Editorial

*Tempora mutantur!* Some ten years ago, criminal law still lived in the shadows of the gardens of European politics and European law. Today, thought and debate on Europe that fails to touch on issues such as the ‘European influence on criminal law’ or – increasingly – ‘European Criminal Law’, is almost inconceivable. The meanwhile indisputable importance of European criminal law has not, however, been the only and decisive motive for the editors to publish a new law journal, the *European Criminal Law Review (EuCLR)*, which henceforth, will be published three times a year. In actual fact, it is owing to other reasons that, with this first issue, we present a new forum for academics, practitioners, politicians and legislators in Europe with an interest in Criminal Law: In our view, a frustrating and indeed detrimental gap exists between a still underdeveloped scientific and political exchange on the one hand, and the importance of European criminal law issues, which can hardly be overestimated, on the other. It is this gap which the *EuCLR* wants to bridge in the years to come.

Deficiencies of discussion, notwithstanding a number of valuable initiatives in the past, can be identified on several levels: In the first place, there are considerable trenches between all those who deal with identical issues and problems, but *in different Member States of the European Union*. Secondly, communication and ‘cross-pollination’ between academics and practitioners dealing with European criminal law must be qualified as highly underdeveloped; and finally, it seems to us that there is a lack of constructive discussion between the actual or supposedly existing ‘camps’, which – inaccurately and to a somewhat exaggerated extent – could be summarised as the ‘European criminal law sceptics’ on the one hand, and the ‘European protagonists’ on the other.

As a result of these shortcomings, the topics relevant to all Member States have been discussed separately, in parallel, rather than in common debates. The frustrating lack of communication between academics and the ‘real world’ – by no means a European peculiarity, but known to be the case in most Member States – has reached a new and threatening dimension in the European Union. A functioning academic community throughout the Union has not yet come into being. Politicians, police officers and prosecutors, however, already form a small but well-functioning ‘in-group’. To make things worse, the ‘sceptics’ and the ‘protagonists’
seem stuck in a static warfare, in which one side is charged with being overly compliant with populist and political demands and lacking in principles, while the other, to the contrary, is confronted with the charge of misunderstanding and overemphasising traditional principles and the ‘rule of law’ in a fundamentalist manner.

The price to pay for the missing or failing communication is a European criminal policy and a European criminal law which have fallen short of European citizens’ legitimate expectations and their possibilities. The bill must not only be paid by the Member States, but also – and foremost – by European citizens as a whole.

A balanced and exemplary criminal law requires constructive-critical dialogue between practitioners and academics and between the different political ‘camps’ and tendencies. If we want to strive for such a criminal law in Europe notwithstanding its different legal traditions and cultures – and the editors have no doubt that we should – then a common European forum for constructive and controversial debate is essential.

The programme and profile of this new journal have thus been sketched accordingly:

The EuCLR wants to make a contribution towards resolving the aforementioned grievances. The editors – a long-term cooperating team of convinced Europeans and active criminal law professors from ten Member States with a specialisation in European matters and with close ties to the legal profession – want to foster the scientific and political discourse on European criminal law and European criminal policy by providing a forum for the essential and lamentably still deficient discussions on a variety of subjects and problems. In terms of relevance, internationality and quality of the contributions to be published in the EuCLR, we will apply high standards guaranteed by peer review.

In order to fulfil its comprehensive function, the EuCLR is open to contributions dealing with European criminal law in a wide sense: If we refer to the classical criminal law subjects, contributions could relate to substantive criminal law as well as to criminal procedure, enforcement of sentences, legal assistance or matters of criminal policy.

In the European context the ambit of discussion shall not be limited to developments in the framework of EU law, especially in relation to harmonisation of substantive or procedural criminal law and to judicial cooperation in criminal matters; moreover, we want to stress the importance of the European Convention on Human Rights and the jurisprudence of the European Court in Strasbourg and – generally – the influence of European law on the national criminal law systems. Last but not least, we see it as one of the main tasks of the new journal to document and foster the ongoing discussion regarding criminal policy at EU level and within the Member States.

The content obviously determines the addressees of the EuCLR and – at the same time – the potential authors of this new journal. In order to achieve the aforementioned aims, we, the editors, wish to invite all interested writers to submit
their contributions; for further information for authors, please consult www.euclr.eu. This invitation extends not only to well-established and experienced academics, but also to young scientists with a keen interest in European criminal law. Moreover, we welcome contributions from practitioners in the areas of politics and justice who are ultimately in charge of creating and upholding a high standard of criminal law which takes into account aspects of security and individual rights at the same time.

It is, therefore, with great anticipation that we look forward to receiving your contributions and comments.

The Editors
Preface

European Criminal Law Review (EuCLR)

Viviane Reding*

The development of substantive and procedural EU criminal law has reached a new phase. With the entry into force of the Lisbon Treaty we have left behind the "third pillar" approach that often led to arduous, narrow-gauged decisions in many policy areas involving criminal law, on which the European and national parliaments had little say. The Lisbon Treaty also sheds new light on the potential scope of EU criminal law, building upon two landmark cases of the European Court of Justice.1

With regard to the multiple and increasing challenges modern criminality poses to the EU, including particularly serious forms of cross-border crime or offences at the expense of European public money, the opportunities thus offered by the Lisbon Treaty should not go unused. And they will not: Since December 2009, together with Member States, we have put in place a strong agenda for justice policies in the EU. The Stockholm Programme sets political priorities and defines actions to realise the area of freedom, security and justice over the next five years.

With the Lisbon Treaty and the Stockholm Programme, EU criminal law now has the best prospects to evolve. As the first ever Justice Commissioner it is my great privilege to propose both procedural and substantive criminal law measures under the Lisbon Treaty that will go the streamlined way of the ordinary legislative procedure, in which the European Parliament and the Council of Justice Ministers are on equal footing. Articles 82, 83 and 325 of the Treaty on the Functioning of the European Union will be of particular interest in this process. Complementary institutional improvements, such as the reinforcement of Eurojust and the establishment of a European Public Prosecutor’s Office, also can bolster the deterrent effect of criminal law in specific areas of crime.

However, I will apply appropriate prudence. Criminal law is not an end in itself, and it carries many specificities, which the legislator summarised as follows: “(...) criminal penalties (...) demonstrate social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law”.2 Therefore, only when criminal law is in line with our common European values and principles, and only when EU legislation in this field has a clear added value over national action, it will be legitimate and credible. Subsidiarity and proportionality as provided in Article 5 of the Treaty on European Union form a core part of these

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1 Judgments of 13 September 2005, C-176/03, and of 23 October 2007, C-440/05.
principles. When applied in the light of the diverse legal systems and traditions of Member States, and given the severity of criminal sanctions, these principles clearly turn EU criminal law into an instrument of last resort.

With the Lisbon Treaty, the Charter of Fundamental Rights has likewise become legally binding. This means that, in accordance with Article 51 of the Charter, we must now measure all EU legislation and Member States’ implementing measures with this yardstick. The European Union must be exemplary when it comes to the effective implementation of the Charter of Fundamental Rights. Concerning criminal law, the maxims of *nulla poena sine lege* and *ne bis in idem* are set out, respectively, in Articles 49 and 50 of the Charter. They add to, and specify for the legal order of the EU, the obligations already enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the Convention Implementing the Schengen Agreement.

The European Commission is well placed to perform legal quality control, which takes into account this normative framework – both *a priori*, if and when it makes legislative proposals, and *ex post*, when it monitors implementation. But the Commission is wise enough not to work alone. It requires dynamic input and analysis for the emergence of EU criminal law, from other EU institutions such as the European Parliament, from Member States including national Parliaments, as well as from academics and from practitioners in the judiciary or from the Bar. In this regard I applaud and hugely welcome the work of the European Criminal Policy Initiative. After it published the Manifesto on European Criminal Law at the end of 2009, I am pleased to see the launch of the European Criminal Law Review, the first edition of which you are now holding in your hands. Thanks also to the linguistic choice, this journal allows an exchange of assessments, opinions and new acknowledgements on criminal law across the EU. This is a great opportunity. I would like to encourage all, EU law scholars, students and practitioners alike, to contribute to this journal. EU lawmakers need your best possible advice.
The Importance of Core Principles of Substantive Criminal Law for a European Criminal Policy Respecting Fundamental Rights and the Rule of Law

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Abstract

The article discusses the conditions on which a rule-of-law abiding criminal policy may be exercised on a European level. The analysis is premised on the understanding that criminal law fulfils a dual role: on the one hand, it protects fundamental interests; on the other, it constitutes a yardstick of civil liberties. Hence, the very identity of substantive criminal law cannot allow it to be reduced to a mere procedural mechanism coordinating various legal orders of EU member States. The main part of the presentation is dedicated to affirming this position by transposing fundamental principles of criminal law traced in domestic legal orders to a broader European environment. The principles examined in this light are: the requirement of a fundamental interest worthy of protection; the ultima ratio principle; the principle of legality; the requirement of law enacted by Parliament; the lex certa requirement; and the principle of guilt. Each one among these principles is applied with a view to restraining counter-crime policy in a manner that respects civil liberties. Accordingly, it is shown that respect for these principles would effectively associate the nascent ‘European criminal law’ with the constitutional traditions of EU Member States, thus ensuring its compliance with the rule of law.

I. The identity of criminal law, the Stockholm Program, and the foundations of a European criminal policy in line with the rule of law

Criminal law is admittedly the harshest mechanism States employ to achieve social control. Criminal sanctions themselves – proscribed and enforced for lack of milder means in order to address serious violations of basic interests in legally organized societies – constitute counter-breaches of inter alia the liberty and property of those convicted. At the same time, the moral and social blame inherent in every criminal sanction remains firmly attached to the convicted criminal long after the sentence has been served.

Such being the identity of criminal law, it becomes apparent that it should not be viewed merely as an instrument to preserve legally protected interests, but also as a mechanism which curbs or even infringes on fundamental liberties of those which contravene it. It has aptly been proclaimed that a decision to criminalize any given

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conduct denotes the assumption of a requisite democratically legitimized responsibility for a form of State action associated with the bounds of constitutionally permissible interference with individual liberty. This is why any criminal justice system necessarily presupposes a set of principles and restraints to keep State countercrime activities in check. In that sense, criminal law is closely linked to the protection of fundamental rights and the rule of law.

On the other hand, it is only reasonable that those very features of criminal law – apposite to the liberal tradition of democratic societies – also constrain a supranational entity such as the EU Indeed, respect for human dignity, liberty, democracy, equality, the rule of law, and human rights (article 2 TEU) constitute cornerstones of the EU foundation and should thus characterize the initiatives of the Union in binding its Member States to adopt criminal law rules. Disassociating criminal law from the protection of fundamental rights or even loosening such association – albeit for the sake of addressing transnational crime by means of enhancing judicial cooperation – is liable to emasculate elemental values inherent in democratic societies, which subject the exercise of State authority to the rule of law. Even within international entities, then, no legitimate approach to criminal law can ignore its dual nature as a means of protecting fundamental interests as well as a yardstick of civil liberties.

It is not my intention at this point to appraise the EU’s approaches to criminal law over the past few years. Suffice it to say that a mere look at the action plans adopted by the EU after the Treaty of Amsterdam, i.e. from the outset of its active involvement in the field of criminal justice, would demonstrate that the protection of and respect for fundamental rights of citizens and the rule of law first came on the scene in the Stockholm Program of 1 December 2009. This perspective is evident in the political priorities laid out by the European Council for the period

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1 See, e.g., I. Manoledakis, General theory of criminal law [in Greek], 2004, pp. 26 et seq.
2 See the decision rendered by the Federal Constitutional Court of Germany on the Treaty of Lisbon, 2 BvE 2/08, 2 BvE 5/08, 2 be 1010/08, 2 be 1022/08, 2 BvR 1259/08, 2 BvR 182/09 of 30. 6. 2009, section 356.
3 In a noted passage, F. von Liszt has described criminal law “as an insurmountable blockade for crime policy” [“unübersteigbare Schranke der Kriminalpolitik”] (Strafrechtliche Aufsätze, Bd. 2, 1905, pp. 75 et seq., 80).
4 See especially I. Manoledakis, The ‘fundamental interest’ as a core concept of criminal law [in Greek], 1998, pp. 34 et seq.
5 See art. 83 of the Treaty on the Functioning of the European Union [hereafter TFEU] on minimum rules concerning criminal offenses and sanctions. Also note the newly-introduced competence of the EU to adopt criminal rules in its own right (i.e. without the co-operation of its Member States); on such competence see H. Satzger, Internationales und europäisches Strafrecht, 4th ed. 2010, pp. 100-102.
6 See supra note 1, p. 29.
8 Tampere European Council (15/16 October 1999), Presidency Conclusions, 18. 10. 1999, PE 168.495, Hague Program (C 53 of 3. 3. 2005) and Program (C 115 of 4. 5. 2010, pp. 1-38).
between 2010 and 2014 with respect to the Stockholm Program. According to the Council, “[t]he challenge will be to ensure respect for fundamental freedoms and integrity while guaranteeing security in Europe”, while “[i]t is of paramount importance that law enforcement measures and measures to safeguard individual rights, the rule of law, international protection rules go hand in hand in the same direction and are mutually reinforced”.\(^9\) In its Action Plan implementing the Stockholm Program, the Commission notes, also for the first time, that “[t]he Union must resist tendencies to treat security, justice and fundamental rights in isolation from one another.”\(^10\) According to the Commission, these “go hand in hand”, and hence call for a comprehensive and coherent approach.

This latter position appears to signify the need to overturn a tendency that has permeated the practice of the EU in the field of criminal law for more than a decade;\(^11\) so far, the focus has been on achieving security, absent a correlative assessment of the impact on civil liberties and principles emanating from the rule of law. Such inconsistency had prompted a number of criminal law professors in Europe to launch the so-called European Criminal Policy Initiative (ECPI),\(^12\) as well as come up with a Manifesto on European Criminal Policy presented in late 2009.\(^13\) The said group advocates that the exercise of crime policy through criminal law rules requires both democratic legitimization and respect for the rule of law to the utmost degree, while security itself can only be achieved alongside liberal principles. As alluded in the European Convention of Human Rights itself, these principles have sprung from the Enlightenment and have fueled both cultural development in Europe and the European unification process.\(^14\) It is therefore high time that they came on the scene and restrained EU action in the field of criminal law.

Needless to say, it is one thing to highlight the goal of achieving respect for fundamental rights alongside preserving security in Europe, and a different thing to actually achieve such goal. The prevailing practices employed by the EU in its lawmaking activities, as well as the itemized approach to criminal law contained in the Stockholm Program itself do give rise to certain reservations in this regard. This is because the harmonization of criminal statutes is primarily targeted at facilitating the mutual recognition of judgments,\(^15\) while focal policies against organized crime

\(^11\) Starting with the Tampere European Council conclusions in October 1999.
\(^12\) The Initiative is comprised of 14 professors of criminal law from 10 law schools within respective EU Member States: see www.crimpol.eu and H. Satzger, Der Mangel an Europäischer Kriminalpolitik – Anlass für das Manifest der internationalen Wissenschaftlergruppe „European Criminal Policy Initiative“, ZIS 2009, pp. 59 et seq.
\(^13\) See ZIS 2009, pp. 697 et seq., where the Manifesto has been published in seven languages (English, French, German, Greek, Spanish, Italian, and Romanian); the Greek version can also be found in Porine Dikaiosyne 2010, pp. 78 et seq.
\(^15\) C 115 of 4. 5. 2010, part 3.1.1.
– with the exception of the policy against human trafficking – are utterly oblivious of EU initiatives to eradicate or mitigate the social causes of crime. In the same vein, the Council has alluded to ‘internal security’ within the Union, treated as a fundamental right, while describing all other fundamental rights in the Charter as mere ‘guidelines’ for the so-called “European Security Model”.

Still, the noted change in attitude brought about in the Stockholm Program – albeit on a political and symbolic level – does denote an opportunity to realize the declared political priority to respect civil liberties and the rule of law in the Union; this in turn means that there is room for hope for EU citizens, which the ECPI aspires to actively nurture through its initiatives in the field of criminal law. It is thus imperative that the focus of the EU shift towards principles, which shall guide it in its reasonable effort to adopt and carry out a counter-crime policy; such policy cannot be exercised in a fragmented fashion, absent a systematic set of aims to facilitate reasonable and balanced action against crime, and definitely not without a complete understanding of the extent and depth of the impact which criminal punishment entails on citizens’ fundamental rights, as has been the case with EU action in the field of criminal matters to this day.

