *Intertanko* case. Hence, EU criminal law may not be in such an obscure situation with the definitions of positive fault requirements as has often been contended.

As regards the contours of criminal liability, EU criminal law is indirect by its nature. The Directives (or the Framework Decisions) cannot be applied directly in the Member States. Instead, they are transposed as parts of national criminal law by implementation of the national legislators. Because of the absence of the general part of EU criminal law, including the definitions of positive fault requirements, the national legislators have significant latitude in this implementation.

In the level of authority applying the law, the national judges comply primarily with these resolutions acquired by the national legislators, and for the most part, with the general principles or provisions of national criminal law. However, this has to be done

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in accordance with certain obligations stemming from EU criminal law. This may also involve positive fault requirements. For example, the statement of the CJEU, expressed in the *Intertanko* case, binds the national judges at least in the context of the Directive on ship-source pollution. However, in the absence of these kinds of statements, the national judge has no other option but to comply with the national general part of criminal law.

The Council, the Commission and the Parliament have all emphasized coherency, consistency and also the general quality of EU criminal legislation in their most recent (criminal) political statements.<sup>87</sup> This may be taken as a certain tendency for defining more accurately also some terms of EU criminal law, including the terminology concerning positive fault requirements.<sup>88</sup> There are certain differences between the visions of the abovementioned organs of how this quality could, and also should, be achieved. Both the Commission and the Parliament propose the utilization of legal professionals in law-making. In 2011 the Commission already announced that it was setting up an expert group to assist the Commission in discussions about important legal issues including the relationship between criminal and non-criminal sanction systems and the interpretation of criminal law notions regularly used in EU legislation.<sup>89</sup> The Parliament has also highlighted the consultation of independent experts in relation to law-making.<sup>90</sup> Hence, it seems that both the Commission and the Parliament have stressed legal expertise in law-making.

The Commission and the Parliament have also highlighted certain general principles guiding EU criminal legislation. In this respect, the views of the two organs seem to differ essentially. The Parliament emphasizes the 'general principles governing *criminal law*' (emphasis added), such as *nulla poena sine culpa*, *lex certa*, non-retroactivity, *lex mitior*, *ne bis in idem* and presumption of innocence.<sup>91</sup> The Commission, instead, also refers to legal certainty and *ultima ratio*, but the apparent focus is on the principle of subsidiarity and proportionality, which are, above all, general principles of *EU law*.<sup>92</sup> The most essential difference between the two organs appears to be that the Parliament endeavours to improve the EU criminal legislation from the premises of criminal law, while the Commission rests the development in the premises of EU law in general, remaining mainly silent about general principles of criminal law. The difference is consti-

<sup>87</sup> 2009 Council Conclusions, p. 1, 2011 Commission Communication, p. 3 and 2012 Parliament Resolution, letters H and N, points 6 and 11.

<sup>88</sup> On its abovementioned criminal political communications the Commission stated that there should be a common understanding on the guiding principles underlying EU criminal legislation, such as the interpretation of legal concepts used in EU criminal law (p. 12). Positive fault requirements constitute a textbook example of basic legal concepts used but not defined in EU criminal legislation, although the Commission's communications do not mention them expressly.

<sup>89</sup> 2011 Commission Communication, p. 12.

<sup>90</sup> 2012 Parliament Resolution, point 15.

<sup>91</sup> Ibid, point 4 (...'the importance of the other general principles governing criminal law').

<sup>92</sup> 2011 Commission Communication, p. 6–9 ('Which principles should guide EU criminal law legislation?').

tutive. A similar disparity may also be seen, at least to some extent, in the practical actions of the organs. In section 3.1.1 it was mentioned how the Parliament in particular has looked after the adherence to certain general principles of criminal law by some amendments to the Commission's proposals for criminal law provisions.

Cases like *Spector Photo* indicate that the CJEU is more or less on the same wavelength with the Commission. The Court seems to have stressed an effectiveness-driven approach to various questions concerning EU criminal law.<sup>93</sup> This effectiveness stems from the purposes of Union's provisions, not from the basic principles of criminal law.

This article began with a reference to the special nature of criminal law and the provisions in the Treaties of EU expressing this. These provisions implement the more general principles concerning subsidiarity and respect for national identity and cultural diversity, essential to EU law. The former provisions speak of the pronounced significance of these latter principles when co-operating with matters of criminal law in the context of EU. The EU criminal law constitutes a transnational compound of criminal law in the frame of EU law. The provisions ensuring the special character of criminal law require that the aspect of general EU law should not overtake criminal law. This is in accordance with principles guaranteeing respect for national identity and cultural diversity.

In the meeting of the Criminal Law Contact Group<sup>94</sup> on 12 May 2015, the group discussed the different sets of guiding principles underlying legislative initiatives in the field of substantive criminal law produced by the Commission, the Council and the Parliament. According to the Commission, the three institutions share a common approach to these principles but 'the devil is in the details'.<sup>95</sup> This appears, so say the least, a dismissive statement. The articulation and the principles highlighted in the Commission's communications and the Parliament's resolutions express very distinct standpoints on EU criminal law. The question is not about the details but the foundations. If the Union is about to elaborate its system of positive fault requirements, for example by taking a stand on definitions concerning these requirements, the Parliament's point of view may evidently be seen to be more favourable with respect to both a criminal lawyer and the EU Treaties.

<sup>93</sup> See *Melander* (fn. 57) p. 284–285. According to Paul Craig and Gráinne de Búrca, the requirement of effectiveness of EU law as a general legal principle was also initially developed by the CJEU (*Paul Craig and Gráinne de Búrca, EU Law; Text, Cases, and Materials* (Oxford, 5<sup>th</sup> edition, 2011), p. 218).

<sup>94</sup> The Criminal Law Contact Group (CLCG) was established after the 2012 Parliament resolutions in order to create an informal and inter-institutional forum for the exchange of views on the quality and consistency of legislation in the field of European criminal law. The group is comprised of representatives of the Parliament, the Commission and the Council. The informal nature of the group is based on the unwillingness of the Commission and the Council to enter into negotiations on a formal inter-institutional agreement. (Meeting of the Criminal Law Contact Group on 12 May 2015: Information by the Presidency, Brussels 24 June 2015, 10137/15, JAI 489, DROIPEN 68, COPEN 161, available at <http://db.eurocrim.org/db/en/doc/2355.pdf>).

<sup>95</sup> *Ibid*, p. 2.