The Danish opt-out

Doctrinal issues, future challenges and Nordic implications

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Abstract:
This article examines the scope of the Danish opt-out within the field of EU criminal law. It analyzes the historical and legal origins of the opt-out and provides a doctrinal assessment of key issues concerning its scope, including the significance of judgments from the Court of Justice of the European Union rendered within the framework of the opt-out. Subsequently, Denmark's position is compared with that of the other Nordic countries, concluding that Denmark's relationship to EU criminal law is closely comparable to Norway's. Finally, the article identifies key future challenges that Denmark may face due to its position outside the EU criminal law cooperation. It argues that Denmark's non-participation in the development of a common EU standard for criminal procedural rights may affect its ability to participate in EU instruments founded on the principle of mutual trust.

I denne artikel undersøges rækkevidden af det danske retsforbehold på det strafferetlige område. Artiklen analyserer retsforbeholdets historiske- og juridiske oprindelse, og leverer en retsdogmatisk gennemgang af centrale problemstillinger vedrørende dets anvendelsesområde, herunder betydningen af domme fra EU-Domstolen, der afsiges indenfor for rammerne af retsforbeholdet. Herefter sammenholdes Danmarks position med de øvrige nordiske landes. Det konstateres, at Danmarks status i forhold til EU-strafferetten i vidt omfang kan sammenlignes med Norges. Afslutningsvist udpeges en række fremtidige udfordringer, som Danmarks position uden for EU-strafferetssamarbejdet kan medføre. Det konkluderes, at Danmarks manglende deltagelse i opbygningen af en fælles EU-standard for strafprocessuelle rettigheder potentielt kan få konsekvenser for Danmarks mulighed for at deltage i EU-instrumenter, der bygger på princippet om gensidig tillid (*mutual trust*).

Keywords
The Danish opt-out, criminal law cooperation, EU criminal law, mutual trust, duty of consistent interpretation, Nordic criminal law.

Introduction

Article 67 of the Treaty on the Functioning of the European Union (TFEU) states that the EU should constitute an Area of Freedom, Security and Justice (AFSJ). To reach this goal the EU is equipped with the competence to approximate Member State criminal laws "if necessary" (TFEU Article 67(3)). To achieve this goal, the EU has enacted a wide range of legal instruments relating to procedural, substantive and institutional criminal law, relying on Articles 82, 83, 85, 86 and 88 of the TFEU since the Lisbon Treaty entered into force on December 1st 2009.

In the area of procedural criminal law, the EU has introduced multiple directives, including Directive 2010/64/EU (on the right to interpretation and translation), Directive 2012/13/EU (on the right to information), Directive 2012/29/EU (Victims Rights Directive), Directive 2013/48/EU (on the right of access to a lawyer), Directive 2016/343/EU (on the presumption of innocence), Directive 2016/800/EU (on procedural safeguards for children), and Directive 2016/1919/EU (on legal aid).[1] Many of these directives confer rights that can be directly invoked by the accused before national courts (Mitsilegas 2022, p. 87; Klip 2021, p. 73). The EU has thereby indirectly created a common standard for criminal proceedings (Satzger 2018, p. 166).

With respect to substantive criminal law, law approximation has been somewhat more cautious. However, the Lisbon era has seen the adoption of no fewer than fourteen directives harmonizing Member States' definitions of the 10+1 *euro crimes* listed in TFEU Article 83(1)[2] and the adoption of four directives on the basis of TFEU Article 83(2), which provides EU with the power to approximate Member State criminal law, when it proves "essential to ensure the effective implementation of a Union policy". Finally, regarding institutional criminal law cooperation, the Lisbon era has seen the supranationalization of the Europol and Eurojust and, most recently, the establishment of the European Public Prosecutor's Office (EPPO).[3] Taken together these developments signify that the EU has made a significant step towards establishing a supranational dimension to Member State criminal law.

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1. For ease of reference, these directives will collectively be referred to as The Defence and Victim Rights Directives throughout this article.
2. "These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime." In addition to the 10 euro-crimes listed in TFEU Article 83(1). The Council has by unanimous decision (Council Decision 2023/567) identified the violation of Union restrictive measures as an area of crime that meets the criteria in Article 83(1) TFEU.
3. Regulation 2016/794/EU (on Europol), Regulation 2018/1727/EU (on Eurojust), and Regulation 2017/1939/EU (on the EPPO). The EPPO-regulation is adopted as an enhanced cooperation under TFEU Article 86(1), at the time of writing (June 2025) all Member States except Ireland and Denmark (that both have opt-outs from the AFSJ-cooperation) and Hungary have chosen to participate in the EPPO.