Besides, the Treaty of Lisbon has in fact helped shape a more fitting institutional environment to allow shifting the focus towards guaranteeing civil liberties. Important steps have been taken towards that direction, including: enhancing the role of the European Parliament by extending the co-decision procedure in criminal matters; engaging national Parliaments already at the consultation stage preceding the adoption of European legal acts; allowing for the safeguarding of fundamental criminal law principles of Member States through the so-called ‘emergency break clause’ established under articles 82(3) and 83(3); recognizing fundamental rights (article 6(1) TEU) and providing for the accession of the Union into the ECHR (article 6(2) TEU). Although the subject of citizens’ rights in criminal cases has been scrutinized by publicists, the need to preserve those rights in actual practice has

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16 Part 4.4.
21 See, e.g., the special issue of ZStW 2004 entitled “Die Europäisierung der Strafrechts-Rechtsstaatliche Voraussetzungen, Grenzen und Alternativen”: especially see the contributions of Th. Weigend, W. Hassemer, C. Nestler, H. Fuhr, B. Schümann, Also see B. Schümann (ed.), Ein Gesamtkonzept für die europäische Strafrechtspflege,
especially grown after the Treaty of Lisbon. One need only consider the majority principle, to which the harmonization of criminal rules is now subject; the binding force of these latter rules vis-à-vis Member States; the increased competence of the EU in harmonizing criminal law where it is deemed a necessary means in order to implement a given European policy (article 83(2)); and also the question of supremacy of EU law.22

Such institutional environment, offering a better grip for fundamental rights, but also introducing new risks, calls for a reconsideration of the original principles under which the European Legislature might develop a balanced counter-crime policy ensuring that criminal law serves both its purposes: protect fundamental interests and be a yardstick of civil liberties. A set of principles is needed to determine when the European Legislature may require Member States to employ criminal law rules, and under which circumstances it shall define a criminal act and provide for the appropriate sentence. It is also of the essence to conceive of how principles found in domestic systems can be transposed in a supranational environment, and – conversely – how EU law may complement domestic law.

Before moving on to this subject, one final remark is in order. At first reading, the ‘Manifesto on European Criminal Policy’ appears inconsistent with the vast majority of EU initiatives, which concern criminal procedure, and especially judicial cooperation in criminal matters, as it focuses on substantive criminal law principles. Nonetheless, this has been a deliberate choice, the aim being to reverse the adverse tendency to reduce substantive criminal law to a mere instrument assisting in the mutual recognition of criminal judgments between Member States.23

The object of substantive criminal law – even in the form of minimum rules prescribed by the EU – is to define criminal acts and provide for sentences; however, the said object is hardly served when the elements of crimes conceal considerations pertaining to judicial cooperation in criminal matters as opposed to fundamental substantive principles, which have to be respected in every liberal, democratically legitimized expression of authority in defining crimes and penalties. Besides, the mutual recognition of judgments might better be served through harmonizing rules that do not contain precise elements of crimes, and would thus allow for flexibility in the respective definitions. For instance, the terms “corruption” or “sabotage” connote a whole range of different types of conduct proscribed in each Member State, thus facilitating judicial authorities. However, the use of similar terms – even by a supranational entity – would be far from satisfying the requirement of ‘lex certa’, which ensures foreseeability and protects against abuse by the State. In addition, the


22 See the pertinent analysis of L. Papadopoulou, National Constitutions and EU law: The question of “supremacy”, [Greek] 2009, pp. 260-261, 568 et seq., 687 et seq.; the author sets the foundations of a European legal order based on respect for democracy and human rights as a clear limit to the “supremacy” of EU law (pp. 570-571).

principles of proportionality and respect for the coherence of each Member State’s domestic criminal law system are better served in the absence of a pre-fixed minimum level for the maximum sentence with regard to the harmonized criminal rules. In that respect also, mutual recognition appears to conflict with the said principles. A case in point would be the European arrest warrant as a measure of procedural constraint: by extending its scope of application to offenses punishable with a given sentence (see article 2(1) of the pertinent framework-decision), so as to be able to cover serious crimes, the European legislator has in effect led to the imposition of sentences of such a level to all Member States for the sake of facilitating judicial cooperation and in utter disregard of the gravity of each offense.

Restoring substantive criminal law to its true essence is the first step towards reorienting the EU in the direction of fundamental rights of citizens. What is necessary, in other words, is to make it clear when and under which circumstances the Union may require its Member States to criminalize conduct, even for the purpose of harmonizing the legislation of Member States to facilitate transnational judicial cooperation. The foundations of a foreseeable, reasonable, and balanced EU counter-crime policy, particularly one that is effectuated by means of criminal repression, can only derive from the very principles governing the introduction of substantive criminal law rules on a European level.

II. Fundamental principles of substantive criminal law and the lawmaking function of the EU in the context of the Treaty of the Lisbon

1. The requirement of a fundamental interest worthy of protection

The first issue of concern in employing criminal law on a European level is the requirement of a fundamental interest worthy of protection by criminal law means.

It would be erroneous to assume that the EU possesses a self-evident, ‘intrinsically legitimized’ power to intervene in the field of criminal law simply because the Union’s primary law recognizes such competence. This is equally true whether EU organs establish minimum rules concerning the definition of criminal offenses and sanctions in the areas of particularly serious crime with a cross-border dimension under article 83(1) TFEU, or the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy under article 83(2) TFEU.

Even after it has been determined that the Union’s competence in the field of criminal law may be exercised in a specific situation – based on a narrow interpretation along the lines followed by the German Federal Constitutional Court in its pertinent judgment concerning the Treaty of Lisbon – its activation would require answering a further fundamental question, related to the object of protec-

24 The exercise of such competence would require either an empirical affirmation of the cross-border character of a type of crime (based on its particular features and effects) or exceptional empirical circumstances justifying criminal suppression as the only means to ensure the effective implementation of a policy of the Union: see BVerfG 2 BvR 2/08, BvR 5/08, BvR 1010/08, BvR 1022/08, BvR 1259/08, BvR 182/09, sections 359, 361-362.
tion invoked. It would be worth considering that the notion of ‘cross-border dimension’ may comprise, for example, cybercrime, which is alluded to inter alia in the framework-decision on the European arrest warrant (see article 2(2)). However, one can only conjecture what would be the precise content of ‘cybercrime’ worth protecting by criminal law means. For instance, proscribing the dissemination of ideas via the worldwide web is in some cases liable to even lead to criminalization of one’s thoughts (Gesinnungsstrafbarkeit). Is it conceivable for the criminal law to do so or address any problem – no matter how serious – occurring in the implementation of a Union policy absent harm of a different quality, i.e. simply as a means to ensure a duty of compliance to the law itself? In other words, what would be the positive element that could legitimize the use of criminal law by the European legislator, provided that the latter is already within the ambit of competence provided in the treaties?

The Manifesto on European Criminal Policy adopts a quite straightforward position on this matter: the legislative powers of the EU in relation to criminal law issues should only be exercised in order to protect fundamental interests if: (1) these interests can be derived from the primary legislation of the EU; (2) the Constitutions of the Member States and the fundamental principles of the EU Charter of Fundamentals Rights are not violated; and (3) the activities in question could cause significant damage to society or individuals.  

Such position takes into account both the long doctrinal debate concerning the legitimacy of criminalizing conduct in various Member States of the EU and principles of EU law itself. It embraces the common law tradition that has justified criminalization based on the “harm principle”, as well as the doctrinal proposition

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26 See ZIS 2009, pp. 707 et seq. Cf. Council conclusions on model provisions, guiding the Council’s criminal law deliberations (doc. 16542/09, Brussels 23. 11. 2009): although there are guidelines concerning the forms of violations of a ‘right’ or ‘essential interest’ under the title ‘Structure of criminal provisions’, point (5), there seems to be neither a proper delimitation of the concept of ‘right’ nor any identification of a minimum degree of seriousness of the harm involved, other than criminalizing conduct of ‘abstract endangerment’.

27 See A. von Hirsch, Der Rechtsbegriff und das „Harm Principle“, in R. Hefendehl-A. von Hirsch/W. Wohlers (ed.), Die Rechtsbegriffstheorie, 2003, pp. 14 et seq., where the author presents other widely accepted grounds for criminalization of conduct under common law, such as the so-called “legal paternalism” and “offense principle” (id., at 21 et seq.).
that a fundamental legal interest is the necessary prerequisite of criminalization as accepted in certain civil law jurisdictions.\textsuperscript{28} Moreover, the above position also derives from the principle of proportionality, a cornerstone of EU law:\textsuperscript{29} indeed, absent a fundamental interest worthy of protection against socially harmful conduct of a significant degree, no one (including the EU) may be justified in compelling resort to the most suppressive form of social control (i.e. penal repression), which could not be deemed either necessary or appropriate.\textsuperscript{30}

The requirement of a fundamental interest as delineated above has a dual significance in terms of restraining the European legislator in defining offenses. First of all, it calls for respect for the same “threshold of legitimized criminalization” which binds the Legislature of each Member State guaranteeing fundamental civil liberties. Secondly, every attempt to introduce or harmonize criminal law rules should pay due heed to the constitutional traditions of Member States, so that resort to the emergency break clause of article 83(3) TFEU is averted. Put differently, the harmonization of criminal law on a European level cannot ignore the fact that Member States themselves will ultimately have to implement and enforce the rules adopted, thus importing their constitutional limitations as well as their own understanding concerning the object of protection. Moreover, it is self-evident that the fundamental interests protected by the European legislator can only derive from the primary legislation of the EU, which reflects its structural features, its values, as well as its objectives and limits as a supranational organization with powers conferred by its Member States (see articles 4(1) and 5(1) TEU).

On this basis, one might applaud, for instance, the EU’s decision to adopt a framework-decision on combating trafficking in human beings.\textsuperscript{31} As a form of labor or sexual exploitation of human beings either through deception or compulsion, trafficking constitutes a grave breach of multiple facets of one’s liberty and, potentially, other important rights (including bodily integrity or even the right to life),

\textsuperscript{28} See, e.g., W. Hassemer, Th"{o}rere und Soziologie des Verbrechens- Ans"{a}tze zu einer praxisorientierten Rechtsgut- dlehre, 1973, pp. 100 et seq., W. Hassemer, in Neumann/Puppe/Schild (ed.) Nomos Kommentar zum Strafgesetzbuch, Band 1, Vor § 1, R. Hefendehl/ A. von Hirsch/ W. Wohlers (ed.), Die Rechtsgutetheorie- Legitimationsbasis des Strafrechts oder dogmatisches Glasperlenspiel?, 2003, pp. 119-196, I. Manoledakis, The ‘fundamental interest’ as a core concept of criminal law [in Greek], 1998, D. Spyrokos, The analytic function of the concept of ‘fundamental interest’, [in Greek] 1996, and M. Kaisa-Ghandi, Ein Blick auf Brennpunkte der Entwicklung der deutschen Strafrechtstodematik vor der Jahrtausendwende aus der Sicht eines Mitglieds der griechischen Strafrechtswissenschaft, in A. Eser/ W. Hassemer/ B. Burckhardt (ed.), Die deutsche Strafrechtswissenschaft vor der Jahrtausendwende. Rückbesinnung und Aussblick, 2000, pp. 263 et seq. It is true, of course, that there is disagreement as to the exact content of the concept of ‘fundamental interest’. Some think of them as objects, while others prefer to describe them as interests, functional units or cultural values (see Spyrokos, op. cit., at 14). Whatever its precise content, as long as the notion of ‘fundamental interest’ remains attached to the empirical-social reality (Kaisa-Ghandi, op. cit., at 265 et seq.), it will constrain criminalization in a manner ensuring citizens’ rights against State abuse.

\textsuperscript{29} See art. 4(5) TEU and art. 49(3) of the Charter of Fundamental Rights. For a presentation of the case-law of the ECJ see A. Klip, European Criminal Law, pp. 70, 298-299; Chr. Mylonopoulos, Criminal law of the European Communities and general principles of EU law, Pomia Chronicle 2010, 161; cf. art. 5(6) TEU as well as Protocol no. 2 on the application of the principles of proportionality and subsidiarity. For a critical approach to the principle of proportionality – as applied by the ECJ and the ECHR- see P.-A. Albrecht, Die vergessene Freiheit, pp. 83 et seq.

\textsuperscript{30} For a description of the content and elements of the principle of proportionality see, inter alia, S. Ofmaroudakis, The principle of proportionality [in Greek], 2003, pp. 62 et seq.

which are explicitly enshrined in the Charter of Fundamental Rights of the EU. On the positive side, one should also mention that the EU has stopped short of dictating criminal action against the personal use or possession for personal use of narcotic drugs, confining itself to intervention in the field of illicit drug trafficking alone.\textsuperscript{32} This evidences a certain degree of regard towards the constitutional tradition of those Member States which do not punish harm to oneself or condone any form of legal paternalism that would cancel out individual autonomy.\textsuperscript{33}

Nevertheless, there are other examples demonstrating that the EU has yet to fully comprehend the importance of a requirement to rely on conduct causing significant harm to a fundamental interest when compelling action in the field of criminal law. This is clearly illustrated, for example, in the framework-decision on the fight against organized crime,\textsuperscript{34} which in fact requires Member States to proscribe as a criminal offense either the participation in a criminal organization (article 2, sec. a) or the agreement with one or more persons to commit certain criminal acts (article 2, sec. b), modeled after the common law crime of ‘conspiracy’. Any potential harmfulness of these acts is indeterminate, and hence there is no discernible legal interest worthy of protection. It is true, of course, that the underlying offenses should incur a minimum–maximum penalty of at least four years. However, the framework-decision remains silent as to the nature of these offenses. The only hint offered is the purpose of those taking part in a criminal organization, which should be to obtain, directly or indirectly, a financial or other material benefit. Even that element, however, only attaches to the motive behind the act as opposed to a concrete fundamental interest which is harmed by it. As a result, there are no concrete criteria to assist Member States in deciding what conduct to proscribe, other than the declared vague objective to fight organized crime, which is in stark contradiction to the latter’s importance in the common area of freedom, security and justice. Such legal uncertainty is liable to allow the application of invasive, exceptional procedural measures designed for organized crime to other criminal acts completely unrelated thereto. In other words, the lack of a clearly identifiable object of protection might entail – does entail in fact – a cumulative negative impact on civil liberties.

The requirement of a fundamental interest that is harmed in a socially significant way would be of particular usefulness in determining when the EU shall be justified in employing criminal law means to effectively implement its policies under article 83(2) TFEU. In other words, it offers a method of distinguishing between criminal harm (which justifies the imposition of criminal sanctions) and administrative infractions which are nothing more than regulatory offenses. The Union’s failure to draw a clear dividing line between the two is palpable in the Directive on the protection


\textsuperscript{34} Framework-decision 2008/841/JHA, L 300 of 11. 11. 2008, pp. 42 et seq.
of the environment through criminal law,\textsuperscript{35} which compels Member States to criminalize even conduct that violates mere administrative regulations.\textsuperscript{36}

Applying the said requirement in actual practice would mean that the any legislative initiative on the part of the EU shall follow the principle of good governance, i.e., outline the fundamental interests protected and ascertain that the proscribed conduct causes substantial harm to them. This is the only way for the Union to discharge its duty to set clear obligations for its Member States (as well as provide the rationale behind these obligations) in the context of what has aptly been portrayed as a European Sympoliteia [League of States]\textsuperscript{37} founded on transparency and the rule of law. It would also enable Member States themselves in their effort to transpose European legislation into their domestic legal order.

Last but not least, it is worth noting that the requirement of a fundamental interest worthy of protection under criminal law is not posed differently to the EU (as opposed to individual States); indeed, both the EU and its Member States are equally bound to establish substantive grounds for resorting to the harshest form of social control in a democratic society based on a concrete object of protection justifying criminal punishment.\textsuperscript{38} That being said, one can identify certain special parameters surrounding the said requirement which are particularly relevant with the EU. The first one is the source of the fundamental interests protected by the EU, which is identified with the Union’s primary legislation. Besides, the latter has offered the ground for the inclusion of novel protected interests of the EU itself.\textsuperscript{39}

Another crucial question is whether it is possible for those fundamental interests protected by the EU to be imported into the domestic legal order of each Member State bearing its own legal and especially its own constitutional tradition. Absent a genuine possibility for such a transposition, opting for criminal suppression within a given Member State will inevitably run contrary to the rule of law, and thus lack legitimacy. Although this latter remark reveals the difficulty in satisfying the requirement under discussion, the regime established under the Treaty of Lisbon might offer a way to overcome such difficulty by virtue of its provisions governing consultation with national Parliaments in the Union’s lawmaking function. Under-

\textsuperscript{36} For instance, art. 3 sec. c of the said Directive proscribes the shipment of waste when carried out without prior notification of authorities (art. 2, par. 35 sec. a of Regulation (EC) No. 1013/2006 on shipments of waste) or when such notification was not accompanied by proper documentation (art. 2, par. 35 secs. d and f (iii) of Regulation (EC) No. 1013/2006 on shipments of waste).
\textsuperscript{37} For the conception of the EU as a European Sympoliteia see D. Tsatsos, The meaning of democracy in the context of the European Sympoliteia, [in Greek] 2007, pp. 107 et seq.
\textsuperscript{38} See R. Hefendehl, Europäisches Strafrecht: bis wohin und nicht weiter, in B. Schünemann (ed.), Ein Gesamtkonzept für die europäische Strafrechtspflage, München, 2006, p. 211, affirming that the notion of ‘fundamental interest’ could artlessly be transposed on a European level, as it is not merely a product of national legislation but directly derives from social reality.
\textsuperscript{39} As for example protecting citizens’ interests by preventing and suppressing corruption within the EU apparatus. For a discussion of European fundamental interests see N. Bitzilei/M. Kaiafa-Gbandi/E. Symeonidou-Kastanidou, Theorie der genuinen europäischen Rechtsgüter, in B. Schünemann (ed.), Ein Gesamtkonzept für die europäische Strafrechtspflege, München, 2006, pp. 222 et seq., R. Hefendehl, Europäisches Strafrecht: bis wohin und nicht weiter, o. a., pp. 214 et seq.
standing and overcoming similar difficulties is of crucial importance, as it touches upon the very rationale underlying the legitimacy of resorting to criminal law rules.

