The Regulator's Dilemma: Caught between the Need for Flexibility and the Demands of Foreseeability. Reassessing the Lex Certa Principle[1]

Michael Faure[*]

Morag Goodwin[**]

Franziska Weber[***]

"People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves [i.e. state enforced law]... The object of our study [as legal scholars], then, is prediction".[2]

Oliver Wendell Holmes, Jr.

Abstract

In the risk society of the twenty-first century, regulators must balance risk, and the potential harm to human health and the environment, against the demand of citizens for new technologies and the benefits that they bring; and they must do so in a context of high levels of uncertainty and in which the pace of technological developments can quickly outstrip regulatory efforts. In this volatile regulatory environment, one of the key challenges that regulators face is that of regulatory connection i.e. of creating a connection with the object of regulatory intervention, whether a particular technology or product process, and maintaining that connection as the technology develops and spreads. The demand upon regulators to create and ensure regulatory connection has led to an

---

[1] We are grateful to the participants of the 29th Annual Conference of the European Association for Law and Economics (Stockholm, 21 September 2012) for useful comments on an earlier version of this paper, presented in Stockholm as 'The *lex certa* principle in criminal law: an analytical framework'. We are equally grateful to Sarah van den Brand for editorial assistance.

[*] Michael Faure is Professor of International and Competitive Environmental Law at Maastricht University and Professor of Competitive Private Law and Economics at the Rotterdam Institute of Law and Economics (RILE), Erasmus School of Law.

[**] Morag Goodwin is Associate Professor in European and International Law, Tilburg Law School.

[***] Franziska Weber is a post doc at the Private Law Department, Erasmus School of Law.

[2] Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1896-1897).

increasing use of open or flexible regulation. What this means in practice is an increasing turn to the use of vaguely worded standards in regulatory instruments in place of specific rules laid down in legislation. At the same time, the desire for effective enforcement of these instruments has led to a trend towards the use of criminal sanctions in place of administrative or civil law remedies. What we suggest in this paper is that these two trends – towards standards and towards criminal sanctions – when combined raise serious concerns in relation to the principle of *lex certa*, or legal certainty. These concerns touch both upon the legitimacy of such regulatory efforts as well as the effectiveness of such regulation. This presents regulators with a dilemma: in order for regulation to maintain regulatory connection in the context described above, it must remain flexible. However, if regulatees are to know that they are bound and modify their behaviour accordingly, the fact that they are bound and the requirements placed upon them need to be foreseeable. Moreover, where regulatees face criminal sanctions for breach of these standards, the principle of legal certainty – so central to our idea of what law is and to our acceptance of being bound by it –, made precise in criminal law under the principle of *nullem crimen, nulla poena sine praevia lege poenali*, demands that individuals can readily foresee the consequences of their actions. This paper explores the challenge faced by the regulator in seeking to balance the need for flexibility with the demands of foreseeability in the context of enforcing risk regulation with criminal sanctions. We argue that the current balance is too heavily weighted in favour of flexibility and suggest the use of the notion of development risk liability, in combination with prospective overruling, as a means for seeking a better equilibrium between the goals of flexibility and the protection provided by foreseeability.

1. Introduction

It has become something of a cliché to suggest that we are living in a 'risk society'.[3] It remains, however, a useful shorthand for referring to the nature of the regulatory dilemmas that we face. While human beings have long had an understanding of risk, and have modified their behaviour accordingly,[4] the particular constellation of rapid and far-reaching[5] technological developments and social attitude to those technologies in the here and now raises a number of specific tensions and regulatory dilemmas. Building upon the definition of risk society provided by Beck, Brownsword and Goodwin, in their recent work examining the regulation of technologies in the twenty-first century, have suggested that our era is marked by three intersecting factors: that citizens are generally eager to embrace the benefits of technological developments; that citizens are, at the same time, highly risk averse; and that there is a great deal of uncertainty about both the benefits and, in particular, the risks of new technologies.[6] These factors and their inter-relationships form the regulatory context in which regulators must balance risk, and the potential harm to human health and the environment, against the demand of citizens to stimulate new technologies for the benefits that they bring; and they must do so against a background of high levels of uncertainty. To these three factors can be added a fourth: the pace of technological developments, which can quickly outstrip regulatory efforts. It has been suggested that we are in an age of technological revolution, in which technological change is both rapid and unpredictable.[7] While the social and economic disruption to

---

[3] The term was developed, as is well known, in ULRICH BECK, RISK SOCIETY: TOWARDS A NEW MODERNITY (1992). There is of course now a vast literature on regulating risk; one of the most useful texts in identifying and analyzing risk categories is a study on the risks of genetic modification technologies: Wolfgang van den Daele et al., *Biotech Herbicide-Resistant Crops: A Participatory Technology Assessment* (Berlin: Federal Republic of Germany Ministry for Research and Technology, 1997).

[4] For a review of the regulatory response to a range of technologies across the previous two centuries, see SUSAN W. BRENNER, LAW IN AN ERA OF 'SMART' TECHNOLOGY (2007).

[5] Developments in biotechnology, for example, are arguably forcing us to reassess profound questions about what it is to be human, and about our relationship to the world around us and to each other.

[6] ROGER BROWNSWORD & MORAG GOODWIN, LAW AND THE TECHNOLOGIES OF THE TWENTY-FIRST CENTURY 113, 112-136 more broadly (2012).

[7] Brownsword & Goodwin, *supra* note 6, at 18-23.

which such change leads is in itself nothing new,[8] the scale and depth of technological change in the twenty-first century is likely to be such that volatility will become the key element of regulatory environments.

In this regulatory context, it has been suggested that regulators must answer four key regulatory challenges if they are to create regulation that is effective in this regulatory context; that is they need to design regulatory interventions that are prudent or precautionary; that are economical and efficient; that are legitimate; and that ensure regulatory connection.[9] This latter requirement requires regulators to create a connection with the object of regulatory intervention, whether a particular technology or product process, and to maintain that connection as the technology concerned and other relevant technologies develop and as knowledge, understanding and use of these technologies spreads. Generating and maintaining connection is arguably the greatest challenge that regulators face in an era marked by rapid technological development. The speed and scale of these developments creates a volatile regulatory environment.

Against this background, we focus in this paper upon one specific tension and the regulatory dilemma it poses within risk regulation[10] in a particular legal context. The demand upon regulators to create and ensure regulatory connection has led to an increasing use of open or flexible regulation. What this means in practice is an increasing turn to the use of vaguely worded standards as regulatory instruments in place of specific rules laid down in legislation. At the same time, the desire for effective enforcement of these instruments has led to a trend towards the use of criminal sanctions in place of administrative or civil law remedies. The regulatory context that we examine is the European legal space; and we do so for the reason that the drive towards the use of criminal penalties to enforce risk regulation is most marked within European law.

[8] MATHIAS KLANG, DISRUPTIVE TECHNOLOGY (2006).
[9] See Brownsword & Goodwin, *supra* note 6, at 46-71. There are of course alternative ways of characterizing regulatory adequacy.
[10] Risk regulation refers very broadly to regulatory interventions directed at managing risks in which technology plays an important factor; another term would be safety regulation. Examples include the manufacture of chemicals, food safety, product safety etc.

What we suggest in this paper is that these two trends – towards standards and towards criminal sanctions – when combined raise serious concerns in relation to the principle of *lex certa*, or legal certainty. These concerns touch both upon the legitimacy of such regulatory efforts as well as the effectiveness of such regulation. This presents regulators with a dilemma: in order for regulation to maintain regulatory connection in the context described above, it must remain flexible. However, if regulatees are to know that they are bound and modify their behaviour accordingly, the fact that they are bound and the requirements placed upon them need to be foreseeable. Moreover, where regulatees face criminal sanctions for breach of these standards, the principle of legal certainty – so central to our idea of what law is and to our acceptance of being bound by it –, made precise in criminal law under the principle of *nullem crimen, nulla poena sine praevia lege poenali*, demands that individuals can readily foresee the consequences of their actions.

This paper considers the challenge faced by the regulator in seeking to balance the need for flexibility with the demands of foreseeability in the context of enforcing risk regulation with criminal sanctions. We argue that the current balance is too heavily weighted in favour of flexibility and suggest a possible avenue for seeking a better equilibrium via (the regulatory technique of development risk liability in combination with) prospective overruling.

Section 2 of this paper sets out the theory motivating the increasing use of standards within risk regulation and describes the development of both the use of criminal sanctions to enforce risk regulation in the European context and of the development of the *lex certa* principle within the rule of law and criminal law, more specifically. In Section 3, we examine how various courts within Europe, paying particular attention to the European Court of Human Rights, view and manage the flexibility/ foreseeability dilemma. In particular, we examine the content given by these courts to the notion of legal certainty. On the basis of this description, we suggest that European courts set differing standards for the regulator in regard to what foreseeability requires of them – in itself creating legal uncertainty – and argue that the Strasbourg Court sets the benchmark too low to ensure

the protection of individuals and other actors. Turning from the legal protection that the guarantee of legal certainty provides, in section 4 we examine the value of legal certainty from an efficiency perspective, notably deterrence theory. Following this examination, we conclude that on both legitimacy (section 2 & 3) and efficiency grounds (section 4), regulators within Europe currently fail to strike the best balance between flexibility and foreseeability. In section 5, we consider various regulatory tools and techniques available to regulators for creating an optimal balance by tailoring it to each regulatory situation, and suggest that a combination of the application of development risk liability with the judicious use of prospective overruling addresses the concerns that we identify. Section 6 concludes.

2. The changing nature of regulation in the risk society

The dilemma that legislators, whether at the national or European level, face in creating effective standards that meet the requirements of legal certainty in the context of criminal law has been nicely summed up by Corstens and Pradel and is worth citing at length:

> "Juridical certainty requires that the citizen knows what sort of conduct will render him liable to criminal prosecution. This goal is endangered if the charge is not clear. Nevertheless, it has to be accepted that the modern legislator has a tendency to be concerned with many problems in order to improve the well-being of his fellow citizens and is consequently confronted with some very complex questions. The proliferation of criminal law and the complexity of its texts have had their consequences. The legislator must manoeuvre between the Scylla of vague wording in criminal laws (also allowing a judge much freedom to act) which cover the majority of the targeted situations (a procedure called "open type") and the Charybdis of more specific wording, which create the risk of creating loopholes."[11]

The demands made upon regulators to regulate effectively and efficiently in an era in which the speed of technological change is unprecedented has seen two regulatory trends

[11] GEERT CORSTENS & JEAN PRADEL, EUROPEAN CRIMINAL LAW 357 (2002).

emerge that, taken together, raise serious concerns about the legitimacy of such regulation, both in the context of rule of law concerns and in terms of individual rights. The first trend that we wish to highlight is the increased use of general standards in place of rules that prescribe precisely and clearly desirable behaviour *ex ante*. The necessity of this move becomes clear when analysing the design of regulation for situations of regulatory volatility from the perspective of criteria developed by Louis Kaplow and others for the optimal form of legislation with regards to effectiveness and efficiency.[12] At the same time, however, we are witnessing a movement – our second trend – towards the enforcement of this regulation by criminal law; this trend is particularly pronounced in, but is not limited to, the European legal space. The combination of vague standards and criminal penalties raise clear issues under the principle of *lex certa*. We will explore both trends in this section and the implications for *lex certa* requirements.

2.1. A trend towards the use of standards

The question of the desired specificity in regulation has been largely discussed in the law and economics literature under the heading of the choice between 'rules versus standards'. The rules versus standards debate in law and economics and legal literature dates back to a 1992 seminal paper by Louis Kaplow. In the subsequent twenty years, this line of research has seen various applications, for example in the context of designing effective laws in developing countries,[13] or in relation to behavioural effects[14] or in applications in the field of anti-trust.[15]

---

[12] Cf. Louis Kaplow, *Rules versus Standards: An Economic Analysis,* 42 (3) DUKE L.J. 557-629 (1992); Louis Kaplow, *Characteristics of Rules, in* ENCYCLOPEDIA OF LAW AND ECONOMICS 502-28 (Boudewijn Bouckaert & Gerrit DeGeest, eds., 2000) (also electronically published at http://encyclo.findlaw.com). Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules,* 11 J.L. ECON. & ORG. 150-163 (1995). As *Kaplow* sets out a number of the points, particularly concerning the effects of rules and standards on legal costs and on behavior, can also be found in the prior economic analyses by Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking,* 3 J. LEGAL STUD. 257-286 (1974) and Colin S. Diver, *The Optimal Precision of Administrative Rules,* 93 YALE L.J. 65-109 (1983). His works have been further developed inter alia by Vincy Fon & Francesco Parisi, *On the Optimal Specificty of Legal Rules* (Journal of Institutional Economics, George Mason Law & Economics Research Paper No. 04-32, Minnesota Legal Studies Research Paper No. 07-17, 2007), *available at* http://ssrn.com/abstract=569401.

[13] Cf. Michael G. Faure et al., *Bucking the Kuznets Curve: Designing Effective Environmental Regulation in Developing Countries,* 51 (1) VA. J. INT'L L. 95-156 (2010); ROBERT D. COOTER & HANS-BERND SCHÄFER, THE POVERTY OF NATIONS (2008); Michael G. Faure, *Environmental*

Legal norms can be distinguished into rules and standards – a distinction in which the levels of clarity and flexibility are crucial. The basic distinction between rules and standards is the moment of promulgation of the respective degree of detail;[16] thus the decision as to whether the law is given content and specification *ex ante* or *ex post*,[17] i.e. done before individuals act (rules) or after they have done so (standards).[18] Rules are those legal commands that lead to a clear-cut distinction between lawful and unlawful behaviour, while standards are general legal criteria that gain specific content at the moment of judicial interpretation and application.[19] Unlike clear-cut rules, standards require the application of "a background principle or a set of principles to a particularized set of facts in order to reach a legal conclusion".[20]

Both approaches – rules and standards – involve costs at two stages: at the law-making and at the adjudication stage.[21] In the case of rules, the content of the laws has to be

---

Rules versus Standards for Developing Countries; Learning from Schäfer, in INTERNATIONALISIERUNG DES RECHTS UND SEINE ÖKONOMISCHE ANALYSE/INTERNATIONALIZATION OF THE LAW AND ITS ECONOMIC ANALYSIS, FESTSCHRIFT FÜR HANS-BERND SCHÄFER ZUM 65. GEBURTSTAG 735-746 (Thomas Eger et al. eds., 2008); Anthony I. Ogus, *Regulatory Arrangements in Developing Countries, in* INTERNATIONALISIERUNG DES RECHTS UND SEINE ÖKONOMISCHE ANALYSE/INTERNATIONALIZATION OF THE LAW AND ITS ECONOMIC ANALYSIS, FESTSCHRIFT FÜR HANS-BERND SCHÄFER ZUM 65. GEBURTSTAG 721-734 (Thomas Eger et al. eds., 2008); Hans-Bernd Schäfer, *Rules versus Standards in Rich and Poor Countries: Precise Legal Norms as Substitutes for Human Capital in Low-Income Countries,* U. CHI. SUP. CT. ECON. REV. 113-134 (2006).

[14] See e.g. Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited,* 79 OR. L. REV. 23-60 (2000).

[15] Cf. Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication* (Washington and Lee Law Review 64, 49 - 110; Cardozo Legal Studies Research Paper No. 162, 2007), *available at* SSRN: http://ssrn.com/abstract=927293.

[16] As *Kaplow* claims, not all authors make this distinction clearly enough: the degree of detail used in the formulation of laws is a distinct question from that on the time of giving this content, *see* Kaplow (1992), *supra* note 12, at 557 (586).

[17] Cf. Kaplow (2000), *supra* note 12, at 502 (508) based on 1995.

[18] Cf. Kaplow (1992), *supra* note 12, at 557 (621).

[19] Cf. Posner, *supra* note 12; Diver, *supra* note 12; Kaplow (1992), *supra* note 12; Hans-Bernd Schäfer, *Legal Rules and Standards* (German Law and Economics Working Paper Series 2002), *available at* http://ssrn.com/abstract=999860.

[20] Cf. Korobkin, *supra* note 14, at 23.

[21] Besides the relation between the legislature and the judiciary also the relation between various levels of government (legislature and executive) are discussed in the literature. Also note the

determined *ex ante*. This requires lawmakers to carry out studies in advance in order to determine the appropriate rule.[22] Rules are therefore more costly for legislators than general standards, which require less specificity beforehand. Standards generally have a broader scope of application than rules, and thus require less investment *ex ante* to determine the precise content and scope of the law.[23] Moreover, the cost of adapting a rule is considerably higher than a standard, as it is likely to require amendments to the law. There is thus an area of conflict between initial specification costs and enforcement and compliance costs (including specification at this stage).[24] Whether it is more appropriate to opt for a standard or a rule depends on the nature of the legal environment. Depending on certain factors, the optimal moment of specifying the scope and content of the law (at the moment of enactment in case of rules or at the adjudication and implementation stage in the case of standards) can be identified.[25] There are a number of criteria given in the law and economics literature that determine whether it is more cost effective to opt for rules or standards:[26]

(1) Volatility

Volatility, i.e. changes over time in the regulated environment, lead to legal obsolescence. In an area of law that is subject to a rapid change of economic and social conditions requiring constant assessment of the optimal set of legal decisions, standards are more efficient than rules.[27] Details and specifications that are set out *ex ante* are more sensitive to exogenous, unforeseen changes and become obsolete at a faster rate.