Although, Denmark was the first to join the EU of the three Nordic Member States, Denmark has not taken part in the EU criminal law developments under the Lisbon Treaty. This is a consequence of the Danish opt-out (*Retsforbeholdet*) from Title V of the TFEU concerning the Area of Freedom, Security and Justice. By contrast, the two other Nordic Member States – Sweden and Finland – fully participate in EU cooperation on criminal law.[4]

In this article I examine the scope of the Danish opt-out from EU criminal law cooperation. Section 1 considers the historical background and the legal scope of the opt-out. Section 2 narrows the focus to selected doctrinal issues surrounding the precise scope of the opt-out.[5] Section 3 compares Denmark's status under the Danish opt-out with Norway's position under the EEA agreement and discusses the implications of the opt-out in a Nordic setting. Section 4 addresses future challenges. Section 5 offers concluding remarks. The article employs a traditional legal-dogmatic approach. The main focus of the article is Danish law; while parallels are drawn – particularly to Norwegian law – these do not amount to a full comparative analysis.

1. The Danish opt-out

This section analyzes the political and historical events that shaped the Danish opt-out in its current form and clarifies its legal scope. It begins with a general introduction and concludes with an in-depth analysis of Article 2 of Protocol No. 22 to the Lisbon Treaty on the Position of Denmark (Protocol 22).

1.1. Historical background[6]

When Denmark joined the European Communities (EC) on January 1st, 1973, it was primarily focused on economic cooperation between the Member States. The stated goal of the EC was to create an internal market for goods, services, and working force (and later capital) and abolishing tariffs. This meant that EU/EC law initially had only limited interference with national criminal law. However, from the late 1980's onward EC law increasingly influenced the criminal law sphere of the Member States (Verdoner 2024, p. 230).

Notably, in *C-68/88 Commission v. Greece*, the Court of Justice of the European Union (CJEU) held, that the duty of sincere cooperation (now TEU Article 4(3)) entails obligations for Member States to penalize and prosecute violations of EU law. In the judgment, the CJEU found, that Member States

4. Both Finland and Sweden joined the EU on January 1st 1995. Finland has participated in the EPPO since its operations began on June 1st 2021, while Sweden officially notified the Commision of its wish to join the EPPO on June 5 2024.
5. This section builds upon research presented in Chapter 6 in the author's PhD dissertation.
6. Similar accounts of the historical and political background of the Danish opt-out can be found in (Thorning 2024 I, p. 116; Verdoner 2024, p. 144f; Elholm and Hjortenberg 2024, p. 213f; Elholm 2023, p. 556; Sørensen 2015; Baumbach 2014)

are obligated to ensure "that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law [...] and which [...] make the penalty effective, proportionate and dissuasive,", (cf. *C-68/88 Commission v. Greece*, para 24).

Furthermore, the CJEU held that Member States are required to prosecute such violations with "the same diligence as that which they bring to bear in implementing corresponding national law" (cf. *C-68/88 Commission v. Greece*, para 25).

This obligation to penalize and prosecute violations of EU law remains binding for all Member States, including Denmark (Verdoner 2024, p. 183; Elholm and Hjortenberg 2024, p. 174).

The Maastricht Treaty saw the establishment of the European Union (EU) and further strengthened EU influence on Member State criminal law. The Treaty introduced the so-called pillar structure, which provided the EU with the power to adopt international law instruments regarding Justice and Home Affairs (*third pillar law*). This development continued with the subsequent Amsterdam Treaty which saw the introduction of framework decisions (cf. Treaty on European Union (Amsterdam), Article 34(2b)). Under the Maastricht/Amsterdam Treaty regimes the EU adopted a significant number of criminal law instruments. Notably, these included the Framework Decision on the European Arrest Warrant (Framework Decision 2002/584/JHA) and the Europol and Eurojust Conventions. The criminal law instruments issued under the Maastricht/Amsterdam regimes were, however, due to their placement in the third pillar a form of international law, meaning that they were not supranational in nature.[7]

The Danish voters originally rejected the Maastricht Treaty by referendum on June 2, 1992. In the aftermath of the Maastricht-referendum and the subsequent legal and political turmoil Danish political parties, which represented a significant majority in the Danish Parliament (*Folketinget*), agreed upon a memorandum on Denmark's Position in Europe (Denmark in Europe 1992). The memorandum stated: "*That Denmark cannot agree to transfer of sovereignty in the area of justice and police affairs but can take part in the intergovernmental co-operation which has existed to-date*" (Denmark in Europe 1992, p. 3). The memorandum formed the basis for Denmark's subsequent negotiations with the other Member States regarding the outline of Denmark's continued EU membership. These negotiations culminated in the signing of

7. The framework decisions issued under the Treaty on European Union now form an integrated part of supranational EU law (Protocol no. 36 to the Lisbon Treaty on transitional measures, Article 10(1) read in conjunction with Article 10(3). In a Danish context the framework decisions continues to form part of international law (Protocol 22, Article 2), this means that questions concerning the interpretation of framework decisions cannot be referred to the CJEU for a preliminary hearing (cf. U.2022.3840 HK).

the Edinburgh Agreement.[8] Regarding criminal law the Edinburgh Agreement stated: "*Denmark will participate fully in cooperation on Justice and Home Affairs on the basis of the provisions of Title VI of the Treaty on European Union*" (Edinburgh Agreement 1992, Section D).