2. The *ultima ratio* principle

Due to its particularly invasiveness with respect to citizens’ fundamental rights, the application of criminal law always has to rely on a ‘limiting principle’, lest it grows into a nightmare. Of all principles limiting criminal law, the least ambiguous one is the *ultima ratio* principle. The concise adage “to the exceptional case the ultimate means”\(^{41}\) denotes both a quantitative and a qualitative element,\(^{42}\) since exceptional cases are limited in number and they concern serious breaches of fundamental interests.\(^{43}\) It has aptly been said that the *ultima ratio* principle leaves room for criminal law measures in situations resembling a state of necessity, i.e. when something needs to be done and there is no other solution to be found by society or the State.\(^{44}\)

From a normative perspective, the *ultima ratio* principle is closely linked to the principle of proportionality, which permits the adoption of legal means as necessary to achieve a certain goal; and indeed, in the absence of any other solution, the ultimate means would be necessary in that sense.\(^{45}\) One notable difference is to be observed though: while the principle of proportionality presupposes a goal against which to evaluate whether the means chosen are proportionate (‘ultimate means’), the *ultima ratio* principle as portrayed above claims a stake at describing the goal itself (‘to the exceptional case the ultimate means’).\(^{46}\) It is thus linked to the justification of punishing conduct by criminal sanctions, a matter discussed in the previous section.

Associating the *ultima ratio* principle with the principle of proportionality also reveals that it is firmly founded on principles of EU law. A Union which places the individual at the heart of its activities – as per the preamble of the Charter of Fundamental Rights – cannot possibly compel its Member States to criminalize conduct that can be addressed through milder means; this is because criminal sanctions are per se an infringement on fundamental rights of citizens, owing to their socio-ethical implications and the stigmatization they bring about.\(^{48}\)

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\(^{40}\) Compare with the “principle of subsidiarity” or even the so-called “fragmentary character of criminal law”: see C. Prittwitz, , Der fragmentarische Charakter des Strafrechts-Gedanken zu Grund und Grenzen gängiger Strafrechts- postulate, in H. Koch (ed.), Herausforderungen an das Recht: Alte Antworten auf neue Fragen?, 1997, pp. 145 et seq.


\(^{42}\) Prittwitz, op. cit., at 151.


\(^{45}\) See supra note 30.

\(^{46}\) Prittwitz, op. cit., at 158.

\(^{47}\) See supra note 29.
Besides, there are also empirical grounds hinting towards an ‘ultima ratio-abiding’ criminal law within the EU. The lack of resources to enforce ever-expanding criminal statutes, the weakening of their deterrent force and effectiveness, as well as the emasculation of other mechanisms to address social problems\(^\text{49}\) are all symptoms already apparent in Member States, which cannot be ignored by the Union when intervening in the field of criminal law.

With particular regard to the activities of the EU – especially after the Treaty of Lisbon, recognizing its competence in both harmonizing criminal law rules of Member States and establishing rules of its own\(^\text{50}\) – it should be remarked that the application of the *ultima ratio* principle is anything but certain, particularly when it comes to the *approximation* of criminal law rules in Member States. Although approximation normally implies already existing rules within Member States, it might also entail the adoption of new ones so that certain Member States may fulfill their obligations vis-à-vis the Union. The stricter or broader a criminal rule is, the more pressing the need for justification – and indeed through empirical data – that criminalization was indeed the last resort. In that sense, the Council’s allusion to the application of the *ultima ratio* principle “as a general rule” (declared in relation to the future lawmaking function of the EU in the field of criminal law),\(^\text{51}\) albeit notable, cannot be deemed sufficient per se.

A case in point would be *crime with a cross-border dimension* (article 83(1) TFEU). The mere reference to “particularly serious” crime in the text of the said article is not ample to guarantee respect for the *ultima ratio* principle; indeed, even in the field of particularly serious crime (e.g. terrorism), one cannot exclude the possibility that there were other – milder – means, which were not employed in criminalizing the conduct in question. This is evidenced in the framework-decision 2008/919/JHA on combating terrorism, which extensively opts for the criminalization of a broad array of acts, including “recruitment” and “training” of terrorists through the Internet, as opposed to introducing restraints to those administering the respective websites. The said framework-decision directs Member States to adopt criminal law rules anticipating potential risks to fundamental interests, thus criminalizing conduct which merely generates or supports criminal intent of third persons; in so doing, it contributes to the establishment of a pre-preventive criminal law.\(^\text{52}\) Such premature application of criminal rules, devoid of any discernible link to any risk of a fundamental interest\(^\text{53}\) – even on an abstract level – runs contrary to the *ultima*...
ratio principle as well as the principle of proportionality as accepted in European law. To the extent that a given act does not pose a significant, clear risk to interests worthy of protection, criminal suppression thereof cannot find justification, much less when milder means to address the problem were overlooked. A similar argument can be made of the framework-decision on combating corruption in the private sector. The latter contains no convincing grounds as to why obvious milder means to address corruption have been set aside, such as introducing a streamlined procedure for tort claims, or adopting broad measures of compliance in the workplace (inter alia the four eyes principle, staff rotation, etc.).

This need becomes even more pressing when 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 already been subject to harmonization measures (article 83(2) TFEU). The recognition of such competence is in direct conflict with the ultima ratio principle, as the need for ‘effective implementation’ – particularly in the field of Union policies – is liable to produce a lack of self-restraint until other measures prove efficient. Still, the unique identity of criminal law cannot allow it to be reduced to a mere tool for the implementation of any policy. In order to use criminal law, as previously noted, an EU’s policy should be about the protection of fundamental interests, and the problems arising during the implementation of such a policy should be no less than seriously harmful acts which cannot be addressed through any other means (as established empirically). It is only through conceiving of the need for a truly exceptional application of criminal rules that the approximation envisaged in article 83(2) TFEU can properly take place (based on the apt remarks of the German Federal Constitutional Court). This is why the Directive on the protection of the environment through criminal law has gone amiss, since it imposes the criminalization of regulatory offenses, even though administrative sanctions would be equally – if not more – effective to ensure the effective implementation of the Union’s policy in this field.

That same logic would also apply to those areas where the EU possesses its competence to adopt criminal rules in its own right, as for instance in the case of fraud affecting the financial interests of the Union under article 325(4) TFEU. Affording equivalent protection of these interests in Member States, i.e. the declared goal of cloaking the Union with such a competence, does not connote that such protection can only be achieved through criminal law, at least not unless milder means have proven unfit to achieve such equivalent protection in actual practice. Given that the democratic deficit of the Union subsists even after the Treaty of Lisbon, it is my

54 Framework-decision 2003/568/JHA, L 192 of 31. 7. 2003, pp. 54 et seq.
55 See BVerfG 2 BvE 2/08, BvR5/08, BvR1010/08, BvR1022/08, BvR1259/08, BvR182/09 of 30. 6. 2009, sections 361–362; for a doctrinal discussion of the decision see supra note 25.
57 There are some who argue that the Treaty of Lisbon would permit the introduction of criminal rules even by virtue of Regulations (under articles 325 and 79 TFEU): see a presentation of this view in Satzger, Internationales und Europäisches Strafrecht, 4th ed., pp. 100–101.
opinion that the Union had better stop short of activating the said competence, particularly since the approximation of the national criminal law of Member States through the adoption of minimum European rules is suitable to achieve the equivalent protection of fundamental interests on a European level.58

It becomes perceptible that, when it comes to the EU, there is consistency in the essence of the fundamental *ultima ratio* principle. This only makes sense, since the said principle concerns the use of criminal law as a last resort regardless of the legislator, no matter whether his competence is exclusive or shared (in this case between the Union and its Member States). At the same time, the novel institutional framework introduced in the Treaty of Lisbon calls for even more caution with respect to the application of this principle. The EU has indeed assumed greater responsibility in ensuring that criminal law is used as a last resort, owing to its competence to impose minimum rules and provide for the requisite sanctions.59 Setting minimum standards for criminal suppression to Member States presupposes that the Union has confirmed that these are a ‘necessary evil’, i.e. that there was no other way; otherwise, any step it takes will inevitably destabilize the foundations of a proportionality-based criminal law. Put differently, the fact that the EU now possesses the competence to bind its Member States as to the minimum standards of criminal suppression comes with a requisite burden to ensure that criminal law shall only be used as a last resort to protect fundamental interests. This would be equally true of those sectors where the Union is competent to adopt by itself criminal rules for protecting fundamental interests of its own.

To be sure, an assessment of legislative initiatives adopted by the EU demonstrates that there have been cases in which the EU managed to effectively discharge its duty to respect the *ultima ratio* principle. One pertinent example would be the Directive providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals:60 under article 9 of the said Directive, the obligation to criminalize does not extend to the employment of illegally staying third-country nationals per se (id., article 3(1)), but requires an additional aggravating circumstance (e.g. continuous or persistent repetition of the act, simultaneous employment of a significant number of illegally staying third-country nationals, illegal employment of a minor, etc.). Another example would be the framework-decision on attacks against information systems,61 which obliges Member States to criminalize the illegal access to information systems (article 2), illegal system interference (article 3), as well as certain forms of illegal data interference (article 4), all

58 Prior to the Treaty of Lisbon, reservations had been expressed concerning the recognition of exclusive criminal competence of a supranational organization like the EU even when it came to protecting its own fundamental interests: see N. Bitzilekis/M. Kaiafa-Ghandi/E. Symeonidou-Kastanidou, *Theorie der genuinen europäischen Rechtsgüter*, in B. Schüneman (ed.), Ein Gesamtkonzept für die europäische Strafrechtspflege, 2006, pp. 230 et seq. On this question also see *infra*, under 3. a).


the while excluding insignificant acts to avoid excessive application of criminal sanctions. Although it is dubious whether this is enough to actually forestall excessive criminalization, it is definitely an important step towards preserving the *ultima ratio* principle.

Full respect to this principle, however, would require a number of other important steps, even in those cases where criminal law does appear to be the last resort. Adopting milder means as a matter of priority, as well as justifying criminal suppression as a last resort based on empirical data are the necessary prerequisites to ensuring genuine respect for the *ultima ratio* principle, coupled with the principle of good governance.62

### 3. The principle of legality

The principle of legality (*nullum crimen nulla poena sine lege*) requires that crime be proscribed under *law*, and admittedly claims a central place among fundamental principles of criminal law, as it aspires to keep State power in check with respect to what exactly is punished and how.63 It is no wonder, then, that it enjoys constitutional status in a number of legal orders. Beyond the description of the object of punishment, the principle is also linked to the legislative process.64 Specifically, criminal rules are only then legitimized when they are passed by Parliament upon public discussion (*n.c. n. p. s.l. parlamentaria*).65 This requirement connotes a public process involving the complete awareness of the potential consequences by the citizenry (“Demos”), as well as engages the participation of the citizens – represented by their delegates in Parliament – i.e. the ones who will ultimately suffer the consequences.

In the European context, the principle is enshrined in article 7(1) ECHR,66 article 49(1) of the Charter of Fundamental Rights of the EU, and article 6(3) TEU,67 which goes beyond the fundamental rights guaranteed under the ECHR, requiring respect for *the constitutional traditions common to the Member States*, which

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62 Concerning the use of such data see the conclusions included in Council doc. 16542/09 of 23. 11. 2009 under the title “Assessment of the need for criminal provisions”, point (3).
64 Cf. P.-A. Albrecht, Die vergessene Freiheit, pp. 48–49, associating the principle with substantive criteria as to what may be punished by the State (not any conduct that is troublesome or risky may be criminalized; rather, criminal law should target conduct that constitutes denial of the fundamental rights of others, lest it itself become a liability for liberty). See a similar view in light of the Greek Constitution in N. Panaseskopoulos, The constitutional dimension of harm and guilt [in Greek], Yperaspise 1993 [in Greek], pp. 1254 et seq.; cf., however, I. Manoledakis, The ‘fundamental interest’ as a core concept of criminal law [in Greek], pp. 50–51, at n. 4.
66 Cf. Recommendation No. R (98) 6 by the Committee of Ministers of the Council of Europe, sec. I. a. 1. Arts. 7(1) ECHR and 49), par. 1 of the Charter do not guarantee the principle to its full extent; unlike most Member States, they require criminalization by law, including customary law. For a critical survey of the case-law of the ECHR and the ECJ see St. Braun, EuropГјpische StrafgesetzeschГјcker, 2003, pp. 47–48.
tend to be more elaborate when it comes to legality. This parameter evokes an issue that merits our attention. Because the principle of n.c. n. p. s.l. constitutes the spring of a whole array of fundamental rights, the process of European unification cannot be permitted to shrink it to a ‘least common denominator’ traced in all Member States. This means that those Member States which do not attach so much importance to this particular principle cannot become a role model for the EU, lest respect for the constitutional traditions of other members be compromised. In other words, the reference to constitutional traditions common to Member States in article 6(3) TEU should not be interpreted so as to denote that any given fundamental right should derive from the constitutional traditions of all Member States so as to be recognized on a European level; rather, it would suffice that the traditions in question be common in some Member States. Here lies the particular significance of article 6(3) TEU with respect to the principle of n.c. n. p. s.l. By alluding to fundamental rights emanating from constitutional traditions common in Member States, the said provision essentially guarantees a maximum degree of protection of those rights, drawn from a comparative appraisal of the various legal orders; thus, the constitutional traditions common in certain Member States are ample to engender protection of a fundamental right on a European level.

Beyond the association with law enacted by Parliament, the substantive content of the principle discussed can be broken down into three separate requirements, addressed to the Legislature, the Executive, and the Judiciary, respectively. These are: the lex certa requirement, the non-retroactivity requirement, and the prohibition of applying criminal rules by analogy. The first one is exclusively addressed to the Legislature, the second concerns all three branches, while the third is exclusively addressed to the Judiciary. This explains why this paper – just like the Manifesto on European Criminal Policy – is only concerned with the first two requirements, which are addressed to the European legislator, i.e. our main point of reference, as he is the one deciding on the European Criminal Policy. Adding to the picture, the main problems arising out of the application of the n.c. n. p. s.l. principle on a European level are related to the requirement of law enacted by Parliament and the “clarity” of criminal provisions; on the other hand, the non-retroactivity requirement and the concomitant principle of lex mitior do not appear to cause particular problems. Last but not least, the contemporary institutional framework within the EU entrusts Member States with the task of enforcing criminal law and meting out sanctions via their national court system; hence, the prohibition of applying criminal

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68 These would include, for instance, the United Kingdom and France: see P.-A. Albrecht, Die vergessene Freiheit, p. 58. Nonetheless, even common law now recognizes the principle (see LK/Dannecker, § 1 Rdn. at 5 et seq., at 43 et seq., K. Lüderssen, Europäisierung des Strafrechts und gubernative Rechtsetzung, GA 2003, at 71 et seq.) with a few exceptions (see LK/G. Dannecker, § 1 marginal note 45).


70 For a presentation of the constituent elements of the principle see P.-A. Albrecht, Die vergessene Freiheit, pp. 49 et seq.
rules by analogy could not be transposable before organs of the EU, save perhaps for the ECJ when interpreting EU law (e.g. in the case of a Directive establishing minimum rules concerning the definition of a crime).

a) The requirement of law enacted by Parliament \textit{(n.c. n. p. s. lege parliamentaria)}

It has already been underscored that the principle in question requires the enactment of a criminal law by Parliament, because the most invasive form of State control should derive its legitimization \textit{from the people as directly as possible}. In the EU context, there are admittedly problems regarding this principle, owing to the Union’s democratic deficit, which has been reduced but not completely eliminated by the Treaty of Lisbon. In fact, there are some who argue that eliminating this democratic deficit by attempting to institutionally transform the European Parliament into a “full-fledged Parliament” will not work, until and unless an “identity of a European citizen” is developed with which the people of Europe could identify themselves in relation to a decision-making process on a European level. In addition, it is often argued that the Union itself as a European Sympoliteia of both \textit{States} and \textit{nations} seems to be premised on a unique structure, which could at best sustain equal lawmaking powers of the Council and the European Parliament. One should also not neglect other matters, such as the interaction between EU organs in general, and in particular between the Council and the European Parliament, which delineate the problem on an empirical level; indeed, Member States appear quite reticent in giving up their influence over the supranational organization they have created in favor of an ever-stronger European Parliament. It becomes apparent that the institutional regime introduced by the Treaty of Lisbon is here to stay for years to come; aside from its future improvement, then,

\footnote{This field will gain increasing significance under the Treaty of Lisbon, since the ECJ now possesses the competence to give preliminary rulings on the interpretation of Union law in criminal matters as well without prior authorization by Member States (arts. 19(3)(b) TEU and 267 TFEU).} \footnote{See inter alia R.-A. Lorz, Das Problem des demokratischen Defizits, in D. Tsatsos (ed.), Die Unionsgrundordnung-Handbuch zur europäischen Verfassung, pp. 311 et seq.; for the application of the principle on a European level see inter alia U. Sieber, Die Zukunft des Europäischen Strafrechts, ZStW 2009, pp. 13-14, 50 et seq., 53 et seq.} \footnote{On the possibility of an act passing without a majority vote by the European Parliament in the course of ordinary legislative process, and its ramifications in the field of criminal law see M. Kaiafa-Gbandi, The Treaty establishing a Constitution for Europe and challenges for criminal law at the commencement of 21st century, European Journal of Crime, Criminal Law and Criminal Justice 2005, p. 500, and n. 79; cf. B. Schünemann, Ewigkeitsgarantien im europäischen Strafrecht-Ein Appell an die deutsche Volksvertretung, KritV 2008, pp. 12-13, S. Weber, Justizielle Zusammenarbeit in Strafsachen und parlamentarische Demokratie, EuR 2008, pp. 101-102. Also see the recent decision by the BVerfG BVerE 2/08, BvR5/08, BvR1010/08, BvR1022/08, BvR1259/08, BvR182/09 of 30. 6. 2009, sections 276 et seq. Cf., however, H. Satzger, Das Strafrecht als Gegenstand europäischer Gesetzgebungstätigkeit, KritV 2008, p. 25, adding certain reservations at p. 36. Also see criticism towards the decision of the BVerfG by Böse (ZIS 2010, pp. 82 et seq.), in relation to the democratic deficit in the EU; for a discussion of the problem before Lisbon see H. Satzger, Die Europäisierung des Strafrechts, 2001, pp. 128 et seq.} \footnote{See D. Tsatsos, The meaning of democracy in the context of the European Sympoliteia, [in Greek] 2007, pp. 98, 103-114.} \footnote{See Lorz, op. cit., 343.} \footnote{See Lorz, op. cit., at 1110-1112.} \footnote{See Tsatsos, id., at 1110-1112.} \footnote{See Lorz, pp. 343-344.}
the attention should also shift towards expanding the democratic legitimization within the margin presently allocated, at least with respect to sensitive areas, such as criminal law.