---

relation to the *ex ante* vs. *ex post* legal intervention discussion in: Steven Shavell, *Liability for Harm Versus Regulation of Safety,* 13 J.L. STUD. 357-374 (1984).

[22] E.g. Kaplow (1992), *supra* note 12, at 557 (569).

[23] Cf. Fon & Parisi, *supra* note 12, at 16ff.

[24] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (1998); Richard A. Posner, *Creating a Legal Framework for Economic Development*, 13 (1) WORLD BANK RES. OBSERVER (1998). Difficulties to interpret standards which are not specified emerge for all subjects of law, also the individuals that are addressed by it.

[25] Note that the distinction between rules and standards is not clear-cut and in reality there are mixed forms same as acts consisting of rules and standards, cf. e.g. Kaplow (2000), *supra* note 12, at 502, 510.

[26] Cf. to the factors generally Fon & Parisi, *supra* note 12, at 6. They assume that "lawmakers act benevolently, without considering the impact of political failures and selfish behaviour by legislators, courts, and subjects of the law" as set out on p. 17.

[27] Cf. Schäfer, *supra* note 19, at 2, building upon Kaplow.

Standards are less affected by changes as they indicate only the type of circumstance that is relevant and not the specific circumstance, and the possibility of adaptation to new circumstances by the judiciary *ex post* is left open. Thus, the use of rules is likely to be desirable where the regulatory environment is stable and general standards where it is not.[28] In a situation of regulatory volatility, the potential scope to be given to a norm should be formulated in as open a way as possible so as to cover future, unpredictable, developments.

(2) Frequency of application

A common point in the law and economics literature is the finding that the more often a norm is applied, the more a rule with a higher degree of specificity *ex ante* is desirable as these costs then only have to be borne once.[29] Frequency speaks thus in favour of rules, as the higher adjudication costs associated with standards are likely to be greater than the costs of strict design and promulgation. Standards work best when behaviour varies a lot and there is little repetition in case scenarios.[30] The case for standards would be clearly that of situations which arise rarely, or varying circumstances, or a low frequency. However, in a regulatory environment marked by volatility in which obsolescence is a constant likelihood, lower levels of specificity should be chosen, regardless of the degree of frequency of application.

(3) The complexity of the regulated environment

Another key factor influencing the decision for rules or standards is the complexity of the regulated environment in which the norm is to be situated. It is a general rule that the more complex an environment, the more costly it is to develop norms that cover a wide range of scenarios. In particular, promulgation costs increase with the complexity of the environment that is to be regulated as it is difficult to specify these contingencies.[31] This

[28] *Similar* Kaplow (1992), *supra* note 12, at 557 (621). Also, from a law and technology perspective, Brownsword & Goodwin, *supra* note 6. See, further, Gregory N. Mandel, *Regulating Emerging Technologies,* 1 L. INNOVATION & TECH. 75 (2009).
[29] This is also found by Kaplow (1992), *supra* note 12, at 557 (563). He calls it the "frequency of individual behavior and adjudication" in contrast to a behaviour that would be rare.
[30] *See* Kaplow (2000), *supra* note 12, at 502, 510.
[31] Cf. Fon & Parisi, *supra* note 12, at 7.

situation calls for a general standard that can be given greater specificity *ex post* with the details of individual scenarios. However, when deciding on the likely costs of adjudication, there is an interrelation with the frequency of application.

(4) Judicial specialization

The degree and nature of judicial specialization is another important factor influencing the decision for rules or standards; in particular, it affects the level of guidance that they need in applying the law.[32] Specialized judges are more effective at interpreting and applying complex laws. In order to decrease adjudication costs, it therefore seems to hold that the optimal level of specificity increases the more specialized the courts that are to apply and interpret them.[33] Thus, where judges specialize in particular regulatory themes, such as environmental law, the legislator can make greater use of detailed legal provisions that cover a wide range of situations and variations.[34] One could however argue to the contrary that, precisely due to their specialization such judges are better placed to apply vague standards, thus raising the efficiency of the use of standards.

(5) Applying the criteria to a regulatory environment marked by rapid technological change

The choice for a rule or a standard is dependent on the legal environment in which the regulation must function. When the criteria for choosing between standards and rules are applied to a legal environment in which rapidly changing technologies play a key role – what we have termed as risk regulation – the criteria we describe point towards a clear preference for standards over rules. In such scenarios, static rules are likely to become rapidly outdated and obsolete, leading to regulatory disconnection and ineffectiveness. This will have profound consequences for the protection of human health and the environment. The rapid pace of technological development also points towards the use of standards when considered from the perspective of the frequency of application. Fast-paced change entails strong variation and hence there is likely to be little repetition in case scenarios. Likewise, consideration of the complexity of the regulated environment

---

[32] The same is true for a bureaucrat at lower levels of the executive branch.
[33] Cf. Fon & Parisi, *supra* note 12, at 8.
[34] Cf. *Id*. at 14.

again points in the direction of a preference for a standard as far as regulating technological risks are concerned. The hallmark of the twenty-first century technological revolution is not just speed, as we suggested in the introduction, but also complexity.[35]

The application of the last criterion developed in the law and economics literature – the degree of specialization of the judiciary – to the arena of risk regulation is less clear-cut. While the specialization of judges can be an asset in applying both rules and standards, in the particular scenario of the increasing trend towards the use of criminal penalties to enforce risk regulation, it is important to note that judges in criminal cases are unlikely to be trained in the assessment of technological risks. The question that then arises is that of whom (legislator or judge) is better placed *qua* information and knowledge to be able to adapt the relevant norms to changing circumstances. In this respect the criteria for safety regulation provided by Shavell[36] may be useful. In most cases, according to Shavell, legislators are likely to be better informed than judges about developments in new technologies. However, this point in favour of rules needs to be weighed against the high costs of amending legislation and balanced against the other key criteria of the regulatory environment. What Shavell's theory in any case highlights is the importance both of well-informed legislators and of specialised training for the judiciary in assessing technological risks in the design and implementation of risk regulation.

Given the nature of the regulatory environment created by rapid technological change, it is therefore not surprising that we are witnessing the increasing use of standards as the basis of regulatory efforts. In the domains of product safety, food safety as well as environmental law, increasingly vague concepts are being used to impose general obligations on regulatees to act in the public interest.[37] For regulators to do otherwise

[35] Brownsword & Goodwin, *supra* note 6, at 63-71.
[36] Shavell, *supra* note 21 and Steven Shavell, *A model of the ultimate use of liability and safety regulation*, RAND J. ECON. 271-280 (1984).
[37] See e.g. the General Product Safety Directive 2001/95 which requires that producers and distributors place only "safe" products on the market. A safe product in the Directive is defined as "Any product which, under normal or reasonably foreseeable conditions of use including duration and, where applicable, putting into service, installation and maintenance requirements, does not present any risk or only the minimum risks compatible with the product's use, considered to be acceptable and consistent with a high level of protection for the safety and health of persons".

would be to ignore the likelihood of regulatory disconnection and to accept the ineffectiveness of risk regulation – an unacceptable scenario in light of the risks to human health and environment that new technologies are thought to pose and the extreme risk aversion of twenty-first citizens (voters). Yet while these general obligations may have the advantage of being able to capture more scenarios and thus prohibit more of the undesirable behaviour that the regulation is intended to protect against, they create new, legitimacy-type concerns. Although the use of standards is not necessarily problematic in itself, these concerns arise when standards are combined with the second key trend in European risk regulation: the move towards criminalisation.

2.2. The increasing criminalisation of risk

The use of criminal law to enforce technical regulations is certainly not a new phenomenon;[38] however, policy-makers appear increasingly attached to a belief in the efficiency of the use of criminal law as a tool of social control.[39] The evolution of environmental criminal law at EU level provides an example of this trend, although we suggest that these developments within Europe form part of a more global trend.

Prior to a landmark ruling by the European Court of Justice in 2005, the European Union (EU) lacked competence to regulate in the field of criminal law. However, the changes inaugurated by this ruling have been recognised in the new Lisbon Treaty, and Art. 83 (2) of the Treaty on the Functioning of the European Union provides Union competence to impose criminal penalties. It reads:

> … If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish

[38] E.g. in Belgium already an act of 5 May 1888 (*Monétaire Belge* 13 May 1888) concerning the control on dangerous and potentially damaging installations submitted the operation of such an installation to a system of licenses. The operation of an installation without a license or the violation of license conditions was punished with criminal sanctions (see Michael Faure, *Umweltrecht in Belgien. Strafrecht im Spannungsfeld von Zivil- und Verwaltungsrecht*, Freiburg-im-Breisgau, Max-Planck Institute for Foreign and International Criminal Law, 1992, 66-68.

[39] See e.g. on the use of criminal law to enforce consumer legislation Michael Faure, Anthony Ogus and Niels Philipsen, "Curbing Consumer Financial Losses: the Economics of Regulatory Enforcement", 31(2) LAW & POLICY, 2009, 161, 178-181.

minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76.

This case, the developments that led to it and those that followed will be outlined here to give shape to our assertion of the existence of this trend.[40]

Initiatives to harmonise criminal law at the EU level began at the turn of the century in the area of environmental law. A proposal by Denmark in 2000 under the third pillar to criminalise specific acts at the EU level that constitute serious environmental crime[41] led to the first initiative within the area of criminal law under the first pillar, in the form of a proposal for a Directive of 13 March 2001 on the protection of the environment through criminal law.[42] Under the proposal, the European Commission asserted that the protection of the environmental required criminal enforcement as only criminal penalties were capable of creating a sufficiently dissuasive effect and thus of sending a strong signal to offenders.[43]

---

[40] Of course, this evolution will not be discussed in detail within the framework of this contribution. For details see for example Françoise Comte, *Criminal environmental law and community competence*, EUR. ENVTL. L. REV. 147-156 (2003); Françoise Comte, *Environmental crime and the police in Europe: a panorama and possible paths for future action*, EUR. ENVTL. L. REV. 190-231 (2006); M. Heidemann-Robinson, *The emergence of European Union environmental criminal law: a quest for solid foundations*, ENVTL LIABILITY 71-91 and 111-136 (2008); Ricardo Pereira, *Environmental criminal law in the first pillar: a positive development for environmental protection in the European Union?*, EUR. ENVTL. L. REV. 254-268 (2007) and Diane Ryland, *Protection of the environment through criminal law: a question of competence unabated?*, EUR. ENERGY & ENVTL. L. REV. 91-111 (2009).

[41] *OJ* 39/4 of 11 February 2000. The framework decision was based upon the Council of Europe Convention on the Protection of the Environment through Criminal Law of 4 November 1998, which, however, did not enter into force. For a comment on the provisions in this Council of Europe Convention see Michael G. Faure, *Towards a new model of criminalisation of environmental pollution: the case of Indonesia*, *in* ENVIRONMENTAL LAW AND DEVELOPMENT. LESSONS FROM THE INDONESIAN EXPERIENCE 202-203 (Michael G. Faure & Nicole Niessen eds., 2006). The framework decision was adopted on 27 January 2003.

[42] *OJ* C180E of 26 June 2001.

[43] For comments on this proposal see *inter alia* Comte (2003), *supra* note 40 and Michael G. Faure, *European environmental criminal law: do we really need it?*, EUR. ENVTL. L. REV. 18-29 (2004).

The resulting institutional conflict between the Council and the Commission over the compentence to regulate in the area of criminal law led to the landmark ruling of the ECJ in case C-176/03.[44] In its judgment of 13 September 2005, the ECJ found, that although "as a general rule, neither criminal law nor the rules of criminal procedure fall within the community competence", "the last-mentioned finding does not prevent the community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective".[45]

This movement towards the use of criminal penalties to regulate in the area of environmental law was consolidated in the area of ship-source pollution. A council framework decision to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution was established in July 2005,[46] prescribing minimum sanctions for specific penalties. At the beginning of September 2005, the Commission issued a directive on ship-source pollution, introducing criminal penalties for infringements.[47] In the resulting case concerning the competence to regulate in this area, the ECJ clarified its earlier ruling, concluding:

"From the decision of 13 September 2005, it follows that when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, criminal law may be prescribed on the condition that it is necessary in order to ensure that the rules which it lays down on environmental protection are fully effective. A first test to be applied is hence whether the use of the criminal law is necessary and proportionate to reach the goals of environmental protection at which the particular directive aims. The

[44] *OJ* C135/21 of 7 June 2003.
[45] § 48 of the decision of 13 September 2005. For comments on this decision see *inter alia* Comte (2006), *supra* note 40, at 226-229 and Pereira, *supra* note 40.
[46] *OJ* L255/11 of 30 September 2005.
[47] *OJ* L255/11 of 30 September 2005.

determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence."

This judgment has, however, been rendered obsolete by the Lisbon Treaty reforms. The abolishment of the pillar structure of the Union entails that it is now possible for the Commission to use its new powers to require Member States to introduce a variety of criminal penalties.

A further two directives have been promulgated since the Court's clarification in relation to ship-source pollution, and are together referred to as the environmental crimes directives. They clearly demonstrate the belief on the part of the European Commission in the need for criminal law as an enforcement mechanism in this field. Consideration 3 in Directive 2008/99, in particular, explains that experience has shown that existing systems of penalties have been insufficient for achieving compliance with environmental protection laws. Such compliance, so the text continues, can and should be strengthened by the availability of criminal penalties, which demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law. Consideration 10 of the directive requires Member States to provide for criminal penalties in their national legislation in respect of serious infringements of provisions of community law on the protection of the environment. The directive does not, however, create obligations as regards criminal penalties for individual cases. The updated Directive 2009/123 concerning ship-source pollution follows a similar model, although it contains specific provisions concerning the liability of legal persons; Article 8 of the directive requires that legal persons held liable for environmental offences be punished by effective, proportionate and dissuasive penalties.[48] The Commission is, of January 2011,[49] examining the implementation by Member States of these legislative instruments.

---

[48] See further on this directive, Michael G. Faure, *The Environmental crime directive 2008/99/EC*, EUR. J. CONSUMER L. 2011/193-2008.

[49] The reason is that directive 2009/123 of 21 October 2009 had to be transposed into national law by 16 December 2010; Directive 2008/99 of 19 November 2008 had to be transposed by 26

For the purposes of this study, this brief outline of the developments towards the criminalisation of environmental law within the EU serves to demonstrate the importance with which criminal law is viewed by regulators as an essential tool for ensuring compliance within realms that have traditionally used alternative enforcement mechanisms, such as administrative sanctions or civil law penalties. Moreover, although this trend began in the area of environmental law, it is certainly not limited to it. More recently, for example, in October 2011, the European Commission launched a proposal for a directive on criminal sanctions for insider dealing and market manipulation.[50] The draft justifies the proposed directive in the following manner:

"It is essential that compliance be strengthened by the availability of criminal sanctions which demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties. Establishing criminal offences for the most series forms of market abuse sets clear boundaries in law that such behaviours are regarded as unacceptable and sends a message to the public and potential offenders that these are taken very seriously by competent authorities".[51]

Moreover, these developments within EU law not only show an increasing use of criminal penalties to enforce regulation but also serve to illustrate the combination of criminal law sanctions with the use of standards as the regulatory form. In the proposal on criminalising insider dealing, for example, Member States are required *inter alia* to ensure that the following conduct will constitute a criminal offence:

"(a)When in position of inside information, using that information to acquire or dispose of financial instruments to which that information relates for once own account or for the account of a third party. (…)"

Article 4 also forces member states to criminalise market manipulation which is defined as:

December 2010. An examination of the transposition could hence in theory start from January 2011.

[50] See com (2011) 654 final.

[51] Consideration (6) preceding the proposal for a directive, com (2011) 654 final, p.8.

"(a) Giving false or misleading signals as to the supply of, demand for, or price of, a financial instrument or a related spot commodity contract; (…)".

The standard of "false or misleading signals" is, of course, left deliberately vague and undefined.[52]

The environmental crime directives also make use of vague standards. Article 3 of Directive 2008/99, which describes the offences to be criminalised, provides for the criminalisation of the discharge of materials that are likely to cause "substantial damage".[53] Similarly, the same directive requires Member States to criminalise the operation of a plant "in which a dangerous activity is carried out or in which dangerous substances or preparations are stored",[54] as well as "any conduct which causes the significant deterioration of a habitat within a protected site".[55]

It is this combination of vague standards with enforcement via criminal penalties, we wish to suggest, that raises serious questions under the principle of *lex certa* that goes to the heart of the legitimacy of the law.