This statement might seem contradictory to the passage from the Memorandum, but in fact the meaning was, that Denmark would *only* participate in EU criminal law cooperation as long as the cooperation was international and not supranational in essence (Edinburgh Agreement 1992, Declaration on cooperation in the fields of justice and home affairs). Since this was the case under the Maastricht and subsequent Amsterdam and Nice Treaty regimes, Denmark participated fully in the EU cooperation on criminal law from 1993-2009, including in the establishment of Europol and Eurojust.

The Lisbon Treaty abolished the pillar structure and for the first time provided the EU with an explicit supranational legislative competence on criminal law approximation. This meant that Denmark could no longer participate in the EU criminal law cooperation and has not been party to the development described in the introduction. As a consequence, Denmark had to leave Europol and Eurojust, when the legal bases for the institutions were supranationalized. In 2015 the Danish voters rejected a proposal to change the opt-out to an opt-in,[9] which was largely fueled by a political wish for Denmark to remain in the Europol (Aftale om Danmark i Europol 2014; Hjortenberg and Stevnsborg 2022, p. 47f). In the aftermath of the 2015-referendum, Denmark signed cooperation agreements with both Europol and Eurojust. The agreements give Denmark a sort of "middle-position" as a third country with special privileges in the Europol/Eurojust-cooperation, meaning that Denmark maintains access to some but not all of Europol/Eurojust's systems (Agreement between Denmark and Europol 2017; Agreement between Denmark and Eurojust 2019; Rigspolitiet 2024; Hjortenberg and Stevnsborg 2022, p. 49).

1.2. Scope of the Danish opt-out within the criminal law area

The exact scope of Denmark's opt-out is governed by Protocol No. 22. Article 2 of the Protocol states that "*None of the provisions of Title V of Part Three of the Treaty on the Functioning of the European Union, no measure adopted*

8. The legal status of the Edinburgh Agreement has been discussed in the legal litterature. A consensus seems to have emerged, that the agreement can be seen as a binding international law instrument between Denmark and the other Member States (Thorning 2024 I, p. 44; Thorning 2024 II, p. 84). The agreement is to this end registered in the United Nations Treaty Collection (UNTC 1993, reg. no. 30685). Today however the agreement also forms an integrated part of both EU law and national Danish law. It is referenced in the preamble to Protocol 22 and in the Danish Law of Accession (Tiltrædelsesloven) Article 4(11).
9. An opt-in would have enabled Denmark to pick and choose which measures under Title V, that Denmark wished to participate in (cf. Protocol 22, Annex I, Article 3-5) (Thorning 2024 I, p. 149f).

pursuant to that Title, no provision of any international agreement concluded by the Union pursuant to that Title, and no decision of the Court of Justice of the European Union interpreting any such provision or measure or any measure amended or amendable pursuant to that Title shall be binding upon or applicable in Denmark; and no such provision, measure or decision shall in any way affect the competences, rights and obligations of Denmark; and no such provision, measure or decision shall in any way affect the Community or Union acquis nor form part of Union law as they apply to Denmark. In particular, acts of the Union in the field of police cooperation and judicial cooperation in criminal matters adopted before the entry into force of the Treaty of Lisbon which are amended shall continue to be binding upon and applicable to Denmark unchanged."

Regarding criminal law cooperation, Title V contains all treaty provisions, that grants the EU explicit legislative competence in criminal law matters (i.e. TFEU Articles 82-89). Despite the somewhat convoluted wording of Article 2, the provision states in absolute terms that Denmark will not be bound by 1) The Treaty provisions found in Title V themselves 2) Secondary legislation adopted on the basis of the provisions 3) International agreements, concluded pursuant to those provisions and 4) Decisions made by the CJEU interpreting such provisions.

Regarding initiatives that form part of the Schengen *acquis*, Denmark has the opportunity to implement such measures into national law, thereby creating an international law obligation between Denmark and the other Schengen Member States (cf. Protocol 22, Article 4). So far Denmark has chosen to implement all Schengen-measures within the prescribed six-months period.[10]

Article 2 of Protocol 22 applies only to criminal law instruments adopted under Title V. It does not affect Denmark's obligations under TEU Article 4(3) to provide effective sanctions for violations of EU-law, nor does it affect Denmark's obligations under TFEU Article 325 to counter fraud and other illegal activities affecting the financial interests of the Union. In cases of serious VAT fraud Article 325 may oblige Denmark to enact criminal law measures (cf. C-105/14 *Taricco*, paras. 39-42 and C-574/15 *Scialdone* para. 35).