Under these circumstances, question remains as to whether and how the EU can satisfy the basic requirement of a criminal law enacted by Parliament in those fields where it possesses the competence to intervene.

At this point, one should once more recall the types of criminal competence assigned to the EU: on the one hand, the Union may establish minimum rules concerning the definition of criminal offenses and sanctions through directives which shall then be transposed into the domestic legal order (article 83 TFEU); on the other, it has the authority to establish criminal rules even by itself under such provisions as article 325 TFEU.

As regards the former, there does appear to be a footing for the application of the requirement of a law enacted by parliament. Although some scholars point out that the participation of the European Parliament in the ordinary legislative procedure (articles 289 and 294 TFEU) – under which minimum rules concerning the definition of criminal offenses and sanctions are established through directives – does leave some democratic deficit (at least in the sense certain scholars perceive of the notion of ‘democratic deficit’ in relation to the EU’s competence in the field of criminal law), requiring the partaking of national Parliaments already at the consultation stage is concededly an important step. As long as national Parliaments remain active in actual practice and their input is taken into account, the directives produced will attain a higher degree of legitimization as opposed to those issued under a simple co-decision procedure involving the European Parliament alone. Such legitimization would indeed derive from the European citizenry, represented in their respective Parliaments. Needless to say, the procedure adopted for the involvement of national parliaments remains rather loose compared to lawmaking in the domestic context. Some have suggested the adoption of national rules binding the representatives of each Member State to vote for or against a Directive establishing minimum rules concerning the definition of criminal offenses based on a prior determination by their respective national Parliament. This

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78 Note the narrow interpretation proposed by the BVerG in view of the democratic deficit: 2 BvE 2/08, BvR5/08, BvR1010/08, BvR1022/08, BvR1259/08, BvR182/09 of 30. 6. 2009, sections 358-363.

79 Supra note 73; cf. F. Meyer, Demokratieprinzip und europäisches Strafrecht, 2009, pp. 122 et seq.

80 See Protocol No. 1 on the role of national Parliaments in the European Union. It is true, of course, that National Parliaments may submit a reasoned opinion on whether a draft legislative act complies with the principle of subsidiarity under article 3 of the said Protocol. However, it would be erroneous to deduce that the role of national Parliaments are confined to these ‘reasoned opinions’ alone. Otherwise Art. 12 a TEU on the active contribution of national parliaments referring to their information by institutions of the EU on draft legislative acts would have no meaning. Even absent an explicit clause, a proper reading of the Protocol would lead to the conclusion that national Parliaments are not precluded from submitting their opinion on any draft; indeed, such broadening of the consultation process is likely to expose problems justifying resort to the emergency break clause.

81 Cf. Satzger, KritV 2008, pp. 25, 36 et seq., Schümann, KritV 2008, pp. 13-15, and BVerfG, 2 BvR 2/08, BvR5/08, BvR1010/08, BvR1022/08, BvR1259/08, BvR182/09 of 30. 6. 2009, section 365. At the same time, it is argued that exceptional circumstances may occasionally warrant departure from the decision made in the national Parliament (e.g. due to political considerations weighed during negotiations leading to the adoption of a given directive); in those
would indeed contribute in satisfying the requirement of a criminal law enacted by Parliament, since the binding effect of each directive would be democratically legitimized through the participation of national parliaments. It is of course true that a single Member State can now be bound by a Directive even when it has voted against it, due to the majority principle. Thus, the only way for a Member State to free itself of the pertinent obligation is to claim that a draft directive would affect fundamental aspects of its criminal justice system, hence invoking the emergency break clause of article 83(3) TFEU. Although the allusion to “fundamental aspects” of a criminal justice system is somewhat vague, one could identify at least one circumstance calling for the invocation of the emergency break clause without a doubt: breach of one of the fundamental principles of criminal law outlined above, as well as of those that will be presented further on.

In conclusion, it could easily be argued that, when it comes to the criminal competence of the EU with a view to the approximation of national laws, respect for the requirement of n. c. n. p. s.l. parlamentaria hinges on the degree of involvement of national Parliaments in the consultation process. Accordingly, the EU should make sure to encourage such involvement based on the principle of good governance. National Parliaments, on their part, should not hesitate to actively engage in the function assigned to them, while Member States would be wise to examine the possibility of linking their vote in the Council to prior decision by their Parliament, at least in the field of criminal law. Moreover, the emergency break clause of article 83(3) TFEU can be interpreted so as to safeguard fundamental principles of criminal law, and is thus crucial for democratic legitimization; and indeed, the said clause in effect insures against the adoption of binding criminal law rules that would only be legitimized on the EU level – hence insufficiently – and would contradict fundamental aspects of a Member State’s criminal justice system.

That being said, more serious problems are likely to arise if and when the EU sets about to adopting criminal rules by itself. Even with certain improvements, such as linking votes in the Council to a prior determination by the respective national Parliament, the co-decision procedure does not seem fit to accommodate autonomous criminal competence, at least not as long as the European citizenry (“Demos”) finds itself in statu nascendi. Put differently, as long as the EU falls short of a

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83 Cf. the objections expressed by Böse, ZIS 2010, p. 83, as well as the lower threshold accepted by Sieber (ZStW 2009, p. 55) with respect to the democratic legitimization of criminal rules in the EU


85 For instance, linking votes in the Council to a prior determination by national Parliaments would appear plausible in another case where the ordinary legislative procedure applies, namely art. 325 TFEU concerning fraud against the financial interests of the Union. Nonetheless, the principle of majority on the one hand and the non-applicability of the emergency break clause on the other indicate that Member States cannot absolve themselves of the rules adopted by the EU even if they invoke fundamental principles of theirs. Besides, applying the emergency break clause by analogy in those cases is refuted based on arguments related to functional differences between directives and regulations: see Satzger, Internationales und europäisches Strafrecht, 4. Aufl., pp. 125-126.

community where citizens feel they belong, its exercise of sovereign authority cannot genuinely derive from the people. Notwithstanding the competence entrusted with it in the Treaty of Lisbon, I believe the EU should confine itself to the context of regulatory offenses and abstain from adopting criminal rules by itself until such time as the institutional evolution brings about a further improvement of the democratic deficit. 87 Whenever the exercise of criminal competence appears to be necessary as a last resort, the approximation of criminal laws of Member States via directives would emerge as a viable alternative. 88 Indeed, nothing in the Treaty of Lisbon precludes that option; quite the contrary, both the provision on fraud affecting the financial interests of the Union (article 325 TFEU) and the one on trafficking in persons (article 79(2)(d) TFEU) allude to measures in accordance with the ordinary legislative procedure, thereby implying, inter alia, the adoption of directives.

b) The “lex certa” requirement

This particular facet of the principle of n.c. n. p. s.l. requires that a criminal rule contain a precise description of the objective and subjective elements of an offense as well as the sanction to be imposed. It also requires that every offense be comprised of a human act, hence disallowing punishment for one’s thoughts. Besides, the description must be clear enough so that the citizen can predict which actions will make him criminally liable. Absent such foreseeable, the principle of legality would indeed be rendered moot. 89

It goes without saying that the ‘lex certa’ requirement would apply without any distinction to criminal rules introduced by the EU itself, i.e. without the need of transposition by Member States, as provided for certain cases in the Treaty of Lisbon. 90 That being said, the main type of criminal competence provided in the latter is the one to be exercised through directives establishing minimum rules concerning the definition of offenses and sanctions (article 83(1), (2) TFEU). Therefore, the ‘lex certa’ requirement acquires in this case a more intricate character, owing to the two distinct stages of criminalizing conduct (a European and a national one).

A mere look at the case-law of the ECJ 91 (predating the Treaty of Lisbon) would indicate that the Court has indeed followed the ECHR in requiring that the

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87 See P.-A. Albrecht, Die vergessene Freiheit, p. 167, arguing that the EU should confine itself to means outside criminal law. Also see Bumann, Europäische Strafgesetzlichkeit, pp. 473–474, criticizing the abuse of criminal sanctions for the sake of efficiency.


90 Note, however, the reservations expressed in the previous chapter.
criterion of foreseeability emanates from the text of the rule itself. In the field of criminal law, the Court has emphasized also that the obligation of Member States to interpret the law in accordance with a directive (or a framework decision) cannot lead to the establishment or aggravation of criminal liability. This would appear to imply that it is the national criminal rule that should abide by the principle of n.c. s. l. certa rather than the legislative act by which the EU has compelled its adoption.

However, that kind of reasoning would fail to take into account certain factors affecting EU law, particularly after the Treaty of Lisbon. Through its directives addressing cross-border crime or ensuring the effective implementation of its policies, the EU seeks to establish a minimum content of the definitions of crimes, which shall bind Member States under threat of sanctions in the event of failure of incorporation into the domestic legal order. Such minimum content should clearly derive from each legislative act of the Union, despite the fact that it is up to each State’s Legislature to specify the elements of crimes for the purposes of its criminal justice system. In contrast, the sanction to be imposed need not be determined by the European legislator; that latter task could indeed be performed more aptly on a domestic level, in accordance with the principle of proportionality and the particularities of each criminal justice system.

Requiring the EU to clearly delimit a minimum core of the conduct to be proscribed consists in two important parameters. First of all, lack of such clear delimitation would pose a dilemma to national legislators: either to unilaterally adopt a precise definition and risk diverging from the actual objective of the EU, which the European legislator did not adequately describe; or fail to give a clear description of the offense, thereby violating the principle of n.c. s. l. certa, which would amount to a breach of the Constitution in a number of Member States. It becomes evident that the ‘lex certa’ requirement is addressed to the European legislator as well, inasmuch as the latter may bind Member States to adopt minimum elements of an offense. Otherwise, it would become impossible for national legislators to abide by their obligation to transpose EU law without violating the ‘lex certa’ requirement. Even worse, fear of possible sanctions might lead Member States to opt for transposing pertinent directives verbatim, which would constitute an out-

\[91\] See extensively A. Klip, European Criminal Law, 2009, pp. 167 et seq.
\[92\] See Klip, European Criminal Law, p. 169, Case C-76/06 (2007), Chr. Mylonopoulos, Criminal law of the European Communities and general principles of EU law, Poinika Chronika 2010, 161 [in Greek].
\[94\] See Klip, European Criminal Law, p. 168, Case C-105/03, 16. 6. 2005, par. 45.
\[95\] See Klip, European Criminal Law, p. 171.
\[97\] See art. 260 TFEU.
\[99\] See Klip, European Criminal Law, p. 172, n. 650, referring to specific examples of EU legislative acts causing problems, and suggesting the annulment of the act as the only solution in these cases.
right breach of the principle of legality.\textsuperscript{100} Besides, absent a clear delimitation of a minimum core by the EU, neither national Parliaments nor States’ representatives would be able to contribute in the consultation process or appraise the proposed norms in light of the fundamental principles inherent in their respective criminal justice systems, as the vagueness of the content may conceal serious deficiencies. In turn, this would drastically diminish the potential ambit of the emergency break clause provided under article 83(3) TFEU. Since the consultation process and the emergency break clause are both associated with the democratic principle, one can easily perceive a link between the latter and the ‘\textit{lex certa}’ requirement.

Aside from indirectly furthering the principle of \textit{n. c. n. p. s.l. certa} within a national context, introducing specific directives regarding the minimum content of criminal rules to be adopted by Member States also concerns the European citizens as such. This is because the directive itself, coupled with the national piece of law implementing it, can shed light on what exactly is punishable, thus ensuring foreseeability. Of course, this does not mean that the directive – or at least one interpretation thereof – can lead to the establishment or aggravation of offenses that the national legislator has not proscribed as such by virtue of domestic rules.

A much more pressing need to preserve the ‘\textit{lex certa}’ requirement arises when a European piece of legislation compelling Member States to criminalize conduct refers to other provisions of EU law.\textsuperscript{101} This kind of situation might bring about practical problems, as the ‘\textit{lex certa}’ requirement must be observed with respect to every single provision involved. Otherwise, it would become unfeasible to adopt national rules incorporating EU law in a sufficiently unambiguous manner.

Evaluating the practice of the EU in light of the principle in question – which also applied by analogy to framework decisions issued under the third pillar, considering that they too aimed at binding Member States as to the result to be achieved – would churn out conflicting examples (as was the case with the other principles discussed above). For instance, where the EU wishes to proscribe any type of conduct occurring within a certain field, it does so through detailed descriptions of offenses covering virtually every imaginable situation, such as in the case of drug trafficking\textsuperscript{102} or the protection of the euro against counterfeiting.\textsuperscript{103} Regrettably, these examples constitute evidence of the exception rather than the rule. The latter is expressed in such cases as the framework decision on combating corruption in the private sector, by virtue of which Member States are bound to


\textsuperscript{101} On this issue see Sätzger, Internationales und Europäisches Strafrecht, 4. Aufl., pp. 131 et seq., Zimmermann, ZRZ 2009, p. 76.

\textsuperscript{102} Framework-decision 2004/757/JHA, L 335 of 11. 11. 2004, pp. 8 et seq.

\textsuperscript{103} Framework-decision 2000/383/JHA, L 140 of 14. 6. 2000, pp. 1 et seq.
criminalize both “active” and “passive” corruption.104 The central element of the offense is that a person employed in the private sector requests or receives an undue advantage in exchange for breaching his/her duties. Nonetheless, such breach of duty is only vaguely circumscribed under article 1, sec. b and has to “cover as a minimum any disloyal behavior constituting a breach of a statutory duty, or, as the case may be, a breach of professional regulations or instructions [...]”. Thus, the framework decision would apply to breach of duties arising out of contractual arrangements or even mere orders in the workplace. Since the uncertainty emanates from the framework decision itself, Member States are bound to get entangled in it. Although article 2(3) of the framework decision allows the Member States to limit the scope to conduct involving a distortion of competition in relation to the purchase of goods or commercial services, this does not address the vagueness related to the breach of duty.105 Similar flaws have surfaced in other EU legislative acts:106 another case in point would be the proposed directive on combating the sexual abuse, sexual exploitation of children and child pornography.107 Article 2, sec. b (iii) of the said proposal alludes to visual depictions of any (adult) person appearing to be a child, in disregard of the fact that no criterion in law can possibly determine when an adult would “appear to be a child”, since appearances may in fact vary significantly from person to person (an eighteen-year-old could easily appear to be seventeen, whatever this may mean). It becomes evident, then, that stipulations of this sort cannot satisfy the requirement of foreseeability, and should therefore be left outside the criminal law realm.

In conclusion, the EU still has a long way to go towards ensuring actual respect for this facet of the principle of legality as well.

c) The prohibition of retroactive application of criminal laws and the principle of lex mitior

Last but not least, it is in order to examine yet another facet of the principle of legality, namely the requirement of non-retroactivity and its corollary, i.e. the principle of lex mitior. The obvious import of the said requirement is that criminal rules establishing offenses or introducing aggravating circumstances thereto shall not apply to acts committed prior to their adoption, as this would indeed violate the very core of the principle of legality, i.e. ‘no punishment without law’.108 The

105 On the problem of transposing this framework-decision into the Greek legal order see M. Kaiafa-Ghandi, Punishing corruption in the public and the private sector: the legal framework of the European Union in the international scene and the Greek legal order, European Journal of Crime, Criminal Law and Criminal Justice 2010, 178 et seq.
108 With regard to European law see, e.g., Klip, European Criminal Law, pp. 173 et seq. Chr. Mylonopoulos, Criminal law of the European Communities and general principles of EU law, Poinika Chronika 2010, 161 [in Greek].
requirement is explicitly contained both in article 7(1) ECHR and article 49(1)(a) of the Charter of Fundamental Rights of the EU, which has now attained binding status. Accordingly, under no circumstances may the EU require its Member States to apply their criminal laws retroactively.