2.3. The challenge posed to the notion of legal certainty in criminal law

The principle of *lex certa* in criminal law has a long pedigree. While the famous maxim *nullum crimen, nulla poena sine praevia lege poenali* originated with the German legal scholar P.J. Anselm R. von Feuerbach at the turn of the eighteenth century,[56] the idea it expresses can be traced further back in European history to the English Magna Carta of 1215 (and later variations). Here, in one of the clauses still in force today in English law,

[52] The use of vague standards in directives has been the subject of criticism; see, e.g., MICHAEL FAURE, EUROPEAN CONSUMER LAW 205-206 (2011) and Michael Faure & Marjolein Visser, *How to Punish Environmental Pollution? Some Reflections on Various Models of Criminalization of Environmental Harm*, EUR. J. CRIME, CRIM. L. & CRIM. JUST. 316, 346-356 (1995).
[53] See article 3 (a). This notion of "substantial damage" is also refer to in article 3(b) and 3(d) and 3(e).
[54] Article 3 (d).
[55] Article 3(h).
[56] GUSTAV RADBRUCH & PAUL JOHANN ANSELM FEUERBACH, EIN JURISTENLEBEN ERZÄHLT (1934).

England's feudal barons required their sovereign to proclaim certain limitations to his power, notably including the principle that no freeman can be punished except by the law of the land. This idea that the power of the sovereign to dispose of the lives and lands of his subjects was limited by adherence to the law as it was commonly understood became a fundamental mainstay not only of constitutional thought, but also of the idea of law itself. Legal certainty constitutes an essential element of this notion of formal legality, itself a key part of the rule of law idea that guarantees individual autonomy and dignity.[57] In order for men to be free to act within the limits of the law, they need to know what those limits are – an idea expressed by Montesquieu as legal liberty.[58] Legal certainty thus forms a critical element of what we understand freedom to consist in.[59] It is for this reason that, for Dicey in his *Introduction to the Study of the Law of the Constitution* (1888), legal certainty forms the first principle of the rule of law: "no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land."[60] Legal certainty is thus a mainstay of theories of the necessary attributes of law; from Hayek – "laws must be general, equal and certain" – to the better known formulation by Fuller that legality requires generality, clarity, public promulgation, stability over time, consistency between the rules and the actual conduct of legal actors, a prohibition against retroactivity, against contradictions and against requiring the impossible.

So important is legal certainty to the idea of law and our acceptance to being bound by that law that in his essay, 'The Path of the Law', Oliver Wendell Holmes elevated the

---

[57] See BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS AND THEORY 91 et seq (2004).

[58] See BARON DE MONTESQUIEU, SPIRIT OF LAWS, Prichard, ed., 1914). This centrality of legal certainty to individual autonomy is shared by theorists as wide-ranging as Fuller, Hayek, Unger, Rawls and Raz. *See* Tamanaha for futher details, *supra* note 57, at 94.

[59] See also JOHN RAWLS' succinct statement on the central characteristics of a legal system from a social contract perspective: "A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing a framework for social cooperation. When these rules are just they establish a basis for legitimate expectations. They constitute grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled. If the bases of these claims are unsure, so are the boundaries of men's liberties." A THEORY OF JUSTICE 207 (1991, revised edition).

[60] ALBERT V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 110 (1888).

importance of legal foreseeability to the central business of legal study. He wrote, "People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves [i.e. state enforced law] ... The object of our study [as legal scholars], then, is prediction".[61] In the face of the power of the state to enforce its law, the least we as individual citizens can expect is that we can reasonably predict the consequences of being bound. Of course, legal certainty has been the target of sustained criticism from American realists and critical legal scholars across the course of the twentieth century.[62] However, the 'radical inconsistency' critique of critical legal scholars has not taken hold in mainstream legal thinking; and the idea that some degree of uncertainty is an unavoidable element of legal interpretation and adjudication has not served to undermine the idea of legal certainty as worth striving for.

Thus despite these criticisms drawing our attention to the inevitable inconsistencies in the interpretation and application of the law, legal certainty remains one of the central ideas of what law is, even if it is not able to live up the strong demand of prediction put forward by Wendell Holmes. Moreover, the idea that individuals can only face *criminal* punishment by a duly-enacted, publically promulgated, clear and open law continues to hold a central place in our notions of the rule of law.[63] This is reflected in international human rights provisions, as constitutional principles became codified in human rights language and thereby universalised. Thus we find *nullum crimen, nulla poena sine* enshrined in the 1948 Universal Declaration of Human Rights[64] and in the later International Covenant on Civil and Political Rights (1966).[65] The centrality of this principle to the constitutional balance regulating the relationship of individuals to the state, and now to human rights, entails that even in times of emergency that threaten the life of the state, the non-retroactivity of criminal penalties cannot be abrogated or derogated from.[66] In his influential commentary on the ICCPR, Manfred Nowak has

[61] Oliver W. Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 457 (1896-1897).
[62] See, *inter alia*, DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE (1997).
[63] Tamanaha, *supra* note 57.
[64] Article 11, UDHR, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).
[65] Article 15, ICCPR, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.
[66] See Article 4, ICCPR, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

noted the 'special significance' of *nullum crimen* for both criminal law and legal certainty in general.[67]

Thus, legal certainty is a central element of the rule of law, raiding general legitimacy questions, but it takes on special significance where individuals are subject to criminal penalties. How should we view the two trends that we described in the content of the principle of *lex certa*? More particularly, how does what we know about the general choice between rules (*ex ante*) or standards (*ex post*) affect our understanding of standards of legal certainty in criminal law?

It appears most obvious that rules, which we suggested are those legal commands that lead to a clear–cut distinction between lawful and unlawful, more neatly fit with the requirements of legal certainty. However, we know from the literature on standards that a general standard can be applied with a great deal of precision by the judiciary.[68] The precision demanded by legal certainty can thus be provided but only *ex post*, through interpretation at the enforcement stage. This may not be problematic in terms of the effectiveness of the enforcement of a given norm; however, it may impact negatively on the predictability of the norm, to the extent that judicial interpretation in some cases (but not always) is not sufficiently foreseeable by the regulatee. Yet while standards are more likely to fall foul of the requirements of *lex certa*, therefore, their use has clear advantages in areas of law that struggle with maintaining regulatory connection.[69] Standards have a major advantage as they enable easier enforcement by requiring only that an outcome (e.g. endangerment of the environment) be proven to the high standard of criminal law, and not a particular behaviour. Moreover, by being generally worded, standards also have the advantage (at least from the regulator's perspective) that disconnection does not enable regulatees to avoid liability. While the two trends that we have highlighted – towards a more widespread use of standards and towards greater use of criminal penalties – are intended to make regulation more effective, by enabling the

[67] MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 358 (2nd ed. 2005).
[68] Compare FRANCESCO PARISI & VINCY FON, THE ECONOMICS OF LAW MAKING 97-109 (2009).
[69] *See*, also, BROWNSWORD & GOODWIN, *supra* note 6, chapters 15-16.

flexibility to ensure regulatory connection and by contributing to the effectiveness of enforcement, it is the question of predictability or 'foreseeability' that raises concerns from a rule of law or human rights perspective. In order, however, to understand whether and what kind of challenge the increasing drive towards regulatory flexibility poses to the principle of *lex certa*, it is necessary to consider the way in which courts have interpreted the requirements of legal certainty. It is to the case-law of different European courts that we now turn.

3. Legal certainty in practice: an analysis of European jurisprudence

In this section we explore the scope and weight of the *lex certa* principle in the European context, focusing particularly on the European Court of Human Rights' (ECtHR) interpretation of the requirements of legal certainty in the context of the European Convention on Human Rights (3.1). We look also at the interpretation of *lex certa* in a number of national contexts as determined by national constitutional courts (3.2). Finally, we consider the role of *lex certa* in European Union law, briefly examining the standards set by the European Court of Justice (ECJ) in this area (3.3).

3.1. *Lex certa* in Strasbourg jurisprudence

The European Court of Human Right situates the European Convention on Human Rights (ECHR) in the context of the broad needs of democratic societies. As part of this act of situating the Convention, the Court has held that the "rule of law, one of the fundamental principles of a democratic society, [is] inherent in all the Articles of the Convention".[70] Inherent to the rule of law idea developed by the Court is the requirement of lawfulness, which the Court understands as multi-faceted and as incorporating the principle of legal certainty. This principle, according to the Court, enables each community to regulate itself, "with reference to the norms prevailing in the society in which they live." Further, "[t]hat generally entails that the law must be adequately accessible – an individual must have an indication of the legal rules applicable in a given case – and he must be able to

[70] See Eur. Court H.R., *Iatridis v. Greece*, Judgement of 25 March 1999, para. 58.

foresee the consequences of his actions, in particular to be able to avoid incurring the sanction of the criminal law".[71]

Article 7 of the ECHR makes express provision for the principle of *nullum crimen*. It reads:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.

The prime purpose of this article is, in the words of the Court, "to provide effective safeguards against arbitrary prosecution, conviction and punishment".[72] As with international human rights law, the importance of the guarantee contained in Article 7 is deemed so essential to the basic rule of law that it cannot be the subject of derogation in times of public emergency or war.[73] The Court has interpreted the guarantee provided in Article 7(1) to include the principles of *lex certa, lex scripta*, and *lex stricta*. In a case concerning the 'punishability' of certain conduct, the Court ruled that:

> "[Article 7(1)] also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (...) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law".[74]

Moreover, whether an offence is deemed to be 'criminal' for the purposes of the Convention is not limited to meanings laid down in national law; 'criminal' has thus an autonomous meaning under the Convention, and offences that are considered to be

---

[71] Eur. Court H.R., *S.W. v. United Kingdom* and *C.R. v. United Kingdom* (1995) 21 EHRR 363.
[72] Eur. Court H.R., *Streletz, Kessler and Krenz v. Germany* 2001-II; 33 EHRR 751, para. 50 GC.
[73]Article 15(2) of the European Convention on Human Rights. For Article 7 as an essential element of the rule of law, *Streletz, Kessler and Krenz*, *ibid*., para. 50.
[74] See, Eur. Court H.R., *Kokkinakis v. Greece*, 17 Eur. H.R. Rep. 397, 411 (1994).

administrative offences or are in other ways classified as non-criminal under national law may be viewed by the Court as criminal in the context of Article 7.[75] Similarly, the term 'law' also has an autonomous meaning under the Convention, and includes judge-made law as well as legislation, and delegated legislation as well as primary legislation.[76]

In addition to an autonomous meaning in relation to the sources of law, 'law' also, according to the Court, contains "qualitative requirements, including those of accessibility and foreseeability".[77] In *Kafkaris v. Cyprus*, the Court held that foreseeability requires that an individual be able to know from the wording of the relevant legal provision or a court's interpretation of it whether an act or omission will cause her to be criminally liable and what penalty may be imposed. Similarly, in *Kuolelis, Bartosevicius and Burokevicius v. Lithuania*, the Court found no breach of Article 7 for the criminal conviction of leading members of the Communist Party for their role in an attempted coup in January 1991 against the newly established state. The Court held that the crimes for which the applicants were convicted were "sufficiently clear and foreseeable" and that the consequences of the applicants' actions were "adequately predictable … as a matter of common sense".[78]

The considerable leeway that such a 'common sense' standard offers the state in extending the application of existing law to new conduct, either where a provision's meaning has previously been unclear or is simply given a different meaning by a court, without breaching the protection guaranteed by Article 7 is suggested by an earlier case from the UK. In the case of *CR v. the UK* – a case in which the applicant had been convicted of raping his estranged wife despite a long-standing common law exception entailing that it was not, at the time of the offence, a criminal offence for a husband to rape his wife – the Court held, that "there will always be a need for elucidation of

---

[75] See, for a description of this aspect of the Court's reasoning, HARRIS, O'BOYLE AND WARBRICK, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2009).
[76] Eur. Court H.R. *Kafkaris v. Cyprus*, Judgement of the Grand Chamber of 12 February 2008, para. 139.
[77] *Ibid.*, para. 140. See also Eur. Court H.R., *Korbely v. Hungary*, Judgement of the Grand Chamber of 19 September 2008.
[78] Eur. Court H.R., *Kuolelis, Bartosevicius and Burkosevicius*, Judgement of 19 February 2008, para. 120.

doubtful points and for adaptation to changed circumstances. …progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition". Article 7, it continued, "cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen".[79] The Court's interpretation of Article 7 as allowing for gradual refinement of criminal liability by the courts entailed that no violation had been committed in the case of *CR*, despite the fact that the legislature had had the opportunity to change the exception to marital rape and had not done so. This rather surprising ruling, which concerned a direct over-turning of the law as it was at the time of the offence in order to uphold the defendant's conviction, arguably set the threshold of 'foreseeability' extremely low. One need have no sympathy for this particular defendant to understand the degree of unease with which some commentators met this decision.[80] Indeed, what the case-law of the Court suggests is that it is generally willing only to find a violation of Article 7 in exceptional cases.[81]

Moreover, the Court also expects more than simple common sense from an individual employed in a professional capacity, but will expect professionals to have consulted the law relevant to their position. In *Cantoni* v. *France*, the Court held that "a law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail… This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a higher degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such activity entails".[82] This finding has been repeated by the Court in later judgements, such as *Kafkaris*.[83] This

[79] Eur. Court H.R., *CR v. the UK*, Judgement of the Court of 22 November 1995, para. 34. See also Eur. Court H.R., *Liivik v. Estonia*, Judgement of 25 June 2009; and Eur. Cour H.R., *Cantoni v. France*, Judgement of 26 November, para. 31.
[80] For example, see HARRIS, O'BOYLE AND WARBRICK, *supra* note 75.
[81] *Ibid*., for their analysis of Article 7.
[82] *Cantoni v. France*, *supra* note 79, para. 35.
[83] *Kafkaris v. Cyprus*, *supra* note 76, para. 141.

different standard for professionals – 'special care' in place of simple 'common sense' – is particularly relevant in the context of technological risks and where norms are usually addressed to company professionals who, under Strasbourg jurisprudence, will be expected to have made use of professional advice from lawyers or consultants on the scope of their legal obligations.

Further limitations to Article 7 occur based upon the wording of the text. The application of Article 7 is restricted to cases in which a person has actually been 'held guilty' of a criminal offence. It does not apply to situations in which a prosecution does not lead to a conviction, or has not done so yet, or to situations in which the mere possibility of prosecution exists.[84] Moreover, the Article 7 guarantee protects only against a change to the substantive law that has retrospective effect to the detriment of the accused. It does not apply to situations in which retroactive changes or amendments to rules governing criminal proceedings are to the detriment of an applicant; for example, changes to the rules governing legal aid,[85] to statutes of limitation[86] or to the rules of evidence.[87]

Respect for legal certainty or 'foreseeability' is not, though, limited to Article 7. The Strasbourg Court has developed a set of 'quality of law' standards in relation to Article 5 of the Convention, which protects the right to liberty and security of the person. In defining the notion of 'arbitrariness' in protecting against arbitrary detention under Article 5(1), the Court has elaborated a number of general and specific principles; one of the most important general principles, particularly where deprivation of liberty is concerned, is legal certainty.[88] Similarly, the Court has held that the principle of legal certainty is inherent to the Convention definition of 'lawful detention'.[89] However, in the case of *Steel v. the UK*, the Court accepted that, although provisions such as 'breach of

---

[84] Cf. Dudgeon v. UK, in which the Court held that the mere theoretical possibility of criminal prosecution for a homosexual act was sufficient to breach the right to privacy guarantee in Article 8 of the Convention. Eur. Court H.R., *Dudgeon v. UK*, Judgement of 22 October 1981.
[85] Eur. Court H.R., *X v. Germany*, 3 YB 254 (1960).
[86] Eur. Court H.R., Coëme v. Belgium, Judgement of 22 June 2000.
[87] Eur. Court H.R., *X v. UK*, 3 DR 95 (1975).
[88] See Eur. Court H.R., *Ječius v. Lithuania* (2000) I-X, 35 EHRR 400, para. 56; also Eur. Court H.R., *Baranowski v. Poland*, Judgement of 28 March 2000.
[89] *Baranowski v. Poland*, *ibid*.

the peace' or 'being of good behaviour' were imprecise, vague and general, their meaning had either been sufficiently clarified by the national courts – in the case of 'breach of the peace' – or were sufficiently comprehensible by the applicants – the requirement 'to be of good behaviour' as a condition of being bound over to keep the peace as a criminal penalty.[90]

Further elaboration of the meaning of legal certainty in the context of the Convention is provided by case-law on Article 1, Protocol 1 – the right to property. Reading in the requirement of 'lawfulness' to Article 1 of the First Protocol, the Court has determined that interference with the peaceful enjoyment of one's property must be accessible, precise and foreseeable. In determining whether these standards have been breached, the Court will consider an applicant's awareness of the relevant laws authorizing the interference and their ability to seek information about that law; however, in a similar vein to its finding in *Cantoni v. France*, the Court has held that where the applicant is a company, a higher threshold will be applied as the company will be expected to have sought expert advice on the provisions of domestic law.[91] Moreover, the authorities, in applying decisions affecting property rights, must state clearly the reasons upon which their decision is based. Further, even where state action has not been sufficiently uncertain to breach the protection provided by the lawfulness guarantee, in the context of the Article 1, Protocol 1, legal uncertainty may tip the balance against the state in determination of the fair balance test that the Court performs in the context of Article 1, Protocol 1.[92] The Court's reasoning in the context of this article is likely to be important in consideration of whether fines – and hence deprivation of a company's property – provide sufficient legal certainty.