Denmark is also bound by secondary legislation containing criminal law measures adopted under treaty provisions outside Title V. The EU adopted such secondary criminal law legislation in the field of environmental law under the Nice Treaty (see Directive 2008/99/EC and Directive 2009/123/EC, as well as the CJEU rulings in C-176/03 *Commission v. Council* and C-440/05 *Commission v. Council)*. However, the question of whether the EU still holds the competence to adopt secondary legislation based on treaty provisions outside Title V after the coming into force of the Lisbon Treaty remains debated in literature (Miettinen 2013; Huomo-Kettunen 2014; Baumbach 2014; Verdoner 2024, p. 114).

10. For a list of legal acts covered by the Danish opt-out – including the acts that Denmark has joined via the Schengen opt-in (See Europaudvalget, 2021)

2. Selected doctrinal issues

In the following section, this article examines three complex doctrinal issues concerning the scope of the opt-out. First the article addresses the legal value of CJEU Decisions rendered within the scope of the Danish opt-out. It then analyzes issues related to the uniform interpretation of EU law concepts present in both AFSJ directives and internal market law. Finally, the article will examine situations where the Danish legislator has chosen to voluntarily implement EU legal acts that formally fall within the scope of the opt-out.

2.1. CJEU decisions rendered within the scope of the Danish opt-out

Article 2 of Protocol 22 states that "no decision of the Court of Justice of the European Union interpreting" provisions in Title V shall be "binding upon or applicable in Denmark", and that no such decision "shall in any way affect Community or Union acquis nor form part of Union law as they apply to Denmark." The strict wording suggests that CJEU rulings in preliminary references concerning the Area of Freedom, Security and Justice have no legal relevance for EU law as it applies to Denmark.

However post-Lisbon developments cast doubt on whether this interpretation remains sustainable. Following the abolition of the pillar structure, the CJEU no longer distinguishes between EU law and EC law, and its decisions frequently rely on an interpretation that combines general EU legal sources (such as TFEU Article 21 on the right to move and reside freely in the territory of the Member States) with AFSJ-related provisions (Klip 2021, p. 22ff).[11] This raises the question of to what extent such decisions are binding upon Denmark.

A rigid interpretation could lead to an arbitrary division between the application of Union acquis in Denmark and its application in other Member States. If a general development in EU law – whether concerning general principles of EU law such as direct effect or the scope of rights found in the Charter of Fundamental Rights of the European Union (The Charter) – were to emerge through AFSJ case law, it would be inconsistent to argue that Denmark remains unaffected solely because the development *happened* to arise within the AFSJ context.

However, the wording of Article 2 may allow for a narrower interpretation of the opt-out's scope, whereby only the portion of a CJEU decision that specifically interprets AFSJ provisions falls within the opt-out. As will be explored further, such an interpretation still presents a significant challenge: determining which parts of a CJEU ruling are derived from the interpretation of AFSJ provisions and which stem from the application of general (non-AFSJ) EU law.

11. There are ongoing discussions in legal litterature as to whether criminal law still holds a special position in EU law in the post-Lisbon era (See Verdoner 2024, p. 92f, Suominen 2015, p. 379; Asp 2013, p. 184).

2.1.1. *The ZW Judgment (C-454/19)*

In *C-454/19 ZW*, the CJEU considered whether the German criminal legislation on parental child abduction was contrary to TFEU Article 21 and Directive 2004/34/EC. The accused (ZW), a Romanian citizen residing in Germany with her child, was charged with parental child abduction under Article 235(2) of the German Criminal Code (*Strafgesetzbuch*). The charge related to her acceptance of the fact that the child's father had taken the child to Romania, despite the child being under a partial delegation of parental authority (*Ergänzungspflegschaft*) by the German youth authorities (cf. *C-454/19 ZW*, paras. 9-15).

Article 235(2) of the German Criminal Code imposed criminal responsibility for removing a child from parental or guardian care in order to take them abroad. Parental child abduction within Germany could only be punished under German law if the abductor had used force, threat of serious harm or deception. This meant that the criminal liability for parental child abduction was stricter if the child was taken abroad than if the child was removed from guardian care internally in Germany.

The CJEU found that the German legislation established a difference in treatment that was likely to affect or even restrict freedom of movement under TFEU Article 21 (*C-454/19 ZW*, para. 35). Up until this point, the decision had been based solely on legal sources fully applicable to Denmark. However, in determining the question of whether the restriction was justified, the CJEU drew on "the rules and spirit of Regulation 2201/2003/EC" (*C-454/19 ZW*, para. 48).

Regulation 2201/2003/EC, among other things, harmonizes Member States' jurisdictional rules in cases of child abduction (Articles 10-11) and builds upon and complement the Member States' obligations under the 1980 Hague Convention to ensure "prompt return of children wrongfully removed to or retained" on their territory. (cf. 1980 Hague Convention, Article 1(a)) (Wilderspin 2023, p. 476f).[12] The CJEU argued that the differential treatment of parental child abductions within Germany compared with parental child abductions to other Member States could not be justified, as the EU has established harmonized legislation on the return of abducted children.