The requirement of non-retroactivity knows of one notable exception, which – albeit not always constitutionally guaranteed – can be found in virtually every domestic legal order: criminal law provisions not only can but actually should apply retroactively when they benefit the offender (i.e. either render the act not punishable or mitigate the sanction). This is explicitly provided under article 49(1)(c) of the Charter of Fundamental Rights of the EU, under which the Union may not compel States to apply the law in force at the time of the offense, as long as it was amended thereafter (until the decision is made final) in a manner favorable to the defendant. To the extent the Charter is binding on Member States, this exception is also to be applied by the Legislature and Judiciary of all Member States. Thus, the principle of *lex mitior* enjoys a more elevated status on a European level compared to certain Member States, presenting an excellent example of the way in which a more comprehensive protection of fundamental rights within the EU can be achieved.

This analysis demonstrates, first and foremost, that the principle of legality in all its aspects presents certain particularities on EU level from an institutional perspective, calling for the contribution of Member States in order to leave the core of the principle intact. At the same time, the application of the principle in actual practice (active involvement of national Parliaments in the lawmaking process before EU organs, faithful application of the ‘*lex certa*’ requirement with respect to the transposition of minimum rules concerning definitions of offenses and sanctions) as well as its future institutional form (*lex parlamentaria*) requires further support. Guaranteeing the principle of legality indeed turns the spotlight on the citizen, as it serves to limit the power of government to impose criminal sanctions and safeguards civil liberties. In that sense, the principle of legality provides the citizen with security as well.

4. The principle of guilt

The principle of guilt is another cornerstone of every liberally oriented criminal justice system. Individual guilt for one’s act is indeed an absolute prerequisite legitimizing the imposition of any criminal sanction. According to this principle, a
criminal sanction can be imposed when a criminal act has affirmatively been proven to be the product of a ‘guilty mind’, i.e. it was carried out voluntarily (with the requisite mens rea).\footnote{Cf. BVerfG. Even if the affirmation of guilt inevitably entails an evaluation, the ontological foundation of guilt, i.e. the actual expression of the offender’s mental state vis-à-vis the act, which can only be approached by the judge based on empirical evidence, constitutes a guarantee for the citizen (see Paraskevopoulos, op. cit., at 124; on approaching dispositive concepts based on empirical evidence see esp. W. Hassem, Die Freiwilligkeit beim Rücktritt vom Versuch, in Lüderssen (ed.), Vom Nutzen und Nachteil der Sozialwissenschaften für das Strafrecht, Tb 1, pp. 243 et seq.). On the limits set to approaching the concept of guilt through empirical sciences by due process rights see P.-A. Albrecht, Die vergessene Freiheit, pp. 67 et seq.} Only then shall the individual deserve to bear the blame expressed through punishment. Such substantive content of the principle evidences its association with the principle of proportionality, as well as its function as a limit to the deterrent and/or the rehabilitative orientation of punishment. Penalties are incurred to address acts committed with “a guilty mind”, hence they should be proportionate to the “guilt” and never exceed it for any reason.\footnote{See N. Androulakis, Article 79 CC, in Systematic interpretation of the Criminal Code [in Greek], p. 1038, M. Kaiafa-Gbandi, in M. Kaiafa-Gbandi/N. Bitzilekis/E. Symeonidou-Kastanidou, The law of criminal sanctions [in Greek], 2008, pp. 298-299, N. Paraskevopoulos, in L. Margarites-N. Paraskevopoulos, Penology [in Greek], 7th ed., p. 325.} Thus, the principle of guilt becomes a constraint of State power, protecting against otherwise unbridled deterrent policies, ensuring respect for the human being as an individual, and constituting an expression of respect for human dignity.

On a European level, and in particular relation to criminal law, the said principle derives from article 48 of the Charter of Fundamental Rights of the EU, encompassing the presumption of innocence in the following words: “everyone who has been charged shall be presumed innocent until proved guilty according to law”; moreover, article 1 of the Charter proclaims the inviolability of human dignity.\footnote{The case-law of the ECJ attests to this conclusion, requiring the affirmation of guilt for the enforcement of administrative sanctions: see Klip, European Criminal Law, p. 189.} It becomes evident, then, that the EU subscribes to the principle of guilt to its full extent.

It follows that the EU is bound to abstain from compelling its Member States to introduce strict liability crimes or introduce them itself.\footnote{Cf., however, Klip, European Criminal Law, p. 189, not excluding the compatibility of strict liability offenses with EU law.} Another ramification of the principle of guilt is the difficulty of transposing in those cases where legal persons are responsible for violating fundamental interests in the course of their activities. This is because a number of Member States reject criminal responsibility of legal persons on the grounds, inter alia, of its incompatibility to fundamental principle of guilt.\footnote{See, e.g., M. Kaiafa-Gbandi, Ein Blick auf Brennpunkte der Entwicklung der deutschen Strafrechtsdogmatik vor der Jahrtausendwende aus der Sicht eines Mitglieds der griechischen Strafrechtswissenschaft, in A. Eser/W. Hassem/B. Burkhardt (ed.), Die deutsche Strafrechtswissenschaft vor der Jahrtausendwende, München 2000, 277 ff.} Consequently, the EU had better respect each State’s right to choose whether it will introduce criminal liability of legal persons or not (based on their own understanding of the principle of guilt, which varies according to each people’s culture), as has been the case with every framework decision or directive on responsibility of legal persons so far.\footnote{Cf. K. Klip, European Criminal Law, p. 189, not excluding the compatibility of strict liability offenses with EU law.
Having recalled the self-restrained practice of the EU with respect to the principle of guilt, one should also take note of the fact that the Union’s legislative acts so far steadily associate criminal responsibility with a requisite *mens rea*, and in fact require intent. Beyond rejection of strict liability, this also evinces the EU’s reticence to uphold criminal negligence, insisting on intent as the basis of criminal responsibility. This position is affirmed by the *ultima ratio* principle – as delineated above – which only leaves room from crimes of negligence in exceptional cases, i.e. when the significance of the interest harmed and the gravity of the act render them a necessity.\(^{119}\)

Nevertheless, there are other examples indicating lack of respect for the principle of guilt on the part of the EU. For instance, one should mention article 1, par. 4 of the PIF Convention on the Protection of the European Union’s financial interests, which provides that “the intentional nature of an act or omission […] may be inferred from objective, factual circumstances”. This tends to oversimplify the dispositive nature of intent, which cannot be automatically inferred from ‘objective circumstances’ connected with the act alone. Likewise, article 3 of the said Convention concerning the criminal liability of heads of businesses provides that “each Member State shall take the necessary measures to allow [these persons] to be declared criminally liable in accordance with the principles defined by its national law” in cases of fraud affecting the European Communities’ financial interests when a person under their authority is acting on behalf of the business; however, this provision does not seem to require the ascertainment of a criminal omission or subjective elements, despite the fact that the crime of fraud affecting the Union’s financial interests requires intent on the perpetrator’s part.

Similar problems arise under a number of EU legislative acts which fail to associate the principle of guilt with proportionality. Indeed, absent a requirement of ‘personal guilt’, there is no measure by which to evaluate the penalty to be imposed. There are other examples,\(^{120}\) including the framework decisions on terrorism and organized crime, which require Member States to significantly broaden criminal suppression and should therefore be in line with the principle of guilt. At this point, suffice it to mention an example derived from the proposal for a directive on trafficking in human beings.\(^{121}\) Under article 4(2)(c) of this proposal, Member States are called to ensure that pertinent offenses are being punished twice as harshly, inter alia, if the offence was committed “within the framework of a criminal organization” (i.e. by penalties of a minimum-maximum of at least ten years of imprisonment as opposed to five years in the ordinary cases). Such aggravation of the penalty to be imposed is unjustified. Indeed, if the person committing trafficking in persons

\(^{118}\) See indicatively arts. 5 and 6 of the framework-decision on organized crime (2008/841/JHA, L 300 of 11. 11. 2008, pp. 42 et seq.), as well as arts. 5 and 6 of the proposal for a directive on trafficking in human beings, COM (2010) 95 of 29. 3. 2010.


\(^{120}\) See the Manifesto on European Criminal Policy, ZIS 2009, pp. 711–712.

\(^{121}\) COM (2010) 95 of 29. 3. 2010.
is a member of a criminal organization (so that his acts are committed “within the framework of a criminal organization”), the aggravated conduct would constitute two distinct offenses, namely trafficking in persons and participation in a criminal organization (the latter being separately punished as per the EU’s dictates). Thus, employing participation in a criminal organization to also aggravate the penalty for trafficking would amount to being punished twice on account of the same circumstance in disregard of the principles of guilt and proportionality.

These conflicting (positive and negative) examples from the practice of the EU concerning the principle of guilt reveal that one cannot count on the Union’s commitment in posing restraints to suppressive measures in the form of minimum rules to be adopted by States in the field of criminal law. As long as this remains so, the security aspired within the common European area cannot be attained in a way that respects liberty and justice.

III. Conclusions

The above analysis allows us to deduce the following general conclusions:

Even within an international or supranational environment, such as the EU, criminal law will always retain its particular nature, since it constitutes the sternest mechanism of social control, which deeply affects fundamental civil liberties.

Highlighting such particular nature does not aim at sustaining an anti-European sentiment or insulate Member States’ criminal justice systems from the EU’s legal order. On the contrary, the goal is to underscore the importance of fundamental principles of criminal law in restraining counter-crime policies so that they are implemented in a manner that respects civil liberties and benefits citizens. The EU ought to apply these principles without altering their substantive content, as it subscribes to the same values as the ones that gave rise to these principles in the first place.

At this point in history, the institutional identity and political agenda of the EU as outlined after the Treaty of Lisbon present an opportunity that should not be missed, particularly since guaranteeing fundamental rights of citizens already emerges as a declared goal of the Union. The practical difficulty, of course, is to move from verbally guaranteeing civil liberties to ensuring respect for them in actual practice, an endeavor often proven quite arduous for Member States themselves.

True safeguarding of fundamental rights, a task primarily focused on the sensitive field of criminal suppression, hinges on the EU’s day-to-day activities, and especially on its legal tools, by which it imposes its decisions to criminalize various types of conduct on Member States. The long and winding path towards preserving civil liberties within a common European area – pursued thus far with the preservation of ‘security’ in mind – can only be traversed if the liberal fundamental principles governing

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122 The aggravation of the conduct consists in the breach of public order or, alternatively, the fact that criminal organizations tend to be more harmful towards fundamental interests.
when and under which circumstances the State may impose criminal punishment are placed at the center of attention.

These fundamental principles, as presented in the Manifesto on European Criminal Policy and scrutinized above, should – according to my opinion – be explicitly codified in a detailed manner in the primary legislation of the EU,\(^\text{123}\) to the extent this is not already the case. Europe’s historic and cultural tradition, inspired by the Enlightenment, enables it to implement a “zero tolerance policy on breaches of fundamental rights” as opposed to a mere “zero tolerance policy on crime”, thus achieving better results. However, this would presuppose turning its declared goals and political willpower into actual policies, which shall infiltrate its legislative initiatives binding Member States in the field of criminal law.

The Principle of Proportionality and the Protection of Legal Interests (Verhältnismäßigkeit und Rechtsgüterschutz)

Martin Böse*

Abstract

According to the manifesto on European Criminal Policy, the European legislator has to abide by the principle of proportionality and its sub-principles, the protection of legal interests (Rechtsgüterslehre) and the ultima ratio principle. A critical appraisal of these principles will reveal that a “materialised” concept of legal (“fundamental”) interests cannot be considered a suitable basis for a coherent criminal policy whereas the ultima ratio principle does not go beyond the general requirements of the principle of proportionality. Since absolute limitations cannot be derived from these principles the legitimacy of criminal law should not only depend upon respect for substantial limitations, but derived from procedural requirements in the legislative process as well.

1. Introduction

Whereas the principle of nullum crimen, nulla poena sine lege addresses the formal legitimacy of criminal sanctions, this article examines the substantial limitations of criminal law set out in the manifesto on European Criminal Policy: The principle of proportionality – including, in particular, the ultima ratio principle and the protection of legal interests (“Rechtsgüter”) as the sole legitimate purpose of criminal law.1

The principle of proportionality is one of the fundamental principles of the European Union legal system.2 Even though its scope extends far beyond criminal law, it carries significant importance in the area of criminal law in particular, as Art. 49(3) of the Charter of Fundamental Rights reveals. Thus, the principle of proportionality is more than just a “policy principle”, that is, a sort of guideline for the relevant political actors. It embodies a binding rule of primary law the European legislative process has to comply with.

However, it cannot be denied that the European institutions still have room for discretion in the law-making process. In this regard, the constitutional principle may have a kind of “spill-over effect” in guiding the legislator even beyond the ambit of hard constitutional rules and judicial review by the European Court of Justice.

A corresponding political commitment has been expressed in the Stockholm Programme, adopted in December 2009, stating: “Criminal law provisions should

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be introduced when they are considered essential in order for interests to be protected and, as a rule, be used only as a last resort.”

Given the rather vague notion of proportionality, the efforts of the manifesto put into place in order to develop precise and workable standards for a European criminal policy must be welcomed. Before discussing the single elements of this concept, two preliminary remarks may be permitted:

Firstly, the notion of proportionality implies that a criminal law provision is adopted in order to reach an objective, i.e. criminal law serves as an instrument to prevent significant social harm; one might even say that it is used as a tool for social engineering. Thus, this concept is based on the maxim *punitur ne peccetur* focussing on the (dissuasive and affirmative) effects of criminal law and criminal punishment (*positive / negative Generalprävention*). In contrast, the theory of retribution following the maxim *punitur quia peccatum est* objects to any concept of criminal law founded on a purpose of criminal punishment because the reason for punishment lies in the commission of the crime itself. Consequently, this theory is outside the ambit of the principle of proportionality. In other words, reference to this principle is linked to a particular theoretical foundation of criminal law that has to be accepted if the principle should be applied. Nevertheless, the theory of retribution can be – or must be – considered in the framework of other principles, in particular the principle of culpability (*nulla poena sine culpa*).

Secondly, the principle of proportionality is ambiguous in the law of the European Union. As a general principle, it has been developed as a limitation to acts of the Union interfering with fundamental rights of the individual. On the other hand, the principle of proportionality obliges the European legislator to respect the competences of the Member States (Art. 5(4) TEU and the protocol on the application of the principles of subsidiarity and proportionality). It is obvious that these two notions of proportionality are different from one another. For matters of competence, the need for a common (uniform) standard must be established. Even if action on the European level is “necessary” and proportionate, this does not coincide with the proportionality test with regard to fundamental rights. For example, a directive for the retention of telecommunication data may be based on the former Art. 95 TEC, because of a possible distortion of competition within the internal market, however, it seems doubtful whether these obligations are in conformity with the fundamental right to privacy. Turning to substantive criminal law, one can say that the “special need” to combat crime on a common basis mentioned in Art. 83 sect. 1 TFEU refers to the principle of proportionality in matters of competence. In the following, the article will nevertheless limit and focus

4 In this respect, see Noltenius, „Verhältnismäßige Gerechtigkeit im Strafmaß?“, Höchstrichterliche Rechtsprechung im Strafrecht 2009, pp. 499, 504 et seq., in particular p. 505.
its attention on the discussion of the principle of proportionality with regard to fundamental rights.

2. Legitimate Purpose: Protection of legal interests (Rechtsgüterschutz)

The starting point for the proportionality test is to identify a legitimate purpose. The manifesto defines the requirement of a legitimate purpose as follows:7

“The legislative powers of the EU in relation to criminal law issues should only be exercised in order to protect fundamental interests if:

(1) These interests can be derived from the primary legislation of the EU;

(2) The Constitutions of the Member States and the fundamental principles of the EU Charter of Fundamental Rights are not violated, and

(3) The activities in question could cause significant damage to society or individuals.”

As the discussion of the legislative acts reveals, this definition adheres to the theory of legally protected interests (“Rechtsgutslehre”). According to this theory, the sole purpose of criminal law is the protection of a legal interest (“Rechtsgut”).8 The legislature is compelled to state the purpose of each criminal law provision it wants to adopt. A legitimate legal interest must differ from the norm prohibiting the conduct in question; on the other hand, the prohibited conduct must be capable of violating the protected interest. So, the concept of legal interest rationalizes the legislative process by a precise definition of the protected interest and the requirement of its violability (“Verletzbarkeit”).

But the approach of the manifesto goes one step further, requiring a “fundamental interest” of society and its citizens. In other words, it is not up to the legislature to define a legal interest to be protected by criminal law, but it is bound by a “quasi-constitutional”, substantive concept of “Rechtsgut”. In the author’s view, this approach ignores the objections raised in the discussion at national (German) level.9 A legal interest is always constituted by an appraisal of that interest (as a “good”).10 Since there is no consensus on the ultimate value and pecking order of interests in a modern pluralistic society, legal (“fundamental”) interests have to be assessed and balanced in an open democratic process.11 Restricting the legitimate purpose of criminal law to the protection of fundamental interests of citizens would not only

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override the legislative competences and main tasks of the Parliament, but also delegitimise certain criminal offences that are widely accepted such as cruelty to animals. Correspondingly, even proponents of the theory of legal interest admit that the requirement of a legal interest cannot be applied without exception.12

These critical objections also apply to the definition of fundamental interests in the manifesto. The required link to the primary law of the European Union (first criterion) seems to be equivalent to a constitutionally protected interest on national level. Again, it must be doubted whether reference or silence of the constitution with regard to a specific interest can be interpreted as a main criterion for the appraisal of this interest to be “fundamental” and thereby a legitimate object of protection by criminal law.