In sum, the Court has taken a narrow interpretation of Article 7, limiting its protection to situations in which a conviction has actually taken place. Moreover, the threshold of 'common sense' that the Court has set in relation to foreseeability grants Member States considerable leeway in extending existing law to a new conduct or in interpreting a law in

[90] Eur. Court H.R., *Steel v. UK*, 1998-VII; 29 EHRR 365.
[91] Eur. Court H.R., *Špacěk, sro v. the Czech Republic* (1999); 30 EHRR 1010, para. 59.
[92] See Eur. Court H.R., *Beyeler v. Italy*, Judgement of 5 January 2000.

a new way. The Court has shown itself to be particularly attuned to the difficult facing states in balancing flexibility and foreseeability; as the Grand Chamber concluded in the case of *Kafkaris*, “while certainty is highly desirable, it may bring it its train excessive rigidity and the law must be able to keep pace with changing circumstances.”[93] Finally, the Court’s expectation that professionals and businesses will exercise ‘special care’ in ascertaining their legal obligations further limits the protection offered by Article 7 and the *lex certa* principle more generally. However, while it is wise for the Court to acknowledge the difficulties facing states in finding the appropriate balance between the need for flexibility and the demands of foreseeability, it seems – at least to the present authors – that the Court has set the bar of protection provided by the Convention too low. As we shall see below, the Court’s interpretation provides a minimum upon which Member States and other European courts build.

3.2. Legal certainty in the criminal law of EU Member States

The principle of legal certainty, as part of the broader notion of legality, or rule of law, constitutes a fundamental element of constitutional thinking in the western constitutional tradition, and, as such, often predates the codification of legal certainty in the many human rights documents. Thus, in the Member States of the EU, precise criteria have been developed in case law and legal doctrine on the basis of which the admissibility of vague formulations in criminal law is subsequently judged. These requirements frequently go further than what is required by the case law of the Strasbourg Court. For example, Continental European legal systems often interpret the *lex scripta* principle as requiring penalties to be based upon codified law, where common law traditions have historically interpreted *lex scripta* (‘written law’) to include judge-made law.[94] In order to paint a fuller picture of the *lex certa* implications of the trend towards the use of criminal sanctions at the European level, we shall sketch the contours of legal certainty as it is understood and applied within the criminal law of a number of EU Member States.

---

[93] *Kafkaris v. Cyprus*, *supra* note 76, para. 141.

[94] Roelof Haveman, *The Principle of Legality*, *in* SUPERNATIONAL CRIMINAL LAW: A SYSTEM SUI GENERIS 39, 40 (Roelof Haveman et al. eds., 2003).

3.2.1. Belgium

The Belgium Constitutional Court has regularly had the opportunity to express itself on the admissibility of vague concepts in (environmental) criminal law.[95] In a decision of 22 July 2004, the Court declared on the admissibility – in the light of the *lex certa* principle – of a provision in a Flemish Decree of 4 June 2003 concerning city planning; it held that a criminal sanction provided for in the Decree (as a penalty for illegal building) could not apply to the extent that the offences did not cause "any unacceptable nuisance or serious infringements of essential provisions". In making this finding, the Constitutional Court argued that the Belgian Constitution, interpreted in light of both Article 15 of the International convention on Civil and Political Rights and Article 7 ECHR, allowed for "a criminal law [to] entail a certain flexibility with a view of changing circumstances, but should nevertheless be formulated in wordings on the basis of which anyone who commits a certain act can decide whether the particular behaviour will lead to criminal liability or not".[96] In this particular case, the Constitutional Court held that the phrases "causing unacceptable nuisance" and a "serious violation of essential regulations" lacked the necessary normative content necessary to define a crime, and therefore created an unacceptable degree of uncertainty. As such, the Decree violated the legality principle, according to the Court.

More recent decisions of the Constitutional Courts have followed a similar line. For example, in a case of 20 October 2004 concerning an Act of 3 May 2003 that aimed at de-criminalising the possession of cannabis where use of the drug was not "problematic" or caused a "public nuisance", the Constitutional Court determined that these conditions were so vague as to grant the competence of interpretation to individual officers. The

---

[95] For a summary of this case law see *inter alia* MICHAEL G. FAURE & JAN VANHEULE, MILIEUSTRAFRECHT 424-429 (2006) and more generally, Erik Claes, *Het strafrechtelijk legaliteitsbeginsel en de rechtspraak van het Arbitragehof. Erosie van legaliteit?*, TIJDSCHRIFT VOOR BESTUURSWETENSCHAPPEN EN PUBLIEKRECHT 451-469 (2006).

[96] Arbitragehof No. 136/2004, 22 July 2004, Nos. 2796 and 2839, *Moniteur Belge* 19 October 2004, *Rechtskundig Weekblad* 2004-2005, 582, with case note by I. Van Giel.

legal uncertainty that would be engendered by such empowerment at the officer level was such as to violate the legality principle.[97]

However, not every vague provision leads automatically to annulment by the Belgian Constitutional Court. Flemish environmental law contains duties of care, *inter alia* in the Environmental Licence Decree of 28 June 1985, which force the operator to take all measures necessary to avoid damage, nuisance or serious accidents and, in case of accident, to minimise as much as possible the consequences for humans and the environment. This duty of care is enforced via the criminal law. In a, generally seen as remarkable, decision of 4 March 2008, the Constitutional Court held that a criminal law provides a certain margin of appreciation to the judge in interpreting the vague provisions of this particular law. In not finding a breach of the principle of legality, the Court stressed the importance in this case of the embedded nature of the concept of a duty of care in the broader context of specific duties required of an operator under Flemish environmental law.[98] This context entails, according to the Court, that even though the concept of 'nuisance' is not precisely defined, it may be clear in concrete circumstances what is required of an operator.[99] Moreover, the Court placed additional weight on the fact that the duty of care is addressed to persons who are professionals and hence are better placed to judge which measures they can and should take to avoid environmental harm.

[97] Constitutional Court No. 158/2004, 20 October 2004, Nos. 2727 and 2850, Moniteur Belge 28 October 2004.

[98] Constitutional Court No. 36/2008, 4 March 2008, Moniteur Belge 30 April 2008, *Tijdschrift voor Strafrecht* 2008, 196, with case note. The reasoning of this decision, placing weight on the context in which phrases are embedded, has been reaffirmed in a more recent decision of 27 May 2010. In this case, the Constitutional Court found that the legality principle had not been breached by the creation of administrative sanctions for 'small forms of public nuisance' because parliament had provided concrete examples by which light the phrase was to be interpreted. Constitutional Court, No. 62/2010, 26 May 2010. For a (critical) comment see G. Geudens, *GAS-boetes voor kleine afvalinbreuken*, De Juristenkrant, 23 June 2010, 4-5.

[99] For a discussion see Roel Meeus, *De arresten nr. 36/2008 en 82/2008 van het Grondwettelijk Hof: het moeilijke onderscheid tussen de grondwettige en ongrondwettige open textuur van strafrechtelijk gesanctioneerde milieuzorgplichtbepalingen*, TIJDSCHRIFT VOOR MILIEU EN RECHT 454-472 (2008).

The importance attached by the Court to the identity of the addressees of the Environmental Licence Decree considered in the case of 4 March 2008 was underlined in another environmental law case a few months later. In a decision of 27 May 2008, the Constitutional Court found that a similar duty of care contained in a Flemish Decree on Nature Conservation in this case did violate the legality principle.[100] Article 14 of the Flemish Decree on Nature Conservation held broadly that "anyone who undertakes acts or gives orders to do so and who can reasonably suspect that nature elements in the near vicinity will be damaged or destroyed as a result of those, is obliged to take all necessary measures that can reasonably be expected of him to prevent this damage or when this is impossible, to repair it". In addition to finding that the core terms "elements of nature" that could be endangered by "acts" were too vaguely defined, the Court placed considerable weight on the scope of application of the duty of care. It held that the requirements that the Decree placed on "anyone" was simply too broad to meet the standard of legality. Hence, both *ratione personae* (applicable to anyone, not just operators) as well as *ratione materia* (applicable to "acts" and "natural elements") the definition of duty of care here failed to meet the requirement of legal certainty.[101]

The Belgian Constitutional Court often refers explicitly to the case-law of the Strasbourg Court and it is, according to legal commentators, also influenced by evolutions in Strasbourg jurisprudence. Meeus, for example, has argued that the greater weight given by the European Court to flexibility in *Cantoni* v. *France* is visible in the Belgian Constitutional Court's approach to later cases in it being more readily accepting of vague terminology than it had been previously.[102] Yet, the recent decision concerning the duty of care in the Decree Concerning Nature Conservation shows that the Belgian Constitutional Court continues to take the question of legal certainty very seriously and it does not hesitate to annul provisions that do not pass its *lex certa* test. In particular, where the scope of the criminal provision *ratione personae* and *ratione materia* are overly broad

---

[100] Constitutional Court No. 82/2008, 27 May 2008, Moniteur Belge 29 August 2008.

[101] *See* Meeus, *supra* note 99 and see Peter De Smedt & Hendrik Schoukens, *Natuurzorgplicht. Is er leven na het arrest van het Grondwettelijk Hof van 27 mei 2008?,* NIEUW JURIDISCH WEEKBLAD 738-758 (2008).

[102] *See* Meeus, *supra* note 99.

and vague, the Constitutional Court is likely to annul a provision. In this respect, the Belgian Constitutional Court applies a higher threshold of foreseeability than Strasbourg jurisprudence.

3.2.2. Germany

German criminal law is subject to various 'Garantiefunktionen'[103]: the legality principle (*nullum crimen, nulla poena sine lege scripta*) is explicitly provided for in the Constitution[104] and has been extensively discussed in legal doctrine. The legality principle holds that criminal provisions are to be as precise as possible and broad notions are, to the maximum extent possible, to be avoided. The Constitutional Court has interpreted the *lex certa* requirement as necessitating that the will of Parliament[105] be clearly expressed in the text of legislation itself, so as to avoid personal subjective interpretation by the courts. Moreover, the Court interprets the *lex certa* guarantee as requiring that citizens shall be protected from arbitrary decisions and punished only where the consequences of their behaviour were foreseeable to them.[106] Further, the Constitutional Court has determined that only written law is able to stipulate the criminal nature of an act and establish a criminal penalty for it. In addition, the requirements that lead to criminal liability have to be set out in the act beforehand.[107]

German legal doctrine also sets out a number of distinct aspects of the legality principle: Firstly, *nulla poena sine lege certa* (the 'Bestimmtheitgrundsatz'). This provides that criminal norms must provide a minimum degree of certainty as to the element of a crime and the legal consequences of committing one. This does not prevent the use of general clauses, but their range, and hence their consequences, has to be predictable.[108] In a case before the *Verfassungsgerichtshof* of Bayern, this Court held that creating a criminal offence of "acting against public order" was contrary to the Bavarian Constitution

[103] JOHANNES WESSELS, STRAFRECHT ALLGEMEINER TEIL: DIE STRAFTAT UND IHR AUFBAU 11.
[104] Art. 103 II, see also para 1 Penal Code and art. 7 I ECHR – so-called 'Gesetzlichkeitsprinzip'.
[105] Rechtswille der Volksvertretung.
[106] BVerfGE 28, 175, 183; 48, 48, 56.
[107] BVerfGE 45, 363; 78, 374.
[108] See HANS-HEINRICH JESCHECK & THOMAS WEIGEND, LEHRBUCH DES STRAFRECHTS. ALLGEMEINER TEIL 136-137 (1996).

because it was too imprecise.[109] The citizen must have the possibility to adapt her behaviour in order to comply with the requirements of criminal law. Further, the elements of the crime have to be described concretely enough so that the meaning can be identified through interpretation.[110]

The second aspect of the legality principle laid down in German legal doctrine is that of *nulla poena sine lege previa* (the 'Rückwirkungsverbot'). This principle, in German jurisprudence, pertains only to substantive criminal law and not thus to criminal procedural law, such as, for example, to the retroactive prolongation of prescription periods. A recent controversy in German law concerned preventive detentions; in a ruling on a number of like cases, the ECtHR held that it was contrary to Article 7 of the Convention for preventive detention to be retrospectively extended beyond the maximum period permissible at the time that offences were committed.[111] However, the principle does exclude retroactive legal changes in the context of closed cases and that are to the detriment of the accused.[112] Interestingly, a change in the case law of the highest court due to a change in the legal opinion or due to new insights is not subject to the prohibition of retroactivity.[113] The prohibition of retroactivity is tailored to the normal situation of a country and does not include the protection of politicians for severe human rights violations, such as crimes committed during the National Socialist period.

A third aspect of legal certainty provides that, unlike in other legal areas, the criminally accused are protected from the use of analogies.[114] Customary law or analogies may not be used to create new criminal offenses or to aggravate or expand existing ones to the

---

[109] For a comment see Albin Eser, *Allgemeiner Teil. Das Strafgesetz – Geltungsbereich, in* STRAFGESETZBUCH, KOMMENTAR 30 (Adolf Schönke & Horst Schröder eds., 27th ed., Comment 18 on § 1.

[110] BVerfGE 45, 363, 371; 71, 108; 117, 71.

[111] Eur. Court H.R., *Schummer v. Germany*, Judgement of 13 January 2011; Eur. Court H.R., *Mautes v. Germany*, Judgement of 13January 2011; and Eur. Court H.R., *Kwallteit v. Germany*, Judgement of 13January 2011, as a continuation of *M. v. Germany*, Judgement of 17/ Decemeber 2009. Wessels, *supra* note 103, at 13 referring only to the earliest case. A violation of Article 5 of the Convention was furthermore established in *Haidn v. Germany*, Judgement of 13 January 2011.

[112] BverfGE 25, 269, 289; 46, 188, 192.

[113] BverfGE NStZ 90, 537; BGHSt 21, 157.

[114] Wessels, *supra* note 103, at 14.

detriment of the accused (*nulla poena sine lege scripta et stricta*). The prohibition of analogies embraces all elements of the Penal Code.[115] Importantly this prohibition is void when it favours the accused (for instance, increasing the scope of mitigation).[116] Analogy can therefore close only undesired (from the perspective of the accused) and not desired gaps in the legislation. However, the legislator has left certain issues in the Penal Code open, such as limitations on intent or negligence; and these gaps may be filled within the frame given by the Act by judges or customary law, even to the detriment of the accused (an example would be the institutions of '*mittelbare Täterschaft'*). This legal concept has in the meantime been codified in § 25 I variation 2 of the German Penal Code.

The *lex certa* principle has also been discussed in the context of environmental criminal law. § 324 of the German Criminal Code punishes "anyone who pollutes water or otherwise detrimentally changes its qualities without authorisation".[117] Even though the concepts "pollute" and "detrimentally change" are undoubtedly relatively broad, legal doctrine holds that this complies with the constitutional principle of *lex certa*. A number of authors have, however, noted that the disadvantage of this broad formulation is that it does not exclude the punishment of minor cases that are not worthy of criminal sanction.[118] § 327 of the German Criminal Code concerning the unauthorised operation of installations contains a so-called open norm[119] since it refers to "some other installation pursuant to the federal Emissions Control Act".[120] In order for a citizen to know whether they face criminal prosecution for the failure to obtain a license for running a particular installation, they therefore need to consult another federal act, in this case the Emissions Control Act. Placing such a burden on citizens to consult multiple sources in order to understand their obligations has not been held to be a breach of *lex certa* principle by the *Bundesverfassungsgericht*.[121]

---

[115] BGHSt 18, 136, 140; BGH NJW 07, 524.
[116] BGHSt 6, 85; 11, 324.
[117] Wer unbefugt ein Gewässer verunreinigt oder sonst dessen Eigenschaften nachteilig verändert.
[118] For a more detailed analysis see Peter Cramer & Gunter Heine, *Besonderer Teil. Straftaten gegen die Umwelt*, *in* STRAFGESETZBUCH, KOMMENTAR 2659-2660 (Adolf Schönke & Horst Schröder, eds., 27th ed., Comment 1 on § 324.
[119] In German referred to as *Blankett Norm*.
[120] In German das Bundesemissionsschutzgesetz.
[121] See BUNDESVERFASSUNGSGERICHT, NEUE JURIDISCHE WOCHENSCHRIFT 3175 (1987).