Regulation 2201/2003/EC, and its successor, Regulation 2019/1111/EU, are not binding on Denmark due to the opt-out, raising doubts about the applicability of the CJEU's decision in *ZW* to Denmark. Does the decision qualify as an "interpretation" of provisions covered by the opt-out rendering it wholly inapplicable to Denmark under the strict wording of Article 2 of Protocol 22? Or on the contrary, is the *ZW* decision as a whole applicable to Denmark since the non-binding regulation was only mentioned as one argument amongst others in the CJEU's proportionality review? There seems to be no easy legal

12. See Article 97 of Regulation 2019/1111/EU (which has replaced regulation 2201/2003/EC) on the relationship between EU law and the 1996 Hague Convention.

pathway to resolve such questions. Ultimately, resolving these questions requires a case-specific analysis of the decision at hand.

In the case of *ZW*, the AFSJ-legal source was only referenced in the proportionality review and was not integral to resolving the main question at hand. *Furthermore,* Denmark is (like all other Member States) party to the 1980 Hague Convention and therefore carries the same obligation as other Member States to ensure the return of an abducted child.[13] This suggests that the proportionality review in a Danish context would likely yield a similar outcome as the proportionality review done in the *ZW* case. However, future cases involving a combination of internal market legal sources and AFSJ-related provisions may prove even more difficult to disentangle.

2.2. Uniform interpretation across legal fields

Another doctrinal issue arising from the convergence of the AFSJ provisions and general internal market provisions is that EU legal concepts – present in both AFSJ directives and general directives – are interpreted uniformly across legal fields. As a result, the content of provisions in directives that are not covered by the Danish opt-out can be determined on the basis of directives that do fall within the scope of the opt-out.

A clear example of this issue arises in the context of money laundering. The EU has adopted several legal instruments to combat this practice. These include Directive 2015/849/EU (On the prevention of the use of the financial system for the purposes of money laundering or terrorist financing) which is adopted under Article 114 TFEU and therefore binding for Denmark. Directive 2015/849/EU is implemented in the Danish Law on Money Laundering (Hvidvaskloven) (Ft. 2016-17, L 41, Tillæg A, Lovforslag som fremsat, p. 24) and violations of the law can be criminally sanctioned under Article 78 of the Danish Law on Money Laundering and in severe cases Article 290(a) of the Danish Criminal Code.

The issue arises because the CJEU in its case-law interpreting Directive 2015/849/EU has drawn upon provisions found in Directive 2018/1673/EU (On combating money laundering by criminal law). Unlike Directive 2015/849/EU, which is binding upon Denmark, Directive 2018/1673/EU is adopted on the basis of Article 83 TFEU and therefore falls within the scope of the opt-out.

This dynamic can be seen in the CJEU's decision in *C-790/19 Criminal proceedings against LG and MH*. The case centered around LG, who was charged with laundering money that stemmed from LG's own tax evasion (Paras 20-21). The non-AFSJ EU-regulation on money laundering did not explicitly regulate the question of money laundering committed by the perpetrator

13. Denmark is also bound by the 1996 Hague Convention which applies concurrently with the 1980 Hague Convention between Denmark and the other Member States. The rules found in the 1996 Hague Convention considerably overlaps with the rules found in Regulation 2019/1111/EU (Wilderspin 2023, p. 478).

of the predicate offence (self-laundering). However, the CJEU ruled that the general EU-regulation on money laundering must be interpreted within its "legislative context". This meant that Directive 2018/1673/EU, which explicitly obliges Member States to criminalize self-laundering, had to be taken into account, when determining the scope of "money laundering" under Directive 2015/849/EU (*C-790/19 Criminal Proceedings against LG and MH*, paras 62-67).

In cases such as *C-790/19 Criminal Proceedings against LG and MH* the wording of non-binding AFSJ-directives have a direct impact on the scope of Denmark's obligations under binding internal market EU-law. This is seemingly at odds with Article 2 of Protocol 22, which states that no provision covered by the opt-out "shall in any way affect" Union law "as it applies to Denmark".

However, uniform interpretation of similar concepts found in different legal acts is a common and standard approach in EU law. It would be unsustainable if a key concept – such as money laundering – were to have a different meaning in Denmark than in the rest of the EU. Since such a divergence would undermine the very foundation of legal harmonization.