Furthermore, primary law of the Union cannot be directly compared to a national constitution, since it is fragmentary, which is due to the Union’s limited competences (principle of conferral, Art. 5(2) TEU). Consequently, the treaties cannot provide an exhaustive list of fundamental interests.

Besides, the (possible) differences between the purpose of harmonisation (uniform standards) and the purpose of the harmonised provision (protection of a legal interest) must be taken into account. The criminalisation of money laundering provides an illustrative example in this respect: A directive explicitly stipulating criminal sanctions might be based upon Art. 83(2) TFEU in connection with the competence on the internal market, based on the concern for the stability and the integrity of the financial sector. However, the legitimate purpose of this criminal offence cannot be found in these concerns, but in the aim to deprive the perpetrator of its illegal profits and to protect the interests violated by the previous offence. It seems doubtful at best whether these purposes can be derived from the treaties.

To sum up, a “materialised” concept of legal (“fundamental”) interests does not seem a suitable basis for a coherent criminal policy, since it cannot be applied without exceptions and these exceptions cannot be integrated into the theory of legal interest. By restricting the legitimate purpose of criminal law to the protection of fundamental interests in the above mentioned sense, the manifesto anticipates the assessment of the other criteria of the proportionality test (suitable, necessary, adequate). This effect becomes obvious in the criticism of the framework decision on combating the sexual exploitation of children and child pornography.13 According to the manifesto there is no legitimate purpose to criminalise virtual child pornography. However, the purpose to protect the rights of children can be derived from primary Union law (Art. 24 Charter of Fundamental Rights) and is certainly legitimate; what can be doubted is whether a ban on virtual child pornography is suitable and necessary to achieve this aim.

12 Roxin, Zur neueren Entwicklung der Rechtsgutsdebatte, Festschrift für Winfried Hassemer, 2010, pp. 573, 597; Rudolphi, in: Systematischer Kommentar (note 8), vor § 1 n. 8.
3. Criminal law as a “last resort” (*ultima ratio* principle)

Having established a legitimate purpose, the legislature must assess whether a criminal law provision is capable of protecting a legal interest and that no other measures exist that would be more suitable to safeguard the protected interest.\(^{14}\) The authors of the manifesto correctly act on the assumption that the *ultima ratio* principle is a restriction that can be derived from the principle of proportionality. But the relevance of the *ultima ratio* principle is rather limited with regard to offences based on non-criminal prohibitions in civil or public law, because the introduction of a criminal offence is based on the experience that civil and administrative sanctions have proven to be insufficient so that criminal sanctions are used as a “last resort”.\(^{15}\) As a consequence, criminal law is not used as an alternative, but an additional means that is applied on the basis of pre-existing provisions of administrative or civil law.\(^{16}\) For instance, environmental law states that certain activities require a permission issued by the competent authority or are subject to a notification procedure. The latter applies to the shipment of waste. According to the manifesto, the criminalisation of the failure to comply with this procedure is not compatible with the principle of *ultima ratio* because of its merely formal character.\(^{17}\) However, it should be borne in mind that the proper functioning of the public law regime cannot be guaranteed if it is not supplemented by criminal law provisions. Otherwise producers, collectors and dealers would probably not bother about their obligation to make notification of a shipment of waste. This would render the whole system useless or at least inefficient.

Given the fact that the relevant provision of the directive on the protection of the environment through criminal law requires a shipment undertaken in a non-negligible quantity, it seems quite difficult to see any difference between the illegal shipment of waste and the corresponding offences in the directive on providing measures and sanctions against employers of third country nationals that have been considered compatible with the principle of *ultima ratio*.\(^{18}\)

Since the *ultima ratio* principle focuses on measures to be applied as an alternative means to criminal law, it is evident that this principle comes into play if a conduct not prohibited by other norms is to be criminalised; for activities that occur before the actual commission of a crime, in particular.

Nevertheless, the principle of *ultima ratio* has been subject to severe criticism in this regard. Some scholars held that criminal law might be a less severe means if the alternative instrument were to consist of an overall supervision and inspection of the relevant economic activity. Since criminalisation would only affect a small number

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\(^{15}\) See ECJ, C-176/03 – Commission v. Council, ECR 2005, I-7879, para. 48; C-440/05 – Commission v. Council, ECR 2007, I-9097, para. 60 et seq.


of individuals (i.e. potential offenders), criminalisation of an illegal conduct would not be ultima ratio, but rather – with regard to the overwhelming majority of enterprises – the less severe measure instead.\textsuperscript{19} It is questionable whether the offender who faces criminal punishment will follow this argument. The assessment whether criminal law is a less severe means cannot be based on a comparison of the quantity of individual suffering of the persons concerned. This is a problem of balancing the conflicting interests of different groups that has to be discussed on the level of adequacy (proportionality in the strict sense).\textsuperscript{20} Whether the use of criminal law is necessary must be assessed by the quality of the interference with fundamental rights of the individual person. With regard to the offender, it is obvious that his/ her fundamental rights are seriously affected by criminal punishment. But even if the effects of criminalisation on all the addressees of a statutory prohibition are taken into consideration, the gravity of this instrument cannot be contested. By introducing a criminal offence, the legislature does not only create a new prohibition, but also a serious restriction of the freedom of the individual through an absolute binding rule. Whereas the consequences of illegal conduct in civil and public law are limited and can be regarded as the price that has to be paid by the offender the message of criminalisation is quite clear: There shall be no choice between legal and illegal behaviour. On the one hand, the price (imprisonment) would be too high. Furthermore, criminalising a certain conduct produces social pressure because the individual is expected to obey these fundamental norms and runs the risk of being stigmatised in case of non-conformity.\textsuperscript{21}

Thus, criminalisation of a conduct seriously affects individual freedom. These effects become even greater if the scope of the criminal offence leaves a margin of interpretation; as a consequence legal uncertainty may arise, which could result in an excessive “over-prevention” of harmless conduct.\textsuperscript{22}

To sum up, in most cases the use of criminal law should be considered as a means of last resort. Nevertheless, the criticism of the principle of ultima ratio has revealed that this problem has – at least partially – to be discussed on the level of adequacy or proportionality in the strict sense.

Going back to the criminalisation of preparatory acts, it can be stated as a general standard of criminal policy that the ambit of criminal law – due to the gravity of its impact on fundamental rights – is limited to violations of protected interests or activities that put these interests at risk.

This restriction is based on reasoning similar to that underlying the principle of ultima ratio: With regard to preparatory acts, priority should not only be given to preventive measures taken by the competent police or administrative authorities,

\begin{itemize}
\item \textsuperscript{19} Tiedemann, Der Entwurf des Ersten Gesetzes zur Bekämpfung der Wirtschaftskriminalität, Zeitschrift für die gesamte Strafrechtwissenschaft 87 (1975), pp. 253, 266–267.
\item \textsuperscript{21} See in this regard Böse, Grundrechte und Strafrecht als „Zwangsrecht“, in: Hefendehl/von Hirsch/Wöhlers (note 10), pp. 89, 91 et seq.
\item \textsuperscript{22} See in this regard Böse (note 19), pp. 183 et seq.
\end{itemize}
but also to the autonomous decision of the individual to avoid any violation of the protected interest. As a consequence, preparatory acts – and even the actual attempt, if voluntarily abandoned – are not subject to criminal prosecution. Therefore, the criticism of the framework decision on combating terrorism raised in the manifesto is justified.

However, criminalisation of conduct in the preparatory stage is not per se incompatible with the principle of proportionality and ultima ratio. In this context, an analogy to the principles of imputation might be helpful. If a certain act by its nature and purpose is solely directed at facilitating the commission of a crime by others, it may be legitimate to criminalise this particular conduct. With such preparatory acts, the offender has created a risk he/she no longer has any control over. Under certain circumstances, the protection of the legal interests can prevail over the interest in the use of personal freedom. A high rank of the protected interest and a qualified risk should be considered as indispensable elements to justify the use of criminal law.

On the other hand, criminalisation of an activity which by itself does not cause any harm to society or its citizens seems doubtful if this conduct does not automatically (or probably) give rise to the commission of a crime, as can be shown by reference to the framework decision on child pornography and the recent proposal of the Commission for a directive. In the manifesto, it has been criticised that the framework decision criminalises even virtual child pornography despite the fact that no child has been abused. However, as far as the mere possession, distribution and purchasing of the incriminated pictures are concerned, there is only little difference between real and virtual child pornography because the sexual abuse of the victim has already been committed when the offender comes into play. The criminalisation of virtual child pornography is based on the argument that there is one single and common market for child pornography that does not differentiate between virtual

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25 See in this regard Frisch, Rechtsgut, Recht, Deliktstruktur und Zurechnung im Rahmen der Legitimation staatlichen Strafens, in: Hefendehl/von Hirsch/Wöhlers (note 10), pp. 215, 228 et seq.

26 See in this regard the dissenting opinion of Judge Sommer, in: Bundesverfassungsgericht, BVerfG Reports Vol. 90, pp. 145, 213– 214; Lagodny (Note 16), pp 438 et seq.; Radtke/Steinsiek (note 23), p. 390; Rudolphi, in: Systematischer Kommentar (note 8), § 1 n. 11 a; Sieber (note 23), pp. 358 et seq.


and real child pornography. Consequently, the selling and purchasing of virtual pornography creates a demand for more of the same and an indirect danger for the abuse of children to escalate in order to meet the demand.

This concept of the European legislature seems plausible. However, the possibility to meet the demand by “virtual” pornography – i.e. without causing harm to a victim – raises some doubts on the correlation between selling and purchasing of child pornography and the sexual abuse of children. In particular, the broad notion of “child” includes juveniles below the age of 18 years, so that “child pornography” can be produced by adult actors playing the role a person of 16 or 17 years of age. Furthermore, the mere possession of virtual child pornography cannot be considered market activity and can thus not be regarded by itself as sufficient risk for a child being abused. This objection has been taken into account in the framework decision by providing for an exception from criminal responsibility, but this provision has been removed from the Commission’s proposal.

This topic surely deserves closer examination, but the article must draw to a close on this matter here. The brief overview has shown that the principle of proportionality and its sub-principles (theory of legal interest, ultima ratio) do not entail absolute limitations, but rather provide a road map for the discussion on whether the use of criminal law is legitimate. The elements of this principle (legitimate purpose, suitability, necessity, proportionality) have to be discussed in the context of the concrete legislative proposal. The article shall therefore conclude with a few remarks on the legislative process and the principle of proportionality.

4. Proportionality and legislative procedure

First of all, it seems odd that in legislative proposals the principle of proportionality is mainly considered as a matter of competence. In the Commission’s proposal on child pornography, the principle of proportionality is only mentioned in an enumeration of the fundamental rights and principles that have been considered with “in-depth scrutiny”.29 A detailed analysis of the different offences and their compatibility with the principle of proportionality is lacking. In the author’s view, this must be a crucial element of legislative proposals to come. Otherwise, there is no solid basis for a profound discussion in the legislative process and the principle of proportionality will not perform its task.

Such a profound discussion will also entail a critical review of the existing criminal law provisions. One of the major shortcomings of the discussion at European level is that decriminalisation is left to the Member States. The borderline between criminal and non-criminal conduct is not defined by the European legislature, but by the Member States. Consequently, the latter can always go beyond the minimum standard established by the law of the Union. Even if the European legislator abstains from criminalising a certain conduct in order to respect

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the principle of proportionality, the national legislature is still free to do so. By this, European legislation in criminal law has a repressive “spin”: The national legislature can avoid inconsistencies in criminal law only by adopting criminal provisions which go beyond the minimum standard. This has happened with regard to the elements establishing criminal responsibility as well as to the gravity of the criminal sanctions. A possible solution might be to give the term “minimum rules” in Art. 83 para. 2 TFEU a twofold meaning: a minimum standard of protection by criminal law and a minimum standard of protection against criminal law.

5. Concluding remarks

As mentioned before, too heavy a reliance on the critical potential of the principle of proportionality and theory of legal interest provokes scepticism. Nevertheless, the approach of the manifesto that only a fundamental interest may be subject to protection by criminal law can serve as a common basis for a European Criminal Policy. In the absence of a substantial definition of that fundamental interest, one might think about a higher threshold for the adoption of criminal offences in the legislative process. Just a few months ago, adopting a criminal legislation required unanimity in the Council. As a consequence, a framework decision on criminal law could not be adopted if one Member State was not convinced that a certain conduct should be made subject to criminal punishment. The right to veto fulfilled the (latent) function of procedural safeguard of the principle of *ultima ratio*. Correspondingly, it has recently been suggested at national (German) level that the introduction of a new criminal offence should be subject to a qualified majority in Parliament. But this should be left for further discussion.

The Importance of the Principles of Subsidiarity and Coherence in the Development of EU Criminal Law

Petter Asp*

Abstract

This paper deals with the principles of subsidiarity and coherence and their implications for the further harmonisation of national criminal law under the new treaties. The point of departure is article 5(3) of the Treaty on European Union, on the principle of subsidiarity. According to the principle of subsidiarity the Union shall, in areas that do not fall within its exclusive competence, act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States. This principle calls, in itself, for certain restrictiveness when it comes to making use of the EU competences (in general). As regards criminal law, however, the principle of subsidiarity is supported by the principle of coherence, i.e. the principle that one shall not, without good reasons, disturb or interfere with the inner coherence of the national criminal law systems. In other words: the EU legislator should be aware of the fact that harmonization will always – in one way or the other – include interference with the inner coherence of the national criminal law systems and that harmonization therefore should take place only when it is good reasons for it.

In this context it is emphasized:

- that criminal law is a legal area which is closely connected to national culture and values and to national understandings of difficult and complex ethical questions; in fact the coherence of the criminal law systems should be considered as forming part of the national identities of the Member States, thus being protected under article 4(2) of the Treaty on European Union,

- that criminal law a legal area which is based on an idea of a coherent system of values – reflected inter alia in the levels of punishment for different offences – and which is therefore sensitive (more sensitive than most other areas of law) to external influence,

- that criminal law is a legal area which, by its very nature, is repressive, which (in turn) means that harmonization in this area will – at least in practice – focus on increased repression.

All this makes it essential that criminal law harmonization is used, not as a first-hand measure or tool, but only when it is necessary to achieve the objectives of the treaties – and also then in a manner which show proper respect for the national criminal law systems upon which all EU criminal law measures ultimately build.

1. Introduction

In late 2009 the European Criminal Policy Initiative published a Manifesto on European Criminal Policy. The idea behind the Manifesto was to highlight the need

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for a more principled approach towards the future criminal law cooperation within the European Union. The Manifesto is built upon six basic principles:

1. the principle of a legitimate purpose,
2. the *ultima ratio* principle,
3. the principle of guilt,
4. the principle of legality,
5. the principle of subsidiarity, and
6. the principle of coherence.1

The article of professor *Kaija-Gbandis* in this issue of EuCLR2 focuses on the first four of these principles, i.e. the ones which could be seen as well established and fundamental criminal law principles. As explained in professor *Kaija-Gbandis’* article these principles are, however, not only internal criminal law principles, but they are also principles which are firmly rooted in EU law and which therefore must be respected by the Union.3

In this article I will focus upon the principles of subsidiarity and coherence. These principles could be regarded as meta-principles which do not necessarily have that much to say about the content of the instruments or measures to be taken, i.e. they do not focus on questions of substance. The principles of subsidiarity and coherence do, instead, focus on how the power to harmonize criminal law is used, or rather: on how it should be used.

I will start by saying a few words about the content of the principles and try to show in what way they form part of European Union law. Thereafter, I will, by referring to some general features of criminal law, try to explain why the respect for these principles is of vital importance for the future development of European Criminal Law.

### 2. The principles of subsidiarity and coherence

Let us start with the principle of subsidiarity. The principle of subsidiarity is, of course, a well known principle of EU law. It is perhaps not the principle in EU law which is known as the most justiciable of all principles, i.e. it is not a principle which effectively sets clear boundaries for the legislator.4 This is reflected in the fact that one has seldom – or never – seen it applied directly in court as a reason for finding a certain EU-instrument non-valid. It seems fair to say that the principle of subsidiarity has, up to now, been seen more as a guiding principle than as a firm

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3 See also *H. Satzger*, Der Mangel an Europäischer Kriminalpolitik, Zeitschrift für Internationale Strafrechtsdogmatik (ZIS) 2009, pp. 693 et seq.

4 Cf. e.g. *N. Emiliou*, Taking Subsidiarity Seriously? The View from Britain, European Public Law (EPL) 1995, pp. 590 ff (so also p. 565 footnote 5) and *G. Davis*, Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time, Common Market Law Review, 2006, pp. 72 et seq.
boundary setting norm. If one – in line with mainstream legal theory make a distinction between rules and principles – one might say that the principle of subsidiarity is much of a principle and little of a rule.⁵

Nevertheless, the principle of subsidiarity is evidently a principle which form part of EU law and its general principles.