3.2.3. United Kingdom

According to A.V. Dicey, the rule of law (or 'ordinary' law) and parliamentary sovereignty constitute the two main pillars of the UK's 'unwritten' constitution (although the UK may have no formal written constitution, it does of course possess a number of written Acts of Parliament that form part of that constitution, such as the Bill of Rights and the Habeas Corpus Acts).[122] The rule of law itself consists of a number of separate but related principles, including the idea that all are equal before the law; the principle of fairness – which includes the idea that all laws must be duly enacted, publicly available and readily understandable; the principle of legal certainty – which requires that laws are applied in a predictable and precise manner –; and the requirement that laws be not retrospective.[123]

These fundamental elements of the common law were applied by the House of Lords in a 2005 conjoined case concerning the definition of the common law crime of public nuisance, *R. v. Rimmington; R. v. Goldstein*. This is an important case because it determined not only the scope and definition of the crime of 'public nuisance' but also commented on the relationship between the will of parliament and the common law. The appellants contended that, as applied in their cases, the offence was too imprecisely defined, and the courts' interpretation of it too uncertain and unpredictable, to satisfy the requirements either of the common law or of Article 7 of the European Convention on Human Rights. In allowing the appeal – and thus overturning the convictions of both appellants – Their Lordships considered the requirements of the principle of legal certainty. Lord Bingham, speaking for all, concluded that:

> "There are two guiding principles [of the common law]: no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly and ascertainably punishable when the act was done. If the ambit of a common law offence is to be enlarged, it "must be done

[122] ALBERT V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 34 (1889).
[123] *Ibid.*, 171-330.

step by step on a case by case basis and not with one large leap": R v Clark (Mark) [2003] EWCA Crim 991, [2003] 2 Cr App R 363, para 13."[124]

Lord Bingham continued: "These common law principles are entirely consistent with article 7(1) of the European Convention".[125] Clarifying the meaning of the thus determined principles, Lord Bingham noted:

> "Vague laws which purport to create criminal liability are undesirable, and in extreme cases, where it occurs, their very vagueness may make it impossible to identify the conduct which is prohibited by a criminal sanction. If the court is forced to guess at the ingredients of a purported crime any conviction for it would be unsafe. That said, however, the requirement is for sufficient rather than absolute certainty".

The Lords found additional support for the standard of 'sufficient rather than absolute certainty' in the jurisprudence of the Strasbourg Court. Referring to judgments involving the UK, Lord Bingham concurred:

> "It is accepted that absolute certainty is unattainable, and might entail excessive rigidity since the law must be able to keep pace with changing circumstances, some degree of vagueness is inevitable and development of the law is a recognised feature of common law courts (Sunday Times v. United Kingdom para 49; X Ltd and Y v. United Kingdom (1982) 28 DR 77, 81, para 9; SW and CR v. United Kingdom, para 36/34).

A further element of legal certainty in the common law worth noting in the context of this inquiry is the role given to experts or legal advisors in determining the standard demanded by legal certainty. In a case cited approvingly by Lord Bingham in *R. Rimmingon; R. v. Goldstein*, that of *Fothergill* v. *Monarch Airlines Ltd*,[126] Lord Diplock had observed:

> "Elementary justice or, to use the concept often cited by the European court, the need for legal certainty demands that the rules by which the citizen is to be bound

[124] *Ibid.*, para. 33.
[125] *Ibid.*, para. 34.
[126] [1981] AC 251 at 279; *R. v Rimmington*; *R. v. Goldstein*, para. 32.

> should be ascertainable by him (or more realistically by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible".

The standard of legal certainty may, therefore, be met where a law, whether statutory or ordinary, requires the advice of a competent lawyer to understand it. Thus, in determining whether or not the common law crime of public nuisance was adequately defined, Lord Bingham concluded that it met the requirements of legal certainty with the following phrase:

> "A *legal adviser* asked to give his opinion in advance would ascertain whether the act or omission contemplated was likely to inflict significant injury on a substantial section of the public exercising their ordinary rights as such: if so, an obvious risk of causing a public nuisance would be apparent; if not, not."[127]

The scope of legal certainty in the common law of the UK suggests that, while emphasis is placed upon the importance of foreseeability of criminal liability, absolute certainty is neither achievable nor desirable; this is neatly expressed by Lord Bingham in his suggestion that legal certainty must achieve a sufficient standard rather than an absolute one. Further, in deciding whether legal certainty is of a sufficient standard, the courts will assume that the citizen has the benefit of competent legal advice i.e. the obligation to seek legal advice is not restricted to companies, although this is not to say that a different level of obligation might not be applied.

3.3. Legal certainty in the EU legal order

Although legal certainty is nowhere laid down in either primary or secondary law, it is both a general principle[128] and a fundamental principle of EU law.[129] The general meaning given to legal certainty by the ECJ is that a specific situation must be predictable so that, for example, acts that have been relied upon as legal are not later considered invalid; differences between courts of the Member States as to the validity of

---

[127] *Ibid.*, para. 36 (italics ours).

[128] See Case C-453/00 Kühne & Heitz NV v. Produktschap voor Pluimvee en Eieren [2004] ECR I-837, para. 24. See also JOHN A. USHER, GENERAL PRINCIPLES OF EC LAW 1-9 (1998). See also JUHA RAITIO, THE PRINCIPLE OF LEGAL CERTAINTY IN EC LAW (2003), chapter 5 'Legal Certainty in the Framework of Other General Principles of EC Law'.

[129] See C-323/88 Sermes (1990) ECR I-3027, p. I-3050.

Community acts would be liable to jeopardise the very unity of the Community legal order and undermine the fundamental requirement of legal certainty.[130] However, legal certainty is not, in the words of an author of a study on the principle in the EC legal order, "a compelling legal principle, one to be safeguarded at all costs";[131] rather, the ECJ has expressly noted that legal certainty needs to be combined with other principles, such as the principle of legality, and can be outweighed by a pressing Union objective or where the individual is thus placed in a more favourable position, or where the legitimate expectations of those concerned can nonetheless be respected.[132] For example, the new provisions of a regulation which is replacing an older regulation can be extended to cover situations outside the period covered by the new regulation where the purposes to be achieved or public interest require it.[133] Likewise, while the retroactivity of EU law is prohibited, reasons of general interest can override this prohibition.[134]

However, the Court in *Fedesa* drew a sharp distinction between legal certainty in the non-criminal context and in the criminal context.[135] Where the context is one of imposing criminal liability, the Court upheld its ruling in *Kent Kirk*.[136] In this earlier case, concerning a Regulation creating *ex post facto* national measures imposing criminal penalties in the context of the infringement of fisheries legislation, the Court stated very clearly that retroactive criminal penalties were unacceptable. Giving the basis for its ruling, the Court noted:

> 22. The principle that penal provisions may not have retroactive effect is one which is common to all the legal orders of the Member States and is enshrined in Article 7 of the European Convention for the Protection of Human Rights and

[130] Case 314/85 Foto-Frost [1987] ECR 4199, para 15; Case C-27/95 Bakers of Nailsea [1997] ECR I-1847, para 20; and Case C-461/03 Gaston Schul Douane-expediteur [2005] ECR I-0000 para 21.
[131] Raitio, *supra* note 128.
[132] See 49/59 SNUPAT (1961) ECR 53, p. 87; Case T-7/99 Medici Grimm KG v. Council [2000] ECR II-2671; also Case C-331/88 Fedesa [1990] ECR I-4023 and Raitio, *supra* note 128, at 187-190.
[133] E.g., 1/73 Westzucker (1973) ECR 723; *ibid*., 190.
[134] Further for the interpretation of legal certainty as legitimate expectations in the EU legal order, see SOREN SCHONBERG, LEGITIMATE EXPECTATIONS IN ADMINISTRATIVE LAW (2000).
[135] Case C-331/88 Fedesa [1990] ECR I-4023.
[136] Case C-63/83 Regina v. Kent Kirk [1984] ECR 2689.

> Fundamental Freedoms as a fundamental right; it takes its place among the general principles of law whose observance is ensured by the Court of Justice.

Further, the Court has interpreted the requirement of legal certainty in the context of the imposition of criminal penalties as necessitating Member States to define precisely the prohibited behaviour when transposing EU law into national law. In *Procura della Repubblica Italiana* v. *X*[137], which concerned criminal proceedings in Italy against persons unknown for presumed breaches of a legislative decree regulating the use of display screen equipment, the public prosecutor had to consider various provisions of Directive 90/270 on the minimum health and safety requirements for work with display screen equipment. Referring again to the constitutional traditions of the Member States and Article 7 of the European Convention on Human Rights, the ECJ held that EU law could not be interpreted and applied in such a way that it was to the detriment of the defendant. The Court reasoned:

> 26. ... in a case such as that in the main proceedings, which concerns the extent of liability in criminal law arising under legislation adopted for the specific purpose of implementing a directive, *the principle that a provision of the criminal law may not be applied extensively to the detriment of the defendant, which is the corollary of the principle of legality in relation to crime and punishment and more generally of the principle of legal certainty, precludes bringing criminal proceedings in respect of conduct not clearly defined as culpable by law.*
>
> ...
>
> 30. The directive does not specify what is to be understood by 'habitual [use of] display screen equipment as a significant part of his normal work' for the purposes of Article 2(c).
>
> 31. It is clear from the wording of that provision that the question whether the time habitually spent by a worker at a display screen amounts to a significant part of his work is to be assessed in relation to that person's normal work. The phrase cannot be defined in the abstract, and it is for the Member States to specify its import when adopting national measures implementing the directive.

[137] C-74/95 [1996] E.C.R. I-6609.

> 32. In view of the vagueness of the phrase in issue, the Member States must be accorded a broad discretion when adopting such implementing measures, which in any event, by virtue of the principle of legality in relation to crime and punishment ... precludes any reference by the competent national authorities to the relevant provisions of the directive when contemplating the institution of criminal prosecutions in the field covered by the directive.

What the above cited decisions suggest is that the ECJ interprets the requirements of legal certainty strictly where EU law requires Member States to impose criminal penalties.

3.4. Summary

What our brief examination of the standards of legal certainty applied in the various legal orders interacting within the European space suggests is that the European Convention on Human Rights, and in particular Article 7, provides a base-line below which other European legal orders, including EU law, may not sink. Indeed, the Court's interpretation of Article 7 provides very limited protection, as suggested by reference to 'common sense' standards and by its ruling in *C.R. v. the UK*. Moreover, the Court, both in the context of Article 7 and Article 1 Protocol 1, imposes a higher burden upon professionals and businesses before they can expect the protection of the Convention, requiring these actors to take 'special care' in assessing the level of risk to which their behaviour exposes them; similarly, various Member State legal orders explicitly interpret the protection of legal certainty for ordinary individuals within the requirement to seek legal advice.

While the constitutional orders of the Member States as well as the European Court of Justice recognise Strasbourg's jurisprudence as providing strong guidance, a number of Member States offer more stringent protection of legal certainty. This seems, for example, to be the case in Germany and, to a certain extent, also in Belgium. However, there is also evidence that courts in some systems are willing to lower the level of protection in line with Strasbourg jurisprudence. In contrast, the standard of legal certainty applied by the ECJ in the protection of individual interests is particularly stringent. For example, the ECJ set a tough standard for clarity, or lack of vagueness, in

criminal provisions in *Procura della Repubblica Italiana v. X* by refusing to allow the phrase "habitual use of display screen equipment" to constitute a basis for criminal liability. This suggests that the ECJ is willing to take a tougher stance on legal certainty than the Strasbourg Court. This matters, of course, because much of the risk regulation within the European legal space takes place at the European level. Thus where Member States transpose EU regulation into their national systems, they will need to do so in a way that complies with the standard given to legal certainty as a general principle of EU law by the ECJ.

The case-law and doctrine considered in this section illustrates the clash that exists between flexibility and foreseeability within European legal systems. In this collision between effectiveness and legitimacy, what we have observed is that priority is often given to flexibility over foreseeability, and that the European Convention on Human Rights does to date not in all cases provide an effective protection to individuals or companies.[138] This is particularly sobering given the trends we have identified towards a greater use of vague standards and towards their enforcement through criminal sanctions. In the next section, we attempt to give greater weight to our argument for a new flexibility/ foreseeability balance by highlighting the efficiency arguments in favour of foreseeability.

4. Legal certainty as a requirement of efficiency

The previous sections have sought to sketch how regulators have chosen to respond to an increasingly volatile regulatory environment in the area of risk regulation, by using vaguely worded standards backed up by criminal sanctions. At the same time, we have suggested that regulatory tools such as standards, while 'smart' from the perspective of

[138] See also for a critical evaluation of the case law of the Strasbourg court concerning the *lex certa* principle Joëlle Rozie, "Beklaagde alwetend. Over het criterium van de redelijke voorzienbaarheid als maatstaf van het *lex certa*-principe in strafzaken", *Rechtskundig Weekblad*, 2012-2013, 802-817.

ensuring regulatory connection,[139] raise broader issues related to the principle of legal certainty, particularly where the norms are backed up by criminal sanctions. Our suggestion in this paper is that regulators and the judiciary need to strike a better balance between the need for flexibility with the demands of foreseeability. This, of course, is recognised in much, but certainly not in all, of the jurisprudence in section 3. However, we put the case that the current balance leans too heavily towards flexibility. In this section, we examine the relationship between flexibility and foreseeability and advance arguments, drawn from law and economics theory, as to why the balance needs to be re-set.

While the *lex certa* principle stems from the desire to protect individual rights – to make more balanced the relationship between the single individual and the powerful machinery of state – and not from any striving towards efficiency, law and economic scholarship on how people respond to incentives adds, in an age of new public management, weight to our arguments. Incentives crucially depend on the way in which a law is formulated and applied by the courts. For example, Becker's work on deterrence theory has been hugely influential in predicting a criminal's behaviour in the face of certain sanctions and probabilities of detection and conviction.[140] The underlying assumption of Becker's model is that (potential) wrongdoers are rational and therefore weigh possible gain against likely costs of their behaviour as they search for ways to maximize their individual benefits. The individuals in the model regard crime, for example, in the way that they would a legitimate business, and are assumed to have all the information necessary on the values of the relevant factors. Deterrence theory thus aims at providing the means to set deterrence at an optimal level so that when the individual makes the calculation of the costs of his or her criminal action, the expected costs should outweigh the potential benefits. These costs to the offender consist in the probability of detection and conviction multiplied by the sanction that is imposed. Thus in cases where rates of

---

[139] On smart regulation, which is here understood to mean regulation that is sensitive to the differing motivations and attitudes of regulatees and takes into account the limits of single regulatory instruments, see NEIL GUNNINGHAM & PETER GRABOSKY, SMART REGULATION (1998); also, IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION (1992).

[140] Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 (2) J.POL. ECON. 169-217 (1968).

detection and/or conviction are low, higher sanctions are required to outweigh the loss of a deterrent effect, and vice versa.

If we consider the *lex certa* principle from the perspective of deterrence theory, legal certainty is an essential prerequisite to an individual being able to predict with any degree of confidence the likely outcome of her behaviour. This is so at the level of understanding the type of behaviour that will incur a sanction and at the level of knowing clearly the severity of the sanction that will be imposed. This knowledge is thus crucial information for an individual, legal or otherwise, engaging in a calculation of the costs and benefits of behaviour. Only if a sanction is to be expected by acting in a certain way can incentives be created to prevent individuals from opting to violate the law. Thus, from an economic perspective, the rational individual has to be able to predict the costs of her actions, which is only possible if it is clear when criminal liability will be incurred; this is particularly relevant in situations in which new technological developments play a key role.

Deterrence theory is thus heavily reliant on the notion of foreseeability in order to ensure that the desired level of deterrence is achieved. Only if a sanction/ conviction is to be expected as a consequence of acting in a certain way can individuals be induced not to violate the law. The concept of foreseeability, from a law and economics approach, is thus a way of approximating the probability of criminally liability. As such and in order to optimize deterrence, foreseeability, somewhat paradoxically, requires a degree of flexibility in the application of the law, particularly in relation to new risks or new technologies. Where the principle of legal certainty entails a strict notion of foreseeability and prevents the application of existing law to new facts, perhaps by analogy, it is likely to result in under-deterrence, as the individual or business will be able to anticipate a large amount of leeway in new situations, such as, for example, in the area of nanotechnology. However, where legal certainty is applied too flexibly, so that individuals cannot reasonably predict the consequences of their behaviour, it is likely to result in over-deterrence, which raises costs and has a negative impact upon individual freedom. This is particularly so if behaviour leads to an unexpected conviction. The fear

of conviction for operations in fields that are not yet subject to specific regulation is likely to stifle innovation. There is a fine line, therefore, between under-deterrence, where no criminal liability is incurred in new situations, and over-deterrence, where the consequences of unprecedented case scenarios cannot be predicted. The concept of foreseeability is thus an important means of balancing the desired level of certainty.

Related to the deterrence theory, theories of prevention also rely heavily on legal certainty. Prevention requires individuals to take positive action to avert a situation. Where the outcome of non-prevention i.e. in action is not punishable, an individual has no incentive to take steps to prevent it. Likewise, where there is uncertainty about the consequences of inaction, the preventative effect is low. The preventive effect is thus higher the more clearly a provision sets out both the desired behaviour and the consequences of inaction.