2.3. Voluntarily implemented acts

The last doctrinal issue that this article will investigate is the legal significance of AFSJ-sources that have been voluntarily implemented into Danish law. In some cases, the Danish legislator has chosen to approximate Danish (criminal) legislation to the wording of non-binding directives issued under the AFSJ-provisions. This was the case with Directive 2011/36/EU (On preventing and combating trafficking in human beings and protecting its victims) and Directive 2011/93/EU (on combating sexual abuse and sexual exploitation of children) (Ft. 2011-12, L 57, Tillæg A, Lovforslaget som fremsat, p. 2; Ft. 2012-13, L 141, Tillæg A, Lovforslaget som fremsat, p. 5). A similar process has been suggested regarding the new Directive 2024/1226/EU (On the definition of criminal offences and penalties for violations of Union restrictive measures) (Justitsministeriet, 2025).

The rationale behind voluntary implementation is that Denmark should not offer a lesser protection of citizens on central issues such as human trafficking, sexual exploitation of children or environmental crimes *vis-à-vis* other Member States. However, legal scholars have long pointed out the seemingly contradictory nature of Denmark's stance: on the one hand, its reluctance to transfer sovereignty in criminal law matters and on the other, its eagerness to voluntarily implement EU criminal law directives (Baumbach 2014). However, it is important to note that the rate of voluntary implementation did drop significantly following the 2015-referendum (Verdoner 2024, p. 174).

In cases where Denmark has opted for voluntary implementation, the question arises as to what legal value can be attributed to voluntarily implemented directives. This question can often be answered by looking at the indications

given by the legislator in the *travaux préparatoires* to the legislation implementing the directive.

In the case of Article 262(a) of the Danish Criminal Code which criminalizes human trafficking, which was amended to implement the Human Trafficking Directive, it follows directly from the *travaux préparatoires* (forarbejder) that the legislator wished to align Article 262(a) with the definitions offered in the Directive (Ft. 2011-12, L 57, Tillæg A, Lovforslaget som fremsat, p. 5). Furthermore, the directive was reproduced in full as an annex to the legislative proposal for the amendment of Article 262(a). In such instances there is no problem with interpreting the Danish provisions in light of the voluntarily implemented directive.

This position is indirectly supported by the *Supreme Court's ruling (Højesteret) of 29 May 2017 in Case 70/2017*, where key provisions of the directive were included as supplementary legal grounds (*supplerende retsgrundlag*) in the Supreme Court's judgment (Supreme Court of Denmark 2017, *Case 70/2017, Judgment of 29 May 2017*, pp. 4-5).

However, if the directive is invoked to support an interpretation of Article 262(a) to the detriment of the accused, such an interpretation must respect the boundaries established by the principle of legality which is integral in both the EU and the Danish legal order (cf. Article 1 of the Danish Criminal Code and Article 49(1) of the Charter). In the jurisprudence of the CJEU the Court has consistently held, that this means, that a directive cannot "*of itself and independently of a law adopted for its implementation, have the effect of determining or aggravating the liability in criminal law*" (cf. *C-80/86 Kolpinghuis Nijmegen* para. 14).

3. The Nordic Context

Finland and Sweden fully participate in the EU cooperation on criminal law. Consequently, both countries are increasingly aligning their criminal legislation with EU standards (Asp and Suominen 2022, p. 14; Lahti 2017, p. 541f). In contrast, Denmark occupies a more ambiguous position regarding EU criminal law – ironically, a position more readily comparable to that of Norway, a non-Member State, than to that of the Member States Sweden and Finland. Norway is not an EU Member State, but it maintains close legal ties with the EU through its membership in the European Free Trade Association (EFTA) and its associated participation in the European Economic Area (EEA) Agreement (Arnesen et al. 2022, p. 21). The legal relationship between EU law and Norwegian law operates under a two-pillar structure, where the EEA-agreement serves as a bridge incorporating EU legislative instruments into EFTA law (Arnesen et al. 2022, p. 30ff). Under the EEA Agreement the EEA Joint Committee ensures the continuous incorporation of EU legal acts into EEA law (cf. Article 102 of the EEA-Agreement and the principle of homogeneity found in

Article 1 of the EEA Agreement). EU legal acts adopted under the AFSJ-provisions are not integrated into EEA Law. Meaning that Norway – as well as Denmark – is not a party to legal acts issued under the AFSJ-provisions (See Jacobsen 2015; Suominen 2017).[14] However, this does not mean that Norwegian criminal law is unaffected by EU-law (Suominen 2015).

As with Danish criminal law, Norwegian criminal law is influenced by EU law through the general obligation under EU/EEA law to provide effective, proportionate and dissuasive sanctions for violations of EU/EEA law, that are similar to the sanctions provided for analogous infringements of national law (Arnesen et al. 2022, p. 523f; Suominen 2017, p. 255: Fredriksen and Mathisen 2015, p. 470f). However, the precise range of this obligation in areas where the effectiveness principle might compel Norway to adopt criminal law penalties – such as offences covered by TFEU Article 325 – remains unclear (Suominen 2017, p. 265; Jacobsen 2015, p. 441). Furthermore, Norway, like Denmark, is part of the Schengen Area (cf. Council Decision 1999/437/EC). Regarding the surrender of suspects and convicted persons to other Member States, an agreement between the EU and Norway resembling the European Arrest Warrant entered into force on November 1, 2019 (Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway, 2006).[15] Finally, the Norwegian legislator, similarly to the Danish legislator, has in some instances voluntarily aligned Norwegian criminal law provisions with non-EEA EU criminal law directives (Suominen 2015, p. 385; Suominen 2017, p. 266f).