Thus in article 5(3) of the Treaty on European Union it is stated that:

“the Union shall, in areas that do not fall within its exclusive competence, act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States.”

The principle is, of course, in a way closely connected to the general principle of proportionality since it concerns itself with the necessity of making use of the legislative powers of the EU.⁶

Necessity is, as is well known, a key element also in the general principle of proportionality (which in turn is closely connected to the ultima ratio-principle):

“a measure is justified if, and only if, the aim pursued cannot be reached by another and less intrusive measure.”⁷

Perhaps one could display the relation between proportionality and subsidiarity by saying that the principle of proportionality governs the question whether a certain measure should be taken at all, and that the principle of subsidiarity, then and thereafter, uses the necessity part of the proportionality test for the purpose of finding out whether it is for the Member States or for the Union to take the measure in question.

The subsidiarity principle must, as far as I can see, be a test that is, in itself, second or subsidiary to the principle of proportionality:

If a measure should not – due to lack of proportionality – be taken at all, then it should not be taken at EU level either, i.e. when the proportionality requirement is not met there will simply be no need for applying the principle of subsidiarity.⁸

The principle of subsidiarity is founded on the idea that society is built from the bottom to the top and not the other way around. This means that the central – or in the case of the EU: the supranational – authorities should fulfil only those tasks that cannot be fulfilled effectively by actions on a decentralized, local or regional, level. In this way one ensures that decisions will be taken as closely to the citizens as is possible having regard to the demands of society.

Thus, the principle of subsidiarity is not only an organisational idea, but also an idea closely connected to the idea of democracy and self-governance. By respecting the principle of subsidiarity the citizens are given as much freedom to decide over their lives as possible.

The weight attached to the principle of subsidiarity is underlined by the fact that the treaty provides for a special procedure – involving the national parliaments – to ensure that the principle is respected.\(^9\) I will not go into details in this regard, but merely refer to article 69 Treaty on the Functioning of the European Union and to the protocol on the application of the principles of subsidiarity and proportionality.

To summarize one can say that the reference to the principle of subsidiarity made in the Manifesto should not be very surprising. In a way it states the obvious, i.e. that the EU-legislator should respect the Treaties. I will later get back to subsidiarity and try to explain why the European Criminal Policy Initiative emphasises this principle and why we argue that it should be given extra weight in the criminal law area.

If the principle of subsidiarity is a well known principle, firmly rooted in the European tradition, then the principle of coherence is perhaps somewhat less familiar. In the Manifesto on European Criminal Policy the principle of coherence is presented in the following way:

When enacting instruments which affect criminal law, the European legislator should pay special attention to the coherence of the national criminal law systems, which constitute part of the identities of the Member States, and which are protected under Article 4(2) of the (new) Treaty on European Union (vertical coherence). This means, first and foremost, that the minimum-maximum penalties provided for in different EU instruments must not create a need for increasing the maximum penalties in a way which would conflict with the existing systems. In addition, the European legislator must pay regard to the framework provided for in different EU-instruments (horizontal coherence, cf. Art. 11(3) [new] Treaty on European Union).\(^10\)

If one takes a look in the treaties one will not find a clear legal basis for it corresponding to article 5(3) on subsidiarity, and if one look in legal text books around Europe one will find few, if any, references, to the principle.

Admittedly, the principle was formulated as such – i.e. as a principle of European Criminal Law – by us, i.e. by the European Criminal Policy Initiative, when drafting the Manifesto. This does not mean, however, that the principle does not have institutional support, or that it cannot be derived from other basic principles of EU law, but merely that it has, up till now, not been formulated as a legal principle. As already indicated – see the quotation supra – the principle find support \textit{inter alia} in Article 4(2) of the Treaty on European Union.

The basic idea behind the principle of coherence is that criminal law systems are characterized by the fact that they are systems which presuppose a certain degree of inner coherence. Such an inner coherence is necessary if the criminal law should be able to reflect the values held collectively by the society and if criminal law should be able to meet the understandings of justice held by individuals in the society.\(^11\)


In this context one can make a distinction between an instrumental perspective on law, which emphasises law as a measure for achieving certain concrete results, for getting things done, and a more retrospective perspective on law, which emphasises law as a response characterised by values such as fairness and justice. There is no doubt that law can be a tool for achieving things, and so can criminal law, but it should be evident for everybody that criminal law is not merely a tool or an instrument used for achieving certain ends, but also a system of norms which is there for the purpose of communicating moral values and for the purpose of expressing censure. And if criminal law should be able to fulfil this non-instrumental function – which in the long run is of vital importance also for the ability of the criminal law system to function as an instrument – then it is absolutely essential to have at least some degree of internal coherence.

This feature of the criminal law systems of the Member States makes them especially sensitive to external influence which in turn, makes it extra important not to interfere with the national criminal law system without good reasons. Thus, if one should try to formulate the principle of coherence it would be something like:

One should not (in this context: the EU legislator should not) – without good reasons – interfere with or disturb the inner coherence of the national criminal law systems.

As you can see, this formulation of the principle makes it evident that the principle of coherence is related to the principle of subsidiarity. Both principles state that the EU-legislator should act if, and only if, there is good reasons for it. In fact one can say that the principle of coherence provides us with additional reasons for respecting the principle of subsidiarity when it comes to taking measures on the criminal law field and it does so by reminding us of the value of coherence within the area of criminal law. One could express this by saying that the basic function of the principle of coherence is to boost the principle of subsidiarity.

The relative importance of the principle of subsidiarity and coherence can, of course, vary between different areas. In describing the principles of subsidiarity and coherence I have, to a very large extent, built upon the idea that criminal law is a special creature in relation to which it is of special importance to respect subsidiarity and coherence. I will now say a few words that aims at justifying this point of departure.

3. The criminal law context

If we start with the principle of subsidiarity it should be quite clear that the relative importance of the principle of subsidiarity is greater in criminal law than in most other areas of law and that this is due to considerations of a principled as well as a pragmatic nature.

As regards the considerations of principled nature one could refer not only to the fact that criminal law is a legal area which is closely connected to the idea of state sovereignty – i.e. an area which is closely connected to the understanding of what it is to be a state and as regards which the Member States by tradition are extra sensitive – but it is also, and more importantly, an area in which the principle of *nulla poena sine lege parlamentaria* is considered to be of fundamental importance as one of several aspects of the principle of legality.\(^\text{12}\) In principle the question whether something should be criminalized and thus punishable is a question which should be answered in a legislative process with as direct participation as possible of the citizens.

Thus, having regard to the distance between the citizens and the actual decision making power of the EU, having regard the often discussed democratic deficit\(^\text{13}\) of the EU – which is only partially absolved by the treaty of Lisbon – it should be obvious that the principle of *nulla poena sine lege parlamentaria* points in the direction that decisions on criminal law measures should normally be taken at Member State level.

This is not to say that the situation has not improved with the Lisbon Treaty; it seems clear, however, that the possibilities of real democratic participation still is better on national level than on EU level. It is not only a question of the way in which the citizens can participate in the actual decision making (whether they directly or indirectly elects the people making the decisions, or whether they are involved in the parliamentary process), but it is also a question concerning the quality of the public debate.

In this respect, it seems quite evident that the preconditions for a good and informed public debate are better at national level than on EU level. This is not, of course, due to the quality of the participants in the debate, but simply a consequence of the fact that the Union is huge and consists of 27 Member States. It is simply a more or less impossible task to conduct a meaningful public debate which includes participants from so many countries with so many barriers to communication. Even if you disregard the linguistic difficulties you will face the problem that a public debate will be conducted in so many fora – so many different newspapers and TV-channels – that it will be virtually impossible to grasp the total picture. The problems are enhanced by the fact that the legislative process is international in character, which means that much of the negotiations takes place behind closed doors.


To summarize: the importance attached to the principle of *nulla poena sine lege parlamentaria* indicates that extra weight should be given to the principle of subsidiarity when it comes to the area of criminal law.

In addition to these remarks on the importance on the democratic process, it should be observed that criminal law is a legal area which is closely connected to national culture and national values and to national understandings of complex ethical questions. For example there are important differences between the Member States on such basic ethical questions as:

- the right to abortion,
- the right to end your own life (and to get assistance from others),
- the way to handle the problem of narcotics (whether it should be done by a harm reduction strategy or a zero tolerance strategy),
- the way to deal with expressions of race hatred (should such expressions be met in a public debate or by criminal sanctions),
- the question whether the buying of sexual services should or could be criminalized or not,
- whether and to what extent a person’s honour is something worth defending by means of criminal law etc. etc.

It is clear that such differences are not only technical in character, but that they reflect deeply rooted understandings of different problems and the way they should be solved. Since criminal law forms part of a system of values built on fundamental understandings of this kind it should be considered as part of the national identities of the Member States, which, according to article 4(2) of the Treaty on European Union, should be respected. This does, even more, underline the importance of subsidiarity.

The importance of respecting the principle of subsidiarity is further enhanced by a more pragmatic consideration relating to the structure of the cooperation as regards substantive criminal law.

The harmonisation of substantive criminal law shall according to article 83 of the Treaty on the Functioning of the European Union focus on the establishment of minimum rules concerning the definition of criminal offences and sanctions in the area of particularly serious crime with a cross-border dimension and when such harmonisation is necessary for ensuring the effective implementation of a Union policy in an area which has been subject to harmonisation measures.

This focus on minimum rules will inevitably make the cooperation as regards substantive criminal law one-sided and repressive. This is due to the fact that minimum rules cannot logically provide any added value unless the minimum level is set above the existing minimum level within the Union. If the minimum level is set at the existing minimum level of the Union, then the instrument will not add anything. This means that one can take for granted that each and every decision on minimum rules will, in practice, lead to an increased level of repression in some of the Member States of the union. In other words the cooperation focus only on the side of criminal law that concerns the exercise of state power (Criminal law as
Strafbegründungsrecht), not on the equally important side which is concerned with criminal law as a limit to state power (Criminal Law as Strafbegrenzungsrecht).\textsuperscript{15}

These feature characterizes not only the cooperation within the union, but most of the other international cooperation in the criminal law area, for example the one conducted within the United Nations and within the framework of the Council of Europe. However, the problem with this one-sidedness becomes more acute when the cooperation, as is the case within the EU, is continuous and very ambitious in character.

Being aware of this unbalanced character of the cooperation, one have an additional reasons for taking criminal law measures only when this is necessary having regard to the aim pursued; we cannot constantly, relentlessly and without proper discrimination take instruments that increases the level of repression of the Union. This is not to say that we should not cooperate in the criminal law area, but merely that we should be careful in doing so, having regard to the special characteristics of the cooperation in the criminal law area.

Having said this about the principle of subsidiarity I will now try to justify the special importance of the principle of coherence for the future criminal law cooperation within the union.

I have already underlined that criminal law is very much of a system, the parts of which all hang together in a fairly complex and sophisticated way. In this part of my paper I will try to display this by discussing the way EU instruments affects national criminal law.

As a point of departure we should first take notice of the fact that, even though European Union, since long, has had implications for criminal law and even though the union nowadays has its own competence in criminal matters (see article 83 of the Treaty on the Functioning of the European Union) it is still clear that if you are on the search for the criminal law systems of Europe you will find them on a national level.\textsuperscript{16} We do not – at least not yet – have a common European Criminal Law system, but rather 27 different criminal law systems, one French system, one German system, one Swedish system etc., which to some extent are harmonized by measures taken on EU level. Thus, when discussing questions relating to the criminal law cooperation, we should keep in mind that we are talking about adjustments of the national criminal law systems.

The systematic character of criminal law could be displayed, for example, by referring to the rules in the general part of the national criminal law systems. In this area it is very easy to see that positions taken in one part of the system will often affect positions taken elsewhere in the system. For example, George Fletcher, has


underlined that the way you look at justifications, as negative elements of an offence or as independent rules providing for exceptions on their own merits, will normally determine the answer to a lot of different dogmatic questions, for example whether the principle of legality applies to justifications and whether mistakes as regards elements relevant for justification should be treated as lack of intent. Thus, also when one deals with dogmatic technicalities of the general part one should be aware that there is an underlying strive for coherence. Since the criminal law cooperation within the EU does not focus on the general part we can, however, leave these complexities aside.

Another place where the idea and value of coherence is even more easily seen, however, is at the area of punishment and sentencing and this is clearly an area subject to EU harmonization measures.

Thus, most, if not all, states have criminal law systems which, in one way or the other (for example via the penalty scale applicable to the different offences), rank the existing offences in relation to each other. In all Member States murder is, for example, considered to be a more serious offence than petty theft and somewhere between murder and petty theft you will find, for example, the offence of smuggling of migrants, rape, aggravated assault and so on.

However, even though this ranking of offences is fairly universal it is clear (1) that there are differences as regards the way offences are ranked in relation to each other. For example, one does not have to be a criminal law expert to see the ranking between drug offences and assault clearly differs between Sweden and the Netherlands. And it is even clearer (2) that the general level of repression vary considerably between the criminal law systems of the different Member States.

Thus, even if the situation were such that the Member States ranked the offences in a similar way there would still be differences as regards the level of repression. For example one state might punish murder by 10 years, smuggling of migrants by 2 years and petty theft by fines, while another state might punish murder by 20 years, smuggling of migrants by 4 years and petty theft by one month of imprisonment.

If we assume, as there is good reason to do,

(1) that the Member States strive for coherence within their own systems, i.e. they try to rank their offences in a coherent way, and

(2) that there are differences between the Member States as regards both the way they rank different offences and the general level of repression

then this means in practice, that each and every directive will by necessity disturb the inner coherence of at least some of the criminal law systems that exist in the Union.

The differences that exist between the Member States, simply makes it impossible for the sanctions provided for in a directive to fit in, in all of the criminal law systems of the Member States.18

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Let us take an example. Assume that the normal penalty for smuggling of migrants varies considerably between the Member States. In some states the punishment for a standard case of this offence might be 1 year; for example in state A; in others, for example state B, the punishment in a standard case is 2 years, and in yet others, state C, it might be 4 years. This means that no matter whether the EU decides on a level of sanctions of 1, 2, 4 or 6 years the instrument taken will disturb the inner coherence of either state A, state B or state C.

Until now the EU have coped with this problem by merely deciding on minimum maximum penalties,\(^1\) i.e. by focusing on harmonising the upper limit of the penalty scale. This makes the problems less acute, since the upper limits of the penalty scales do not necessarily affect the actual sentencing that much, but the basic problem is still there: measures of harmonisation always runs the risk of disturbing the inner coherence of the criminal law systems of the Member States and they should therefore be taken with discrimination and only when it is really necessary.

There is, of course, a certain tension between the idea of harmonization on the one hand and the principle of coherence on the other. Someone would perhaps argue the fact that each and every instrument providing for harmonisation will affect the inner coherence of the criminal law system of some Member States shows that there is something wrong with the principle of coherence. In a context where the treaties provides for harmonisation we cannot have principles based on the idea that there are problems connected to harmonisation. Such an objection presupposes, however, a very “black-and-white” or “either or” perspective. What we are saying by emphasizing the principle of coherence is not that we – due to the principle of coherence – should not harmonize criminal law at all, but rather that we should be aware that harmonization will interfere with the inner coherence of the criminal law systems of the Member States and that we, therefore:

1. should be discriminatory and use the tool of harmonization only when this is necessary having regard to the tasks and purpose of the Union, and
2. when doing so, we should leave some room for adaption of the EU rules to the national context.

In this respect, the principle of coherence does not differ from the principle of subsidiarity: due to countervailing reasons both principles state the one should make use of the powers of the EU only when necessary. As stated earlier, one might say that the function of the principle of coherence is to boost the importance of the principle of subsidiarity.

I have now emphasised the importance of coherence taking my point of departure at Member State level. However, the principle of coherence is of importance also if one focuses only on the EU level. In this regard the principle emphasises that the EU legislator should make sure that there is a certain degree of coherence between different instruments taken by the EU, i.e. one should avoid inconsisten-

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cies and other unjustified differences between different instruments. This is also one of the reasons that the European Criminal Policy Initiative emphasises that the cooperation should be built upon certain basic principles: doing so will certainly improve the chances of achieving a sufficient degree of coherence.

4. The Application of the principles – the importance of good governance

I have now tried to explain why it is essential that the principles of Subsidiarity and Coherence are respected within the EU Criminal Law Cooperation. Much is won if we all accept that these principles exist and that they reflect values which are important.

Having said this one should, of course, be aware that principles are principles and that they can be overridden by other considerations – this is especially true when it comes to principles applicable at the legislative level. Without getting into the large and sophisticated discussion on the difference between rules and principles, one can say that principles are ought-to-follow rules that do not have an all-or-nothing character, i.e. they provide reasons for acting in a certain way, but they do not exclude that it sometimes could be justified to act in another way. For example: most legislators adhere to the principle of guilt as a basic principle as regards criminal responsibility, but most states nevertheless allow for certain exceptions in this regard (for example as regards offences committed when being drunk, as regards mistakes of law etc.).