Thus, while the rules v. standards debate within law and economics scholarship emphasises the need for flexibility and suggests the use of standards as a regulatory default instrument in the context of regulating for risk, deterrence theory stresses the need for individuals to be able to predict the outcome of their behaviour. Standards tend to be more costly for individuals to interpret when deciding how to act, since standards are given content and substance only *ex post*, i.e. after the individual has acted.[141] The more information is available beforehand, the easier it is for an individual to steer her behaviour. In scenarios in which the detailed content and scope of regulation is laid down only via case-law, which is essential in a standard-based approach, information is likely to be provided too late to regulatees to incentivise compliance and prevention. Where fast-moving technological developments are de-stabilising regulatory environments, a flexible *ex post* approach to regulation i.e. a focus on standards, is more appropriate as it allows for quicker and lower costs in adaptation to changing circumstances. However, deterrence theory and what we know about encouraging or incentivising prevention suggests the need for a level of foreseeability that is difficult, although not impossible, to create in regulation via *ex post* standards. This sets up a clash between the benefit that

[141] Cf. Fon & Parisi, *supra* note 12, at 4.

standards bring in terms of flexibility and the need for foreseeability so that individuals and operators can adapt their behaviour accordingly. Creating an optimal balance between flexibility and foreseeability is thus likely to lead to more efficient and effective regulation.

For different reasons, therefore, motivated by, respectively, concerns of legitimacy and efficiency, we suggest that European regulators in the area of risk regulation, particularly where they apply criminal sanctions, need to re-calibrate the balance between flexibility and foreseeability. This is, however, no small challenge. In the section below, we attempt to outline possible pools for regulators for grappling with the dilemma of creating optimal regulation that nonetheless protects the fundamental rights provided by the *lex certa* principle.

5. Regulatory techniques for balancing flexibility and foreseeability

There are two specific problems that we suggest arise in the context of the de-stabilization of regulatory environments through rapid technological change that is represented by the clash between flexibility and foreseeability that we are articulating in this paper. The first problem is that regulation may be too general to allow for foreseeability in the context of incentivising individual behaviour, at the same time that standards applied by the judiciary may be too vague to meet the requirements of the *lex certa* principle. Here we consider an alternative to specific rules set by the legislator *ex ante* – foreseeability over flexibility – and vague norms that are filled *ex post* by the judiciary – flexibility over foreseeability – that has been used successfully in areas such as environmental regulation: the specification of conditions *ex ante* in licences and permits, the details of which are determined *ex post* (5.1). The second problem facing the regulator is that regulation, particularly regulation that meets the demands of legal certainty, may be too static or inflexible, and hence incapable of adapting to new developments and therefore of maintaining regulatory connection. However, here, the regulatory tool of licenses and permits is unlikely to help. While permits may be capable of being designed so as to contain vague norms, they are nonetheless not completely able

to provide the necessary flexibility to ensure regulatory connection in an area of rapid development. Instead we turn to a more radical solution in order to reconcile the need for flexibility with the demands of legal certainty (5.2).

5.1. Flexibility via permits or licenses

In the law and economics literature the choice between rules and standards is to a large extent formulated as a choice between legislation and judge-made law. However, there is an alternative that is particularly relevant to the area of technology and risk regulation, and which can provide for greater specificity or foreseeability than *ex post* standards: the use of permits.[142] Permits have become an important regulatory tool in the risk society, most notably in the area of environmental law. For example, when environmental risks are regulated the precise behaviour that is expected from a polluting firm will be laid down in an individual environmental permit specific to that company that will fix relatively specific emission standards. The advantage of permits and licenses in this context is that they are *ex ante* instruments, determining the conditions under which an individual or enterprise can undertake a risky activity. As such, the general conditions under which the permit can be granted are determined in a statute while the powers to fix specific conditions in individual permits are allocated to an administrative agency. Permits thus have the major advantage of being an *ex ante* instrument, but one that can be adapted to local and specific circumstances, and thus can be more easily adapted to changing situations than rules in legislation.

Permits as an instrument of regulation create a regulatory environment in which the legislation allow regulatees to know what type of behaviour will incur what level and form of criminal sanction, thus granting a considerable degree of foreseeability, whilst the permit itself lays downs the specific demands upon the individual regulatee, ensuring an even higher level of foreseeability. At the same time as guaranteeing foreseeability, permits retain a greater degree of flexibility than statutes, as the administrative agencies empowered to decide on the specific terms of each permit or license can adapt those

[142] For the benefits (and costs) of permits walking the line between over- and under-determination, see Anthony I. Ogus, *Regulatory Institutions and Structures* 6 (Centre on Regulation and Competition, Paper No. 4, 2001).

terms to the local environment conditions, to the circumstance of the individual regulatee and to changing risk assessments. Moreover, permits, although administrative obligations, are often enforced by criminal sanctions; for example, in most environmental law, operating without a permit or violating permit conditions is often criminalized. The advantage from a foreseeability perspective of criminalizing a breach of permit conditions is that the regulatee knows, via the permit, precisely what the prescribed behaviour is and hence also what the scope of criminal law is.[143] From a deterrence perspective, it is wise to leave the enforcement mechanism that is most costly to administer as a back-up for the hard core cases.

However, while the use of permits is a key instrument in reconciling optimal regulatory environments and the need for flexibility with the demand to provide precise conditions to the regulatee, this regulatory tool is not without its problems. A first difficulty with permits is that even though on paper permits can (and usually are) more flexible than rules laid down in legislation, in some cases adapting permits to changing conditions may nonetheless incur significant costs. Thus whilst permits offer greater flexibility initially, by allowing administrative agencies to set precise standards *ex post*, that flexibility tends to decrease over time because modifying a permit to meet changing conditions is expensive. This means, for example, that the operation of some enterprises are regulated by permits that are at least twenty years old, in which the standards laid down are thoroughly outdated. Permits may thus be a good means of allowing for adaptation to local circumstances, but they are not well-suited for addressing the issue of volatility or the instability of the regulatory environment.[144]

A second problem with permits in situations of regulatory volatility is that permit conditions are set by administrative agencies. This is very costly. The expense of scrutinizing each and every permit application and of setting individual conditions for

---

[143] See Susan F. Mandiberg & Michael G. Faure, *A Graduated Punishment Approach to Environmental Crimes: Beyond Vindication of Administrative Authority in the United States and Europe,* 34 (2) COLUMBIA J. ENVTL. L. 453-459 (2009).

[144] This could of course be different when permits would indeed adapt dynamically to changing circumstances; this is not always the case.

each application is high, even before the opportunity costs to industry that arise from any delay in the licence being granted are added.[145] Other costs are also associated with permits. To the extent that administrative agencies set these permit conditions in the public interest, the use of permits may increase social welfare. However, administrative agencies are also subject to capture by the industry that they regulate. Lobbying, for example, can result in the setting of sub-optimal standards. This is particular a problem where permits are set by administrative agencies located at the local level, where local authorities are more susceptible to pressure by industry interests.[146] This is most clearly seen in the general practice that the licensing of industry by local governments generates revenue for local government.[147] As soon as a permit system is (ab)used for anti-competitive purposes by creating barriers to entry welfare losses arise.[148] To avoid the costs associated with capture, it is necessary to introduce a system of financial accountability of local authorities and agencies. Such monitoring can be done via systems of public audit; or via procedural accountability guarantees that require local authorities to comply with the doctrine of 'due process';[149] or regulatory impact analysis, that ascertains a public administration's 'substantive accountability'.[150] All these methods are likely to involve the use of external experts and public consultations. Such monitoring increases administrative costs considerably, although they are likely to be justified from a social welfare perspective if weighted against the possible social costs of administrative capture. Nonetheless, from a cost-benefit perspective, monitoring clearly adds additional costs of the monetary type, even where the social costs that may arise from capture are thereby mitigated or even avoided.

---

[145] Anthony I. Ogus, *Regulatory Institutions and Structures* 6 (Centre on Regulation and Competition, Paper No. 4, 2001).

[146] See Michael G. Faure et al., *Bucking the Kuznets Curve: Designing Effective Environmental Regulations in Developing Countries*, 51 (1) V.I. J. INT'L L. 120-123 (2010).

[147] Nick Devas & Roy Kelly, *Regulation or Revenues? An analysis of local business licenses case study of the single business permit reform in Kenya*, 21 PUBLIC ADMINISTRATION AND DEVELOPMENT, 381, 381-391 (2001). Also Ogus (2001), supra note 145 and Anthony I. Ogus, (2002), *Regulatory Institutions and Structures*, 73 ANNALS OF PUBLIC AND COOPERATIVE ECONOMICS 631, 627-648 (2002), *available at* http://ssrn.com/abstract=368572.

[148] Thomas G. Moore, *The Purpose of Licensing*, 4 J.L. & ECON. 93 (1961).

[149] Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions,* 1 JOURNAL OF LAW, ECONOMICS AND ORGANIZATION, 81-100 (1985).

[150] Julie Froud et al. *Controlling the Regulators* (London: Palgrave Macmillan, 1998).

A third problem that may arise with the use of permits to regulate risk is that, despite allowing for both greater flexibility and more specificity in the situations subject to regulation, it is unlikely that permits will be able to include for all the possible risk scenarios that will arise from technological developments. What occurs in practice is that either the permit itself contains vague terminology, such as obliging the licensee to use their "best efforts" to prevent harm to third parties, or that the founding legislation contains, in addition to the conditions of the permit, clauses to the effect that the permit holder shall take reasonable measures to prevent all possible harm resulting from her activities. In some cases, these vaguely worded duties of care are enforced with criminal penalties.[151] In situations in which (vague) standards are introduced, either in the permit or in the founding legislation, the problem of foreseeability and the related question of compatibility with the *lex certa* principle obviously re-emerge.[152]

In sum, while permits are optimal instruments for regulating complexity stemming from local differentiation, at least for a price, due to their ability to balance flexibility with foreseeability, they are much less well suited to situations of volatility in the regulatory environment. Permits do not easily allow for continuing flexibility – vital where the target of regulation is subject to rapid development – because they are likely to become quickly out-dated and are expensive to administer and monitor. As such, permits are likely to function as rules in unstable regulatory conditions rather than as standards, and therefore have the same disadvantages. Where, however, the terms of license attempt to accommodate greater flexibility by returning to vague requirements, they fall foul of the foreseeability principle. What alternative regulatory techniques or tools are, then, available to the regulator? The suggestion of this next section of the paper is that development risk, combined with prospective overruling, constitutes a key regulatory tool or technique in reconciling flexibility and foreseeability in the risk society of the twenty-first century.

[151] See Faure & Visser, *supra* note 65.
[152] *Ibid.*, 349-351.

5.2. Applying 'development risk' as a regulatory technique in situations of regulatory volatility

One area of law that has long struggled with the need for regulation to provide flexibility whilst guaranteeing a clear standard of foreseeability in unstable regulatory environments is the field of civil liability. One of the primary aims of liability is to incentivise the potential tortfeasor to act so as to prevent his action or inaction from causing harm to others. A great deal of research has been conducted on the negative effects of retro-active regulation in liability[153] and law and economics scholarship has clearly shown – as deterrence theory would suggest – that an *ex post* finding of liability for behaviour that was not considered wrongful at the time that it took place rarely serves any purposes of accident prevention.[154]

However, the same scholarship has also shown that in situations in which rapid technological developments lead either to the emergence of new risks or to improvements in the ability of regulatees to prevent risks at lower costs, it may be optimal for courts to impose more severe sanctions or to extend liability to behaviour that was not previously deemed wrongful. This research in the law and economics field has concluded that, in situations in which standards could be stricter for no greater cost whereby the risk to human health and the environment were to be further reduced, it would lead to sub-optimal regulation if tortfeasors were only to be held liable for compliance with an existing standard and could under no circumstances be held liable for risks that had not been foreseen.[155] Instead, this research asserts that the knowledge or foreseeability of a regulatee that they may be held liable *ex post* for behaviour that causes harm creates incentives for a potential tortfeasor to obtain as much information as possible about the

[153] *See*, e.g., Kenneth Abraham, *Environmental Liability and the Limits of Insurance*, 88 COLUM. L. REV. 942. 957-959 (1988) and James Boyd & Howard Kunreuther, *Retro-active Liability or the Public Purse?*, J. REG. ECON. 79 (1997).

[154] *See* Michael Faure & Paul Fenn, *Retroactive Liability and the Insurability of Long –Tail Risks*, 19 INT'L REV. L. & ECON. 487 (1999). It might of course, however, serve other purposes, such as sparing the taxpayer the cost of providing victims with compensation.

[155] *See*, e.g. Ellen Schwartz, *Products Liability, Corporate Structure and Bankruptcy: Toxic Substances and the Remote-Risk Relationship*, 14 J. LEGAL STUD. 689 (1985).

risks associated with their behaviour.[156] The creation of such incentives is referred to in the literature as 'development risk liability', and is intended to provide the regulatee with sufficient and appropriate incentives to invest in research on the risk of their activities and into optimal technologies to prevent or minimise those risks.[157]

5.2.1. The technique of 'development risk liability'

The application of development risk to a party obviously leads to a flexibility/ foreseeability dilemma. On the one hand, flexibility demands that the standard setting process in civil law is seen as a learning process whereby the standard of care is not static but changes over time.[158] It would clearly lead to regulatory disconnect and thus ineffectiveness to hold that due care standards should never change. There may be many reasons, for instance new technological insights, as to why judges might impose a more stringent standard of care than is generally recognised as representing the legal standard at that moment. This new standard can, moreover, have an important signalling function for other parties in the market who can adapt their future behaviour to the new circumstances. However, the foreseeability question, and thus one of fundamental rights, arises with regard to the individual defendant in the particular case in which a new standard of care is set. Is it acceptable to sacrifice the guarantee of legal certainty for the benefit of a more efficient standard in the future by rendering an individual or individual operator retroactively liable for behaviour that was not considered wrongful at the time when it was committed?

---

[156] This point has been made by Steven Shavell, *Liability and the Incentive to Obtain Information About Risk*, 21 J. LEGAL STUD. 259 (1992). And see Louis T. Visser & Heicko O. Kerkmeester, *Kenbaarheidsvereisten en Gewoonten als Verweren Tegen een Aansprakelijkheidsaktie: een Rechtseconomische Benadering*, TIJDSCHRIFT VOOR MILIEUAANSPRAKELIJKHEID 48 (1996).

[157] See Michael Faure & David Grimeaud, *Financial Assurance Issues of Environmental Liability, in* DETERRENCE, INSURABILITY AND COMPENSATION IN ENVIRONMENTAL LIABILITY. FUTURE DEVELOPMENTS IN THE EUROPEAN UNION 59 (Michael Faure ed., 2003).

[158] This argument has been powerfully stressed by Claus Ott & Hans-Bernd Schäfer, *Negligence as Untaken Precaution, Limited Information and Efficient Standard Formation in the Civil Liability System*, [1997] IRLE, 15-29.

One case, discussed already in section 3, that has seen courts apply development risks in precisely this way in the area of criminal law is that of *C.R. v. UK*.[159] In this case, the House of Lords upheld the defendant's conviction for a crime – the attempted rape of his estranged wife – that was not yet an offence in England & Wales on the basis that the defendant could reasonably have been expected to know that the common law defence against marital rape no longer accorded with contemporary societal norms and thus could no longer act as a defence in such situations. Lord Keith of Kinkel, on behalf of the Court, concluded that relying on the Hale proposition of 1736, that a women gives her irrevocable consent to sexual intercourse at the moment of marriage, was no longer possible. He stated:

"Hale's proposition involves that by marriage a wife gives her irrevocable consent to sexual intercourse with her husband under all circumstances and irrespective of the state of her health or how she happens to be feeling at the time. In modern times any reasonable person must regard that conception as quite unacceptable."

Lord Keith went on to dismiss the idea that the Court was engaging in the retroactive application of law in denying the applicant's appeal by noting that,

"This is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it."[160]

This conclusion was supported by the European Court of Human Rights, which appears to rely upon Article 17 of the Convention – the abuse of rights clause – to dismiss concerns about any harm done to the rights of the applicant. It is worth quoting the passage in full in order to gain a fuller understanding of the Court's reasoning:

"The essentially debasing character of rape is so manifest that the result of the decisions of the Court of Appeal and the House of Lords – that the applicant could be convicted of

---

[159] Although it is possible to view this case as an example of prospective overruling – see the Law Commission's report on the growing number of exceptions to a husband's immunity that could have suggested to a reasonable observer that it was only a matter of time before it was done away with altogether (see para 22 of *C.R. v. the UK*) – we consider an example of a development risks approach, because of where both the House of Lords and Strasbourg Court lay emphasis in their reasoning.

[160] R v. R, 23 October 1991 ([1991] 4 All England Law Reports 481.

attempted rape, irrespective of his relationship with the victim – cannot be said to be at variance with the object and purpose of Article 7 of the Convention, namely to ensure that no one should be subjected to arbitrary prosecution, conviction or punishment. What is more, the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom."[161]
The basis for the European Court's reasoning is thus that a greater injustice would be done by viewing the English courts' development risks approach towards the Hale Proposition as violating the guarantees of Article 7 ECHR. By relying on the idea of development risks – even in such a sensitive area as criminal law – the English courts were able to ensure regulatory (re-)connection.

Obviously, the rape case before the House of Lords is of a totally different nature than the foreseeability dilemma with respect to technological risks, central to this paper. However, the relevant point in both cases is the same, being the balance between on the one hand the need for flexibility and adaptation to (in that case societal) changes and on the other hand the question whether these changes are foreseeable for the persons to whom they apply. The European court's decision sets the standard of foreseeability extremely low and makes many observers, including the present authors, uneasy. While the decision may have been justifiable as an extremely exceptional case, it arguably failed to strike the right balance between flexibility and foreseeability.