With regard to institutional cooperation Norway – like Denmark – retain the status of third country vis-à-vis Europol, EPPO and Eurojust. However, Norway has entered into cooperation agreements with Europol and Eurojust (Suominen 2015, p. 394). However, the scope of Norway's cooperation agreement with Europol differs slightly from that of Denmark. Since Denmark generally enjoys easier access to Europol's systems. For example, Article 9(2)(f) of the Europol-Norway Agreement (2001) requires that a Norwegian request to search Europol's systems – such as the Europol Information Systems (EIS) – must explicitly include "indications as to the purpose of and the reason for the request". This requirement to provide reasoning for search requests does not exist in the corresponding Article 10 of the Europol-Denmark Agreement (2017) (See Hjortenberg and Stevnsborg 2022, p. 114f).

In conclusion, both Norway and Denmark remain outside significant post-Lisbon developments within EU criminal law. Nevertheless, both countries have experienced "indirect" EU influence on their national criminal law through

14. The status of Norway and Denmark is only aligned with regards to post-Lisbon criminal law instruments since Denmark contrary to Norway took part in the intergovernmental cooperation on criminal law under the Maastricht- and Amsterdam Treaty regimes and is still bound by criminal law instruments issued in this period.
15. See on the complications delaying its entrance into force (Suominen 2017, p. 257ff).

general principles of EU/EEA law, voluntarily alignment with certain EU legal acts, and cooperation agreements with Europol and Eurojust.

4. Future Challenges

In this Section the article addresses future challenges arising from the complex interplay between continuing developments in EU criminal law and the Danish opt-out. Rather than offering an exhaustive analysis, the focus will be on outlining the contours of future challenges within procedural and substantive criminal law.

Regarding procedural criminal law the EU has gradually built a common standard for defence- and victim rights in criminal proceedings through the adoption of the Defence and Victim Rights Directives under Article 82 TFEU (Mitsilegas 2019, p. 115ff). Denmark has not taken part in these developments. The Defence- and Victim rights Directives have not been implemented into Danish law – not even through voluntary implementation – and therefore cannot be invoked before Danish national courts.

The rights found in the Defence and Victim Rights Directives build upon the human rights standard for a fair trial found in Article 6 of the European Convention on Human Rights (ECHR) and in Article 47-48 of the Charter, both of which are binding for Denmark. However, the Defence and Victims' Rights Directives have "translated, expanded and clarified" the rights enshrined in the ECHR and the Charter (Mitsilegas 2019, p. 129).

In many instances, the Danish Administration of Justice Act (*Retsplejeloven*) read in conjunction with Article 6 of the ECHR and Article 47-48 of the Charter might offer the same degree of protection as the Defence and Victim Rights Directives.[16] However, in some instances Danish law does offer a lesser protection of the suspect than the Defence and Victim Rights Directives.

An example of this can be found in relation to when the suspect has the right to access to a lawyer. Danish law offers the suspect the right to a lawyer from the time of accusation (*sigtelsestidspunktet*) (cf. Article 730(1) of The Administration of Justice Act), while Article 3(2a) of Directive 2013/48/EU (On the right of access to a lawyer in criminal proceedings) gives the suspect the right to access to a lawyer before the first questioning by police or other law enforcement. In some cases, this includes police questioning conducted in immediate connection with a course of events, in such instances the suspect would not always be informed of his right to access to a lawyer under Danish law (Regeringen 2015, p. 69). Even in cases where Danish law provides a level of protection comparable to

16. In connection with the 2015-referendum on transforming the opt-out into an opt-in, the Danish government assessed that Danish law was, to a large extent, already in compliance with the criminal procedural directives adopted prior to the referendum (Regeringen 2015, p. 64, 66, and 69).

that in the directives, Denmark's non-participation reduces transparency for non-Danish defendants seeking to assert their rights in criminal proceedings. Instead of relying on the clear and codified provisions of the Defence and Victim Rights Directives – which can be found in 24 authorative language versions – defendants must navigate a complex mix of national law, ECHR jurisprudence, and general principles of EU law.