A case from the German system, in which a court applied the idea of development risks but was able to create flexibility without sacrificing foreseeability, arguably serves as a better example. The German Bundesgerichtshof, the highest German civil and criminial court,[162] in a 1980s case concerning a skiing accident that had occurred on the well-known Zugspitzeplatte, in which the victim had hit an unprotected ski lift pillar, came up with an interesting approach to standards of liability. The Court first held that the party

[161] *C.R. v. UK*, *supra* note 79, para. 42 (emphasis ours).
[162] See Bundesgerichtshof, 23 October 1984, [1985] *Neue Juristische Wochenschrift*, (NJW), 16-20 and Bundesgerichtshof, 14 March 1995, [1985] NJW, 26-31.

responsible for the ski lift had violated a general duty of care owed to the skier. It grounded this judgement in the following way:

> "Die mit einer solchen Abpolsterung verbundenen Kosten stehen nicht außer Verhältnis zu ihren aus den Schleppliften zu erzielenden Einnahmen. Zudem ist der Unternehmer in der Lage, die Aufwendungen über den Fahrpreis weiterzugeben." [The costs associated with the padding of the ski lifts are not disproportionate to the expected gains. In addition, the business is in the position to pass on the related expense to the users via the ticket price.]

However, in considering the question of whether the ski-lift operator was also to blame for the accident, the Court concluded that it was not:

> "Jedoch muß den Verkehrssicherungspflichtigen der Pflichtverstoß bei Anwendung verkehrserforderlicher Sorgfalt erkennbar gewesen sein, wobei Bewertungszweifel über die Pflichtmäßigkeit oder Pflichtwidrigkeit des schädlichen Verhaltens zu seinen Lasten gehen. Hier fällt ins Gewicht, daß Entscheidungen Deutscher Gerichte zur Sicherung von Liftstützen zum Schutze der Skiläufer bei derartigen Pistenverhältnissen im Unfallzeitpunkt, soweit ersichtlich, nicht ergangen waren. Eine solche Sicherungspflicht lag auch nicht ohne weiteres in der Tendenz der bis dahin ergangenen Rechtsprechung zur besten Sicherungspflicht." [However, when applying the required care in social life, the fact that the duty of care was violated should be knowable to the individual. Doubts concerning the question whether his behaviour violated or complied with the duty of care are held against the individual who has to comply with the duty. In this respect, an important aspect is that as far as we can see, at the moment of the accident, there were no decisions of German courts concerning the padding of skilifts to protect skiers. Such a duty of care was moreover not foreseeable based on the until then applicable case law concerning the optimal duty of care.]

In announcing that it would abide by existing norms, here relating to duty of care, in the case before it but apply a different, stricter, standard in the future, the Bundesgerichtshof

made use of the technique of prospective overruling.[163] The advantage of this technique was that it allowed the Court to introduce a stricter standard of the duty of care – to update the regulation in this area to take account of changes in the cost to operators of padding ski-lifts – while at the same time respecting the guarantee of legal certainty for the defendant before it.

Of course, as Lord Nicholls of Birkenhead noted in the context of *Natwest v. Spectrum Plus Ltd.*,

"In all cases development of the common law, as a response to changed conditions, does not come like a bolt out of a clear sky. Invariably the clouds gather first, often from different quarters, indicating with increasing obviousness what is coming."[164] This is true of most legal change in most legal systems. The difference between the normal process of legal reform and development risk liability is that normal legal reform takes place via regulation whereby new standards are foreseeable for the regulatees or include a foreseeable adaptation via case law. Development risk liability implies liability even if the risks may not have been foreseeable, thus providing further incentives for research into risks that were not known on the basis of the state of scientific and technical knowledge when the product was put into circulation.[165]

Our contention in this paper is that development risks constitutes a regulatory technique of real value in ensuring the effectiveness and legitimacy of regulation in situations of regulatory volatility. As the German case makes clear, a distinction has to be made between the retrospective application of a new liability regime and liability for development risks. Holding actors liable for risks that are not yet known is not necessarily inefficient, precisely where, if they know in advance that a strict form of

---

[163] The decision in this case has been supported in the Dutch legal literature by JAN DRION, STARE DECISIS. HET GEZAG VAN PRECEDENTEN (1950) and by Olav Haazen, *De Temporele Werking van een Rechterlijke Uitspraak*, *in* DE ROL VAN DE RECHTER IN DE MODERNE WESTERSE SAMENLEVING 171 (Henry G. Schermers et al. eds., 1993).
[164] National Westminister Bank plc v. Spectrum Plus Limited and others [2005] UKHL 41.
[165] It is the formulation which can be found in art. 7(e) of the European Product Liability Directive of 25 July 1985 (*Official Journal* L210/29 of 7 August 1985: "The state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered."

liability applies, it will provide incentives to acquire information about potential new risks and on the optimal techniques for preventing that risk from ocurring. Thus strict liability could well provide appropriate incentives for investment in optimal preventive techniques. This, however, does not require, or indeed perhaps justifies, the retrospective application of new standards or new contexts that do not positively affect future incentives for prevention i.e. where the regulatee was unaware that they would be held to a strict liability standard. Development risk liability refers exclusively to risks that could not be known by (industrial) operators at the time of the design of their practice, process or product and that appear later in the course of the process of operation or manufacture; this definition also includes technological improvements that enable risks to human health or to the environment to be reduced i.e. that do not increase the risk of the product or primary process but that create the possibility of reducing risk further. In such cases, however, the legal rule as such does not change but the standard of liability to which an operator is held is viewed flexibly.

Liability for development risks is desirable from an economic perspective where it has the possibility to positively influence incentives for prevention and where the development risk liability is not retroactive liability in disguise, which has of course other reasons for being unattractive than merely being inefficient.[166] Development risks is, then, a valuable technique for ensuring that regulation keeps pace with technological developments. Moreover, where regulatees are aware that they will be held to a strict liability standard, the law provides sufficient certainty both to incentivise risk minimisation and to protect individual rights. However, where a standard of strict liability has not previously been used or where the applicable sanction is a criminal one, applying a development risks approach in determining the appropriate standard of liability falls foul, we suggest, of the principle of foreseeability, or *lex certa*.[167] It is in these

---

[166] A similar – balanced – conclusion concerning the efficiency of a development risk defense is reached by Gerhard Wagner, *Haftung und Versicherung als Elemente der Techniksteuerung*, VERSICHERUNGSRECHT, 1450, 1441-1480, (1999).

[167] Of course, the case of *C.R.* suggests that development risks will not fall foul of the Strasbourg standard as it presently is; however, as we suggested above, the ECJ sets higher standards of legal certainty and so arguably should the European Court of Human Rights.

circumstances that we propose the use of prospective overruling as a judicial technique for preventing an equal injustice in applying a development risk approach.

5.2.2. The dilemma of prospective overruling

Prospective overruling, however, has something of a chequered history and is not without controversy, particularly in the criminal law context. While some senior judges have suggested that the use of prospective overruling is a question of judicial responsibility,[168] other, equally senior judges, have suggested that it introduces arbitrariness and unfairness into judicial decision-making.[169] We will attempt to address these concerns below in examining prospective overruling as a technique.

Prospective overruling is a judicial technique in which a previous precedent or authority is overruled without the new ruling having retrospective effect. It thus represents a departure from the fundamental notion that judicial decisions that develop or change the law necessarily have retroactive effect. It is or has been used where a court wishes to overturn or amend bad law but is wary of the consequences of the retrospective application of their finding, whether because of the inherent unfairness that would result to an individual who had relied on the existing law in good faith[170] or because of reasons of practicality, where the decision would have sweeping consequences for the operation of the judicial system.[171] Although appearing similar, prospective overruling differs from *obiter dicta* in two significant ways: firstly, while judges can use *obiter dicta* to declare certain rules to be bad law or to comment on the likely direction of necessary legal reform, such comments do not entail that the decision in the case before them will be

---

[168] Notably, of course, Roger J. Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility,* 28 HASTINGS L.J. 533 (1977). Traynor was a Justice of the California Supreme Court, 1940-64 and Chief Justice of California, 1964-70. He is one of the most respected American jurists of the twentieth century.

[169] See Lord Birkenhead, *Natwest v. Spectrum* [2005].

[170] *See*, e.g., a 1675 English case detailed by W. Leach, PROPERTY LAW INDICTED, 16-17 (1967); cited in Traynor, *supra* note 141.

[171] *See Linkletter v. Walker*, 381 U.S. 618 (1965), in which the US Supreme Court decided not to apply its finding in *Mapp v. Ohio* (367 U.S. 643 (1961)) – extending an earlier ruling that the fourth amendment of the Constitution prohibits unreasonable searches and seizures by government agents, thereby excluding evidence gained by violating the amendment, to the states – retrospectively to judgements that had become final before *Mapp*. For consideration of these cases, and others, *see* Traynor, *supra* note 141, at 792-796.

inconsistent with a future case. Secondly, *obiter dictum*, while possibly highly influential, does not acquire the quality of stare decisis and therefore is not binding.

There a number of different ways in which a court can use prospective overruling:[172] firstly, a court can announce a new rule or standards that will apply only to future cases i.e. not to the case before it in the instant dispute. The old rule would also govern any cases that arose from action taken prior to the announcement of the new rule but determined after it. This has been called 'pure' prospective overruling.[173] A second approach would be to announce a new rule that is only applicable to future cases that arise after the announcement but, as an exception, to apply it to the instant case. A third alternative is to apply the new rule not only to the case at hand but to all other cases already pending at the time of announcement; this approach excludes those cases in which the action that motivated them predates the announcement but where proceedings had not already been commenced at the moment of declaration of the new rule. Finally, a fourth possibility would be for a court to announce a new rule not having retroactive effect but to suspend the entry into force of that new rule until a future date. This technique is used both to allow those actors likely to be affected by the change to adapt their behaviour accordingly, and to give the legislature the opportunity to enact a different rule should they so wish.[174] Traynor termed this form of prospective overruling 'prospective-prospective overruling'.[175] In this version of prospective overruling, the new rule does not apply to the case in which it is announced, or to any other cause of action that arises before the delayed entry into force of the new rule. The ECJ, for example, has accepted the need to place temporal limitations on its rulings in the interests of justice,

---

[172] See Ben Juratowitch, *Questioning Prospective Overruling*, N.Z. L. REV. 393, 395 (2007). Also, Walter V. Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y.U.L. REV. 631 (1967).

[173] Juratowitch, *supra* note 172, at 406.

[174] This form of prospective overruling has been used in a number of instances by US Courts; see, e.g., Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959); Parker v. Port Huron Hosp., 361 Mich. 1, 28, 105, N.W.2d 1, 14 (1960); Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 292, 118 N.W.2d 795, 803 (1962).

[175] Traynor, *supra* note 168, at 784.

although it has declared that it does so only in exceptional circumstances.[176] A variation on this form of prospective overruling has been suggested by Advocate General Jacobs, whereby both the retrospective *and* prospective effect of a ruling of the European Court of Justice could be subject to a temporal limitation, in that case until the Member State concerned had had a reasonable opportunity to consider the introduction of amending legislation.[177]

In addition to the European Union, a number of jurisdictions have used or accepted the possibility, if only in principle, of prospective overruling in exceptional circumstances, including the US, India,[178] New Zealand,[179] Canada,[180] the UK and Germany. The European Court of Human Rights has been understood to issue prospective rulings,[181] although there is some doubt as to whether its 'dynamic' approach to Convention interpretation is properly classified as such;[182] however, it certainly accepts such rulings in domestic courts as compatible with the rule of law.[183] At its apogee in the US, the US Supreme Court ruled in the case of *Linkletter v. Walker* that in both criminal and civil cases, "the accepted rule today is that in appropriate cases the Court may in the interests of justice make the rule prospective".[184] However, since the 1970s, the use of retrospective overruling in the US has been in retreat. While it remains unclear as to whether the use of 'pure' prospective overruling (where the new rule does not apply to the case at hand) has been abandoned in civil cases,[185] the Supreme Court has overturned its earlier enthusiasm and now prohibits prospective overruling in criminal cases[186] and

---

[176] See for an example of such a temporal limitation, *R (Bidar) v. Ealing London Borough Council* [2005] 2 WLR 1078, 1112, para. 66-69.
[177] Case C-475/03 Banco Popolare di Cremona v Agenzia Entrate Ufficio Cremona, 17 March 2005, paras. 72-88.
[178] *See* I.C. Golaknath v. State of Punjab, AIP 1976 SC 1463.
[179] Chamberlains v. Sun Poi Lai [2007] 2 NZLR 7.
[180] *Re Manitoba Language Rights* [1985] 1 SCR 721.
[181] See Eur. Court H.R., *Goodwin v. UK* (2002) 35 EHRR 18.
[182] For what seems to us a sensible reading of the Court's approach in *Goodwin*, see Juratowitch, *supra* note 172, at 398-400.
[183] *See CR v. UK*, *supra* note 79.
[184] Linkletter v. Walker, 381 U.S. 618 (1965), 628.
[185] *See* Glazner v. Glazner, 347 F 3d 1212 (2003), a decision of the Court of Appeals of the Eleventh Circuit.
[186] *See* Griffith v. Kentucky, 479 U.S. 314 (1987).

the use of selective prospective overruling (i.e. 'non-pure') in civil cases.[187] Yet, despite the discrediting of prospective overruling as a technique in the US more than twenty years ago, it continues to attract the interest of senior common law judges. In a 2005 case, *Re. Spectrum Plus*,[188] the House of Lords found that it was theoretically possible for a judgement to be overruled with prospective effect only; and in 2007, two members of the New Zealand Supreme Court accepted the same possibility.[189]

5.2.3. The pros and cons of prospective overruling

Given that the heyday of prospective overruling has, until recently, been behind us, what reasons are there for being suspicious of the technique? There are, it seems, two main reasons for rejecting prospective overruling wholesale. The first has been articulated by the Australian High Court in its emphatic refusal to countenance the use of prospective overruling and concerns an understanding of the nature of judicial interpretation; in the case of *Ha v. New South Wales*, the Court ruled that "it would be a perversion of judicial power to maintain in force that which is acknowledged not to be the law".[190] In this reading, where a court determines that the rule they are required to apply is bad law, i.e. that the 'real law' is actually now a different standard, it is simply untenable to continue to apply the wrong standard, even where it results in a manifest injustice to one of the parties before it. The notion that prospective overruling is a perversion of judicial power gains further credence from the commonly accepted understanding that the role of the judiciary is to interpret the law in light of the case before it; where the primary function of the courts is to adjudicate between parties, going beyond the particular case by making a general statement about the law is seen by some as "blatantly legislative".[191] While the

---

[187] *See* James B Beam Distilling Co v. Georgia, 501 U.S. 529 (1991), and Harper v. Virginia Department of Taxation, 509 U.S. 86 (1992).

[188] [2005] 2 AC 680.

[189] Chamberlains v. Sun Poi Lai [2007] 2 NZLR 7.

[190] Ha v. New South Wales (1997) 189 CLR 465, 504.

[191] See Juratowitch, *supra* note 172, at 407. See also the concurring opinion by Justice Harlon in *Mackey v. United States* (401 U.S. 679), in which he stated: "If we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all … In truth, the Court's assertion of power to disregard the law in adjudicating cases before us that have not already run the full course of appellate review is quite simply an assertion that our constitutional function is not one of adjudication, but in effect of legislation."

legislature looks forward, the proper direction of the courts' attention is backwards, applying the existing law to situations that have already happened. This view was echoed by the US Supreme Court in *Griffith v. Kentucky*, in which it ruled, concurring with earlier minority opinons by Justice Harlon, that the "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication".[192]

The second reason for critics to reject prospective overruling concerns the impact upon individuals of arbitrariness to which propective overruling gives rise. In *Griffiths v. Kentucky*, the US Supreme Court stated quite simply that "selective application of new rules violates the principle of treating similarly situated defendants the same."[193] Once a rule or practice has been declared bad law or unconstitutional, it violates the central notion of equality before the law if the new rule is applied to benefit one individual but not another. These concerns can be somewhat alleviated by applying the new rule to all cases steming from action arising at or after the time of the cause of action of the case in which the new rule is announced i.e. by limiting the normal retrospective effect of rulings only marginally, but to do so would be to reduce considerably the possible benefits of prospective overruling. In effect, those parties who had relied in good faith on the previous standard in such actions would be held to a new, stricter standard and thus their legitimate expectation of and right to legal certainty would be compromised.

What, then, are the benefits? In particular, would other, less dramatic, techniques do the same job without encountering the hostility that prospective overruling can inspire? *Ober dicta* could be used, for example, to indicate a likely direction of legal reform without actually introducing a new rule. However, it is in large part the binding nature of a prospective decision that makes it such a useful technique in balancing flexibility and foreseeability. While *ober dicta* could be used in a similar way, because such statements lack the ability to bind future courts, they reduce the foreseeability of parties at the same as reducing the incentive for operators to adapt their behaviour; operators may instead

[192] *Griffiths v. Kentucky*, 479.
[193] *Id.*

play a waiting game in which they fail to carry out adaptations in the hope that a different court will continue to apply the existing standard. Prospective overruling, we suggest, cannot be replaced by the less controversial tool of *ober dicta*. Moreover, *obiter dicta* would obviously only provide a solution in those legal systems where they exist, which is not the case for many of the civil law systems.

The first main benefit of prospective overruling follows on from the assertion that it is a perversion of judicial power to uphold a law that is understood to be unsound. Courts are rightly reluctant to overturn a precedent, even where they are convinced of the unsoundness of the rule in question, where the harm caused by retrospective change is greater than the supposed benefits. Thus, Justice Traynor suggested, in his classic article on the topic, that the main benefit of the technique of prospective overruling is that it enables courts to change bad law without upsetting the expectations of those who have relied upon it.[194] For Traynor, prospective overruling, in direct contrast to its critics, is a necessary tool for the proper administration of justice. Allowing bad law to stand simply because to overturn a precedent would entail unacceptable and unreasonable hardship for one of the parties concerned is an equally perverse understanding of the judicial role.

Traynor's concern is arguably borne out in European risk regulation. Here what we see occuring is the limitation of liability of producers and operators precisely because of a reluctance on the part of the regulator to use development risk for fear of applying standards retrospectively. The recent EU Product Liability Directive,[195] for example, explicitly excludes liability if the producer can prove that, having regard to the circumstances, it is probable that the defect did not exist at the time when the product was put into circulation. Moreover, the 'state-of-the-art defence' is provided for in Article 7(e) of the directive, which protects the producer from liability if she can prove that the state of scientific and technical knowledge at the time when the product was put into

---

[194] Traynor, *supra* note 168, at 779, inc. footnote 16.
[195] Article 7(b) of the European Product Liability Directive of 25 July 1985 (*Official Journal* L210/29 of 7 August 1985) excludes liability of the producer if he proves "that, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that this defect into being afterwards".

circulation was not such as to enable the existence of the defect to be discovered i.e. signaling a preference for the opposite of development risks liability.[196] Article 15(1)(b) does provide an option for Member States to introduce liability for development risks; however this option has only been taken up to date by Luxembourg and Finland.[197] This reluctance to apply development risks liability may lead to inefficiencies and may reduce the incentives to producers to reduce the risk of products where they are able to do so in a cost effective manner. In such a situation, the use of prospective overruling would avert the fear of new standards being applied retrospectively, whilst at the same time allowing for standards of liability to be made stricter over time as new technological develops and allow producers to adapt their products to minimise the risk of harm.

In response to the criticism that prospective overruling sees courts assume powers that belong only to the legislature, Traynor argued that such objections on grounds of the limitations of judicial power reflect an unecessarily restrictive and conservative interpretation of the role of the judiciary. The understanding that attention to the general state of the law is solely the task of the legislature is based upon the old-fashioned view that judges should not make law. While here is not the place to rehash this argument, it suffices to note that this notion has been successively undermined across the twentieth century by legal realism and, later, the critical legal studies movement. If it is not possible to maintain the strict delineation between the act of law-making and the act of legal interpretation, the objections to prospective overruling on the grounds that it violates the separation of powers loses much of its bite.

The concern that the technique may violate the principle of equality before the law is much more difficult to dismiss. Prospective overruling, particularly of the pure variety, undoubtedly involves treating cases, and thereby individuals, differently by applying

---

[196] The state of the art defense has also been addressed in the American context by James Boyd & Daniel E. Ingberman, *Should 'Relative Safety' be Test of Product Liability*, JLS, 433-473 (1997). They show that the 'customary practice test' tends to induce inadequate safety, whereas the 'technological advancement test' tends to induce excessive safety.

[197] And by Spain for food on medical products as well as by France for products derived from the human body. See the overview of the transposition in domestic law, provided in the *Green paper on the liability for defective products* (COM (1999) 396 final of 28.7.1999), pp. 35-36.

different rules to similar situations and therefore can introduce arbitrariness into the administration of justice. Only the foolish would imagine that there is no arbitrariness in the process of justice but this cannot, of course, be an argument for introducing more. A firmer argument would be that, in a very few special instances, prospective overruling is a necessary technique to ensure that justice is done; just as, on very rare occassions, applying development risks in the area of criminal law *retrospectively* may also be required for the interests of justice to be served, as the UK and Strasbourg courts found in *C.R. v. UK*. Prospective overruling enables a stricter standard of liability, whether criminal or civil, to be achieved for the future, thus presumably serving the common good of reducing risk to human health and the environment; whilst avoiding the unfairness of applying this new standard to the present defendant, where he could not reasonably have anticipated the new rules and relied on the earlier standard in good faith.

5.2.4. Application of development risk liability to the enforcement of risk regulation

The stricter standard of legal certainty in the context of criminal law, and the explicit prohibition of retroactive legislation in criminal law, has meant that there has been little discussion of development risks or prospective overruling in literature on risk regulation, whether in the European context or beyond. Moreover, there is a even more pronounced reluctance to apply development risk as a judicial technique in regulating for risk. This, we would suggest, is highly likely to lead to regulatory failure by ensuring regulatory disconnection and thus ineffectiveness, with all the consequences for the risk to human health and environment that such a failure is likely to entail. At the same time, operators are being held criminally liable for actions that fall under vaguely defined standards – an unacceptable situation that undermines the rule of law and, we would argue, violates individual rights, whether this is recognised as such by the European Court of Human Rights or not.

What we are therefore suggesting is that courts apply development risk liability as a regulatory tool in situations of the enforcement of risk regulation i.e. in legal environments in which technology plays a key role. This would entail, for example, a court examining whether, taking into account the state of the art and the available market

information, it was reasonable for a defendant to have anticipated that the norms had changed, and thus whether it was reasonably foreseeable that her behaviour would incur criminal liability. Where it might be unreasonable to expect the average individual constantly to anticipate what changes in standards might come about, the type of regulation that we are concerned with here – risk regulation – applies overwhelmingly to producers and operators i.e. corporations, which can reasonably be expected to have access to both up-to-date scientific and technological information within their field of operation and to seek regular legal advice as to the standard of liability to which they will likely be held. Such an expectation is thus perfectly in line with Strasbourg jurisprudence on the 'special standard' of legal certainty that applies to corporations and professionals.

What we, in additon, suggest is that in certain situations, for example in which a criminal sanction is at stake or where the interests of justice otherwise require, courts use prospective overruling as a complementary judicial technique to ensure that the requirements of legal certainty are met. Were a model of prospective overruling to be applied in such scenarios, however, courts would apply the existing standards to the defendant before them but would declare that in the future the standard will be applied differently. On this basis, courts would decide what standard of liability to apply and, where a new standard of liability is determined, whether justice is best served by applying their ruling retrospectively or prospectively. It is, of course, possible to imagine other criteria that could be applied to restrict the use of prospective overruling, such as that it should not be applied to the detriment of an individual, or it is a technique only available to the most senior courts.[198] The development of strict criteria must necessarily be, however, the subject of another paper.

In addition to strict but necessarily general criteria that would be needed to govern the application of development risk, whether applied alone or in tandem with prospective

[198] For example, in *Chevron Oil Co v. Huson* (404 US 97 (1971), 106-107), the Supreme Court summarized the three factors to be taken into account when considering if a decision should be applied non-retroactively i.e. prospectively: whether the decision established a new principle of law, whether retrospective operation would advance or retard the operation of the new rule, and whether the decision could produce substantial inequitable results if applied retrospectively. Traynor developed criteria in his seminal article, *supra* note 168, at 798.

overruling, other, practical conditions would also need to be addressed. For example, the use of development risk liability assumes that judges understand the technological developments that they are called to judge upon and are up-to-date with the state-of-the art. One method is to instigate rigorous judicial training across all courts – something that, as we saw in section 2, Shavell, among others, has advocated. However training judges, given the the speed at which technological developments occur, the sheer range of technologies they would be required to have mastered and the depth of specialisation they would be required to have, is likely to be both impractical and, we suggest, unfeasible. A less onerous method of achieving the same goal would be to require courts to seek expert advice on the state of technology at the moment the disputed action occurs and on the reasonably availability of risk-mitigating technology available to the defendent. Such a system would involve additional costs being attached to the judicial process, and thus to the implementation of standards; however, we contend that these costs would be easily dwarfed by the costs of ineffective regulation that our proposal intends to address. Moreover, these costs are unlikely to tip the balance of optimal regulatory instrument from standards to rules, given the need for flexibility in a volatile regulatory environment.

An alternative to prospective overruling, however, would be, where a legal system allows for such a concept, the idea of mistake in law.

5.2.5. Mistake in law

One way in which prospective overruling could take form in criminal law could be, depending on the legal system, via the concept of 'mistake of law'. This notion is hinted at in a number of different legal systems. The idea here would be that where a defendant acted on the basis of her knowledge of the legal norm and could not have reasonably been expected to know that the legal norm would be applied more strictly, she would be 'mistaken' as to the content of the law, which would therefore constitute a defence to the charges and result in acquittal.

Mistake of law is connected to the *mens rea* requirement.[199] For example, the German mistake of law doctrine is based upon the requirement for criminal liability that defendants have knowledge of material wrongdoing i.e. a perpetrator must have understood with some level of specificity in what way his conduct violated the law. In the absence of this knowledge, section 17 of the German criminal code excuses the defendant of criminal culpability.[200] This same section of the code defines mistake of law as a "lack of insight into the wrongfulness of the conduct". A similar provision can be found in the German code on administrative violations (*Ordnungswidrigkeiten*);[201] similarly, in situations in which the defendant is accused of regulatory offences, a 'mistake of law' finding could be registered as 'error *juris*', leading to acquittal.[202]

Examples of case law in which defendants are acquitted on grounds of a lack of criminal liability because of the notion of 'mistake of law' in situations in which regulation has changed are also to be found in other jurisdictions. In a Belgian case concerning prosecution for the construction of a building without a permit, the defendant, who had constructed a house with a permit, was faced with a decision by an administrative court annulling the building permit, as a result of which his building had to be considered illegal. The Cour de Cassation held, however, that at the moment that the building had been constructed, the defendant could reasonably believe that the permit was lawful and that the construction was legal. The defendant was hence acquitted on the charge of

---

[199] Gunther Arzt, *The Problem of Mistake of Law*, *in* RECHTFERTIGUNG UND ENTSCHULDIGUNG. RECHTSVERGLEICHENDE PERSPEKTIVEN, II JUSTIFICATION AND EXCUSE, COMPARATIVE PERSPECTIVES 1029 (Albin Eser & George B. Fletcher eds., 1988).

[200] *Id.* at 1042.

[201] *Id.* at 1048.

[202] See *Id.* at 1048: "In regulatory offences, the description is more often than not factually 'empty'. Punishable behaviour is not described in factual detail; rather, it is described as a violation of legal rules – rules which are usually not in the criminal code itself because they are too intricate or apt to change frequently. The question whether knowledge of these norms is a constituent of the intent element of a crime or whether it is a separate matter baring on culpability under the mistake of law defence is hotly debated. Prevalent scholarly interpretation helps defendants by extending the scope of standard mistake (which exculpates even in the event of negligent mistakes) and limiting the scope of mistake of law (with its notion that only unavoidable mistakes excuse)."

building without a permit, even though his permit had been annulled with retroactive effects.[203]

Similar provisions can be found in the common law, although there are obviously differences in formulation. In the American model, for example, penal code section 2.04 deals with ignorance or mistake and holds in section (3) that "a belief that conduct does not legally constitute an offence is a defence to a prosecution for that offence based upon such conduct when: (a) the statutes or other enactments defining the offence is not known to the actor and has not been published or otherwise reasonably made available prior to the conduct alleged; or (b) he acts in reasonable reliance upon an official statement of the law, afterwards determined to be invalid or erroneous."[204] The same notion is often discussed under the concept of "authorized reliance", which refers to a belief that conduct does not constitute on offence where the origin of the belief is in affect an act of the state itself or one of its agencies. An example of this is a situation wherein a court, having held that a statute is unconstitutional, later changes its mind and declares the statute to have been valid. In *State* v. *O'Neill*,[205] for example, the defendant was prosecuted under a statute that the Supreme Court of Iowa had previously declared to be invalid; when the United States Supreme Court took a different view, the state court was forced to alter its initial finding on the validity of the statute. In this case, even though it was accepted that the statute in question had never been unconstitutional, a defence of error *juris* was accepted.[206] Thus, the notion of mistake of law is also available as a judicial tool in common law countries to protect individual defendants where the norm concerning unlawful behaviour has changed and could not have been reasonably anticipated by the

---

[203] See Cour de Cassation (Belgium) 14 March 1989, *Rechtskundig Weekblad* 1989-90, 954 and Cour de Cassation (Belgium) 2 December 1981, *Rechtskundig Weekblad* 1982-83, 1008.

[204] See Anthony T.H. Smith, *Error and Mistake of Law in Anglo-American Criminal Law*, *in* RECHTFERTIGUNG UND ENTSCHULDIGUNG. RECHTSVERGLEICHENDE PERSPEKTIVEN, II JUSTIFICATION AND EXCUSE, COMPARATIVE PERSPECTIVES 1081 (Albin Eser & George B. Fletcher eds., 1988).

[205] 147 Iowa 513, 126 N.W. 454 (1910).

[206] Smith, *supra* note 204, at 1088.

defendant.[207] The effect would therefore be the same as prospective overruling without the related controversy.

Whether via prospective overruling or by means of the concept of mistake in law, the use of development risk liability in combination with one of these techniques allows a new balance between flexibility and foreseeability to be struck: norms can be adapted dynamically to changing circumstances, thus avoiding the inefficiency and ineffectiveness of the rigid rules produced by legislation and permits, whilst at the same time guaranteeing legal certainty for the individual defendant. Such a balance would, we contend, be both fairer and more efficient than the *status quo*.

6. Concluding remarks

We have suggested in this paper that one of the greatest challenges facing regulators in the area of risk regulation in the coming decades will be the problem of regulatory connection as a consequence of rapid and continuous technological change. In order to create and, more importantly, to maintain regulatory connection, regulators need to opt for instruments that allow for flexibility. This awareness manifests itself in the increasing trend towards open regulation within Europe, characterised by vague standards-based instruments, that offer greater flexibility than detailed legislative rules. This trend in itself is not necessarily problematic; indeed, as law and economics theory suggests, it makes a great deal of sense for regulators to adapt their choice of regulatory instrument to the volatility of the regulatory environment.

The problem, as we have sought to argue, comes with the combination of this choice of regulatory instrument with criminal sanctions. We have attempted to demonstrate the growing development towards criminal sanctions as a means of enforcing these vague standards at the European level. The combination of these trends, we have claimed, raises serious issues under the notion of legal certainty – a key requirement of the rule of law –

[207] See further on this issue John Kaplan, *Mistake of Law*, *in* RECHTFERTIGUNG UND ENTSCHULDIGUNG. RECHTSVERGLEICHENDE PERSPEKTIVEN, II JUSTIFICATION AND EXCUSE, COMPARATIVE PERSPECTIVES 1125-1148 (Albin Eser & George B. Fletcher eds., 1988).

and thus challenges the legitimacy of such regulatory efforts. We have made this claim despite the low bar set by the European Court of Human Rights with regard to legal certainty, even in the context of criminal law and where the defendant faced lengthy incarceration upon conviction. Our examination of the effectiveness of the principle of legal certainty in providing protection within the jurisprudence of a number of EU Member States suggests that, following the lead of the Strasbourg Court, too great a weight is accorded to flexibility at the expense of individual protection. At the same time, we have suggested that legal certainty plays an important role in ensuring efficienct regulation by enabling and incentivizing individuals to modify their behaviour in compliance with the legal norm. In sum, we have argued that regulators and the judiciary need – both on legitimacy as well as effectiveness grounds – to strike a better balance between flexibility and foreseeability.

We have suggested that tools exist for regulators to better address the flexibility/ foreseeability dilemma. Permits may be useful in certain scenarios but are impractical, we argue, in situations of regulatory volatility that we are describing here. Instead, we put forward an alternative and little discussed solution: the application of development risk liability – a technique that allows for great flexibility in the application of regulatory standards and thus for efficient and effective enforcement – balanced, where necessary, by the technique of prospective overruling (or 'mistake in law'), which allows for a high threshold of foreseeability to enable regulatees to modify their behaviour and to prevent gross injustice from being done.

Our suggestion that the use of development risk liability, in combination with prospective overruling, has much to recommend it as a regulatory tool for ensuring effective regulation in the field of risk is likely to be controversial. We have sought to show that many of the concerns are unwarranted. However, more research on how such techniques could and should be applied is necessary. Yet, even where one remains hesitant about the idea of employing either technique, particularly in the area of criminal law, the reasoned observer would be hard-pressed to disagree with our assertion that their use could surely not be more unjust than the current situation, in which individuals and corporations are

held criminally liable for behaviour that they, acting in good faith, could not reasonably have foreseen. The idea of legal liberty, originating with Montesquieu, requires no less.