Denmark's non-participation in the Defence and Victim Rights Directives not only affects legal certainty but may also have implications for mutual trust within the AFSJ. The CJEU has consistently held that the basis of instruments such as the European Arrest Warrant, is "*the high level of trust which must exist between the Member States*" (*C-158/21 Puig*, para. 67;) and that "*the principle of mutual trust requires, particularly as regards the area of freedom, security and justice, each of those States, save in exceptional circumstances to consider all the other Member States to be complying with EU law, and particurlarly with the fundamental rights recognised by EU law*" (*C-158/21 Puig*, para. 93; *Joined Cases C-428/21 PPU and C-429/21 PPU HM and TZ*, para. 37; *Joined Cases C-354/20 PPU and C-412/20 PPU L and P*, para 35).

If this logic is accelerated, Denmark's non-participation in the development of a common AFSJ-standard for defense rights across Europe may in time affect the degree of mutual trust placed in Denmark by other Member States in the area of criminal law. Although the CJEU has not (yet) indicated a direct link between the Defense- and Victims' Rights Directives and the principle of mutual trust.[17]

Regarding substantial criminal law, especially directives adopted under TFEU Article 83(2) may cause future challenges (Baumbach 2014, p. 309; Verdoner 2024, p. 165ff). Article 83(2) equips the EU with the power to adopt criminal law directives, where such measures are deemed "*essential to ensure the effective implementation of a Union policy.*" The provisions has been used to issue directives on fraud against the EU budget, market abuse and enviromental crimes.[18] Denmark is not bound by these directives. Nevertheless, Denmark remains bound by its general obligation to ensure effective sanctioning of EU-law violations, including breaches of Regulation 596/2014/EU (on market abuse) and offences affecting the financial interests of the Union (cf. Article 30 of Regulation 596/2014 and TFEU Article 325(1)).

The wording of TFEU article 83(2) may give rise to questions on whether it is sustainable for Denmark to keep a different level of sanctioning for violations

17. However, this may be because the CJEU has primarily been referred questions concerning the exercise of defence rights in areas where EU law has not established specific rules (see Joined Cases C-428/21 PPU and C-429/21 PPU HM and TZ, paras 57-62).
18. Directive 2024/1203/EU (on environmental crimes), Directive 2017/1371/EU (PIF-directive), and Directive 2014/57/EU (on market abuse).

of central EU policies than the level of sanctioning deemed "*essential*" by the other Member States and the EU legislator.

Other challenges that will not be addressed here relates to the institutional cooperation between Denmark and the other Member States within Europol. The Danish National Police Force (Rigspolitiet) has long been concerned that Denmark's status as a third country in relation to Europol has operational consequences for Danish Police and leaves Danish Police in a vulnerable position in relation to international police cooperation (Rigspolitiet 2024, p. 20). The National Police Force assesses that these challenges will increase as new technological tools are added to the Europol toolbox, added to the Europol toolbox, or if Denmark are forced to leave the Prüm-cooperation due to the supranationalization of the new Regulation 2024/982/EU (The Prüm II Regulation) (Rigspolitiet 2024, p. 20f).[19]

5. Final remarks

Since the Lisbon Treaty entered into force on 1 December 2009, the EU has constructed a supranational framework for national criminal law, comprising complex and detailed legislation on a range of key criminal law issues. At the same time, the EU has expanded and "Lisbonized" institutional cooperation in criminal justice through Europol, Eurojust, EPPO and other bodies. This development has placed the Nordic countries on opposite sides of an ever-widening divide: while Sweden and Finland fully participate in the development of an EU-criminal law area, Denmark and Norway occupy – similar – "middle" positions with regard to EU influence on their national criminal law.

Against this backdrop of increasing Nordic divergence, this article has analyzed the historical background and doctrinal scope of the Danish opt-out, examined selected doctrinal issues, and identified future challenges arising from Denmark's complex position within EU criminal law.

The analysis demonstrates that while the opt-out excludes Denmark from significant developments within EU-criminal law, it does not serve as a complete shield against influence on Danish criminal law. Instead, Denmark's position gives rise to a number of doctrinal complexities, including questions regarding the legal significance of CJEU decisions rendered within the scope of the Danish opt-out and challenges stemming from the convergence of AFSJ law with internal market law.

19. The Prüm II Regulation gives Member States and Europol access to conduct automated searches in databases of other Member States containing DNA reference data, dactyloscopic reference data and vehicle registration data (cf. Articles 5(1), 10(1) and 16(1 of Regulation 2024/982/EU). The Prüm II Regulation will be fully implemented in 2027 at which point it will replace the existing Prüm legislation to which Denmark was a party (Ft. 2023-24, Tillæg G, Redegørelse R8 om Udviklingen i EU-samarbejdet 2023, p. 7).

Beyond existing doctrinal issues, the Danish opt-out is expected to continue generating legal challenges across different areas of criminal law, some of these include defense rights, mutual trust, the effective sanctioning of EU law violations, and police and prosecution cooperation. These challenges highlight the evolving and increasingly intricate relationship between Denmark and EU criminal law, underscoring the need for continued legal scrutiny of the opt-out's implications.

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