It is therefore of vital importance to ensure that not only lip-service is paid to the principles but also that they are actually applied effectively in the legislative process. In line with the principle of good governance it should be a task for the European legislator to ensure that their products are justifiable from the viewpoint of subsidiarity and coherence. Thus the European legislator, should, before enacting any criminal law instruments, evaluate whether the measure needs to be taken on EU level (subsidiarity) and what consequences the instrument has for the coherence of the national criminal law systems, and as natural part of the preparation explicitly justify the conclusion that it is satisfactory from this point of view.20

In this respect the European Criminal Policy Initiative welcomes the protocol on the principles of subsidiarity and proportionality since it requires that the EU legislator justifies its proposals from the viewpoint of subsidiarity and proportionality, and also gives the national parliaments a role as watch-dogs in this respect. We sincerely hope that this process will be used seriously and that it will turn out to be an important feature of the future cooperation.

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5. Concluding remarks

As indicated in the manifesto, there are of course examples of instruments where the principles of subsidiarity and coherence have not been observed. But there are also, and perhaps more importantly, examples where the principles of subsidiarity and coherence has been respected by the EU-legislator and which shows that it is possible to combine a strive for harmonization with respect for subsidiarity and coherence.

One example of this is that the EU, so far, has abstained from requiring the introduction of criminal law responsibility of legal persons (which would be constitutionally problematic in several Member States). Another example is that the EU has avoided introducing minimum-minimum penalties which would be problematic especially in states that do not at all operate with minimum penalties.

In fact, there has also been cases where a special provision has been introduced which explicitly allows for the preservation of the inner coherence of the criminal law systems of the Member States. Thus, article 1 section 4 of the framework decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, explicitly provides for an exception for the purpose of preserving the inner coherence of the national criminal law systems. After having set a requirement of a minimum maximum penalty of eight years this section allows the Member States to make use of a lower maximum sentence if this is necessary to preserve the coherence of the national penalty system. The wording of this section is as follows:

If imperative to preserve the coherence of the national penalty system, the actions defined in paragraph 3 [i.e. instances of smuggling of migrants] shall be punishable by custodial sentences with a maximum sentence of not less than six years [instead of eight years], provided that it is among the most severe maximum sentences available for crimes of comparable gravity.

I would like to end this article simply by emphasising that this section could be used as positive role model for the future cooperation. I think that it provides a great example of how you can harmonize and at the same time provide for a certain room for manoeuvre on the part of the Member States, thereby securing that coherence can be retained at the national level.

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20 See European Criminal Policy Initiative, ZIS 2009, pp. 713 et seq.
Mutual Recognition and its Implications for the Gathering of Evidence in Criminal proceedings: a Critical Analysis of the Initiative for a European Investigation Order

Frank Zimmermann, Sanja Glaser, Andreas Motz*

Abstract

The authors examine the development of cooperation in criminal matters within the European Union with a special view to the gathering of evidence and the proposed directive for a European Investigation Order (EIO). First, they analyse the legitimacy of the mutual recognition of judicial decisions in criminal matters. Then they describe the most characteristic features of the framework decisions on the mutual recognition of freezing orders and the European Evidence Warrant. On this basis, they scrutinise the initiative for an EIO in a third step. Although they come to the conclusion that the initiative largely avoids forum shopping and leaves the executing Member State more discretion in the implementation of an EIO than previous instruments have done, they criticise that specific prerequisites of coercive measures could lose their effect (e.g. the requirement of previous judicial authorisation). Furthermore they call for additional grounds for refusal in order to improve the foreseeability of criminal prosecution, e.g. the double criminality requirement or a territoriality reservation.

I. Introduction

On 29 April 2010 seven EU Member States launched an initiative for a directive on the European Investigation Order (EIO).1 If successful, it would be another important step towards the full implementation of the principle of mutual recognition in criminal matters. This contribution takes into account the development until March 2011. Since the time when the text was originally drafted for the THEMIS competition organised by the European Judicial Training Network in 2010, various amendments have been discussed – and the debate still continues. Nevertheless the negotiations have reached a stage at which it should be possible to foresee the characteristics of the new instrument with sufficient clarity and assess its implications. Apart from that, the analysis of the proposal for an EIO shall also serve to illustrate the general opportunities and problems that go along with the mutual recognition of judicial decisions in criminal matters.

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1 OJ 2010 C 165/22.
II. Origins and theory of the principle of mutual recognition

Closer cooperation in criminal matters in Europe has been an issue at least since the 1970s.\(^2\) It has been of great importance since the foundation of the internal market in 1992 and the subsequent opening up of national borders in accordance with the Schengen Conventions. This process has given criminals the chance to operate throughout the EU without interference and beyond the control of any single Member State. Thus, there was an increasing need of national prosecution authorities to cooperate in order to be on a level playing field with international (and often organised) crime.\(^3\) At the same time, the EU Member States urged to approximate their provisions of substantive criminal law in order not to offer offenders any ‘safe harbours’. These were some of the reasons which led to the creation of the former ‘third pillar’ of the EU in the Maastricht Treaty of 1992. With the Treaty of Amsterdam (1997), the cooperation in criminal matters and the approximation of the Member States’ criminal laws even became the main issues within the ‘third pillar’ (which was consequently re-labelled as ‘Police and Judicial Cooperation in Criminal Matters’).

1. The traditional system of mutual legal assistance

However, this conferral of competences on the EU to take measures in certain fields of criminal law and procedure did not itself solve the problems with the struggle against cross-border crime. This was because, under the afore-mentioned circumstances, the traditional instruments of mutual legal assistance did not offer an adequate means of cooperation any longer. They were characterised by what can be called the ‘request-principle’: one State submits a request to another State, which is more or less free to determine whether it will comply with it or not.\(^4\) Therefore the outcome of a request under the traditional system could be rather uncertain. Additionally, practical problems such as deficient language skills and missing contact between the national authorities would frequently occur. As a result, the traditional system of cooperation is usually – though not undisputedly\(^5\) – criticised as slow and ineffective. Furthermore, there used to be numerous bilateral and multilateral international agreements defining different formal and material prerequisites for the granting of mutual legal assistance. Due to this fragmentation it was not always easy to determine which rules were to be applied when deciding on a request. To illustrate the impact that the principle of mutual recognition caused on cooperation

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\(^2\) In 1975, the Trevi Group was created by the European Council in order to co-ordinate the fight against terrorism.

\(^3\) According to Craig/de Bura, EU LAW, 4th ed., Oxford, 2007, pp. 234 et seq., another reason was to provide the EU with a ‘new’ banner to enhance its legitimacy.

\(^4\) COM (2000) 495 final, p. 2; H. Satzger, International and European Criminal Law, Munich, 2011 (to be published soon), § 10 margin no. 26 (with regard to the EAW).

in criminal matters within the EU, two particularly important ‘traditional’ conventions on cooperation with regard to evidence in criminal proceedings shall be presented in further detail.\(^6\)

a) The European Convention on Mutual Assistance in Criminal Matters of 1959

The first major piece of legislation dealing with mutual assistance in criminal matters in Europe was the Council of Europe’s European Convention on Mutual Assistance in Criminal Matters of 20 April 1959,\(^7\) which all EU Member States have ratified. It was designed to provide basic rules for successful cooperation in criminal matters. Since obtaining evidence is an important part of that, this so called ‘Mother Convention’ addresses some evidence related problems. However, mutual assistance was minimal compared to today.\(^8\)

Art. 3 of this convention states that the requested Party shall execute, in the manner provided by its law, the so called ‘letters rogatory’ relating to a criminal matter for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents. The Parties were allowed, however, to let the execution of letters rogatory for search and seizure depend on different preconditions, such that the offence is punishable under the law of both States (requirement of double criminality), that the offence is an extraditable one in the requested State or that the execution of the letters rogatory is consistent with the law of the requested Party (art. 5). Furthermore, assistance could be refused for many other reasons that were mainly based on political considerations – for instance if the request concerned a behaviour that the requested Party considered a military, political or fiscal offence, or if the requested Party considered the execution of the request likely to prejudice its sovereignty, security, ordre public or other essential interests (art. 2).

Although this convention was amended by an additional protocol in 1978,\(^9\) which aimed at facilitating legal assistance with regard to fiscal offences and was likewise ratified by all EU Member States, it took several decades until substantial advances in cooperation in criminal matters could be achieved on a multilateral European level – this time by an instrument created within the framework of the European Union.\(^10\)

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\(^6\) The Convention Implementing the Schengen Agreement (CISA, OJ 2000 L 239/1) also deals with judicial assistance in its arts 48-53, but was largely superseded by the EU Convention of 2000.
\(^7\) ETS No. 30, entered into force on 12 June 1962.
\(^8\) For example, the convention addresses experts and witnesses (arts 7 et seq.). However, these provisions only deal with serving writs and securing witnesses’ and experts’ rights. A signatory State could not ask another one to conduct an interrogation.
\(^10\) A second additional protocol to the CoE’s Convention of 1959 was adopted in 2001 (ETS No. 182) and entered into force on 1 February 2004. It contains similar provisions as the EU Convention of 2000, but has only been ratified by 13 EU Member States until March 2011.
b) The EU Convention on Mutual Assistance in Criminal Matters of 2000

On 29 May 2000, the European Council adopted the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union\(^\text{11}\) to provide mutual assistance in a fast and efficient manner compatible with the basic principles of the Member States’ national laws. Although it was based on art. 34(2)(d) TEU-Amsterdam, this convention still followed the rules of the traditional system of cooperation. In general, it was intended to supplement (amongst others) the provisions and facilitate the application of the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, art. 1(1)(a). Its art. 1(2) further provides that more favourable agreements between the signing States shall not be affected.

The Convention concentrates on two main parts: The first part (arts 1-7) addresses formalities and procedural aspects of mutual assistance. The Member States shall execute requests as soon as possible (art. 4(2)) and shall comply with the formalities and procedures expressly indicated by the requesting State (art. 4(1)), so called *forum regit actum* principle.

The second part (arts 8-22) deals with specific forms of mutual assistance, like the restitution of articles obtained by criminal means to their rightful owner (art. 8), the temporary transfer of persons held in custody for purpose of investigation (art. 9) and the hearing of witnesses or experts by videoconference (art. 10) or telephone conference (art. 11). Detailed provisions for the interception of telecommunications can be found in arts 17-22.

Only one year after its adoption – and long before it actually entered into force – the convention was amended by an additional protocol with regard to information on bank accounts.\(^\text{12}\)

2. The principle of mutual recognition pursuant to arts 67(3), 82(1) TFEU

Since the entry into force of the Lisbon Treaty in 2010 arts 67(3) and 82(1) TFEU explicitly state that the principle of mutual recognition shall be the basis of cooperation in criminal matters. From art. 82(1) TFEU it can even be inferred that the new competences to adjust national provisions of criminal procedure in art. 82 (2) TFEU and to harmonise the Member States’ substantive criminal law in selected fields according to art. 83(1) TFEU are mainly intended to serve the implementation of the recognition approach. This emphasis on the principle of mutual recognition in the new European primary law shows that this concept has become fundamental for future cooperation in criminal matters within the Union.

When it was initially being applied to the field of criminal matters, the principle of mutual recognition did not have any foundation in the European treaties. Instead

\(^{11}\) OJ 2000 C 197/1; entered into force on 23 August 2005.
\(^{12}\) OJ 2001 C 326/1.
it was merely based on political will. In 1998, during its EU Presidency, the UK Government presented this principle as a new approach to solve the problems concerning cooperation in criminal matters. One year later, at the European Council of Tampere, it was already regarded as the ‘cornerstone’ for all future developments with regard to cooperation in criminal matters. A further important step towards its general acceptance was the communication from the Commission to the Council and the European Parliament on ‘Mutual Recognition of Final Decisions in Criminal Matters’, which contained detailed proposals for its implementation. These political efforts finally led to a consensus on the application of the principle of mutual recognition in criminal matters. In 2002, the framework decision (FWD) on the European arrest warrant (EAW) was the first measure based on the mutual recognition approach, which was subsequently followed by many others.

However, the underlying concept is not at all a new one, but it originates from the internal market where it serves the free movement of products and persons: if a certain good is admitted to the market of one Member State, the principle of mutual recognition ensures that it will also be admitted in all the other Member States and can therefore be traded in the entire Union. This way every Member State has to recognise the other Member States’ regulatory standards, even if they are lower than its own ones. In its original field of application, the principle of mutual recognition thus enhances free trade within the Union without the necessity to harmonise regulatory laws.

a) The functioning of mutual recognition in criminal matters

In general, when applied to judicial decisions in criminal matters, the principle of mutual recognition works as follows: if the judicial authorities of one Member State (issuing State) issue a particular decision with regard to a criminal proceeding, the authorities of the Member State to which this decision is directed (executing State) are obliged to execute it without further examination. Thus the admissibility of the respective measure can only be established by the issuing authority on the basis of its own domestic law, whereas the implementation of the decision is governed by the executing State’s law. As a consequence, the executing authority must comply with the issuing authority’s decision, no matter if a comparable measure would be admissible under its own law. Only under very limited circumstances the executing State can invoke a right, or even a duty, to refuse the execution of the foreign authority’s decision: the legislative acts adopted so far indicate a narrowly confined

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17 OJ 2002 L 190/1.
and apparently exhaustive list of (mandatory or optional) reasons for non-execution. Apart from that, these instruments normally do not concede the executing authorities any further discretion. Exceptions to this rule might be derived from the ECJ case law with regard to the internal market. But since the only indication for the admissibility of extraordinary grounds for refusal could be seen in passages guaranteeing the respect of fundamental principles of Union law (e.g. in art. 1(3) FWD EAW), they would have to be limited to extreme cases. Thus the executing authorities do not have much leeway in the implementation of the foreign decision, whereas such wide discretion used to be normal under the traditional system of mutual legal assistance.

b) General criticism of mutual recognition in criminal matters

As a consequence, the issuing State’s law of criminal procedure takes effect in the executing State’s territory. One could even say that the executing State partially loses the control of the enforcement of judicial decisions in criminal proceedings in its own territory. Hence, traditional concepts of national sovereignty are being challenged. This is, of course, a very sensitive issue – therefore it is commonly accepted that the application of the principle of mutual recognition requires mutual trust: the extraterritorial effects of decisions issued by another Member State’s authorities are only acceptable to the executing State if it has confidence in the reasonableness of the issuing States’ laws and their application. However, the assumption that a sufficient level of mutual trust has already been achieved is a questionable one. This can be inferred from the following considerations:

(1) Criminal proceedings usually entail serious interferences with the individual’s basic rights. For instance, investigative measures for the gathering of evidence – upon which this contribution shall focus – normally go along with interferences with privacy and property rights. Apart from that, the fact of being prosecuted itself can have a severe stigmatising effect – for example, the searching of a suspect’s home will usually be noticed by neighbours and discredit the concerned person. Therefore, the question of where to draw the line between the public interest of conducting a criminal investigation on the one hand, and the protection of the concerned person’s fundamental rights on the other, is one that is strongly influenced by constitutional law and a society’s historical, cultural and social values.

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18 E.g. for shortcomings that are clear and based upon information that is submitted by the issuing Member State, see A. Klip, European Criminal Law, Antwerp, 2009, pp. 344 et seq.
22 V. Mitsilegas, EU Criminal Law, Oxford, 2009, p. 132, criticises the entire concept of mutual trust as ‘inherently subjective and thus not amenable to judicial review’.
23 Ambos, ZIS 2010, pp. 563 et seq.
reason it is not surprising that before the entry into force of the Lisbon Treaty, the EU did not have an explicit competence to take harmonising measures in the field of criminal procedure and that, consequently, there has virtually been no harmonisation at all. The European Convention on Human Rights (ECHR), and in particular the fair trial principle as enshrined in its art. 6, has not produced a satisfactory approximation of criminal procedural laws in Europe either (and was not intended to do so), but only prohibits proceedings that are unfair when seen as a whole. Common rules for specific aspects of criminal procedure can therefore hardly be derived from the ECHR (except the ban of torture pursuant to art. 3 ECHR). But how shall the executing State’s authorities have trust if they cannot be sure that the issuing State provides for similar rules in criminal proceedings and guarantees a comparable level of protection for the individual as their own legal order?

(2) At this point, another crucial aspect comes into play – legal certainty. In parallel with the principle of legality in substantive criminal law it could be argued that the severe interventions going along with criminal investigations are only acceptable if the citizens have at least the chance to foresee (by taking a look in the respective code of criminal procedure) the coercive measures they might be confronted with. Otherwise, they will not be able to inform themselves about their procedural rights and the limits of the authorities’ capacities; hence an effective defence would become almost impossible. But according to the mutual recognition approach, a citizen can potentially be confronted with the procedural rules of 26 foreign States, all of which can theoretically take effect on the territory of his or her home country – a circumstance that Mitsilegas calls a ‘journey into the unknown’. This would not cause any serious problems if the Member States’ laws on criminal procedure more or less resembled each other. However, as shown above, this is not the case – even defence counsels will hardly be able to find out to what extent the respective coercive measure has been admissible.

(3) An automatic execution of judicial decisions issued in another Member State can also be problematic due to differences between the national provisions of substantive...
criminal law. Criminalisation of social behaviour is one of the strongest interventions of government into people’s lives. As the German Bundesverfassungsgericht (Federal Constitutional Court) has recently put it in its decision on the constitutionality of the Lisbon Treaty: ‘It is a fundamental decision to which extent and in which areas a political community uses the means of criminal law as an instrument of social control.’ This linkage between fundamental values and criminal law can easily be illustrated by provisions concerning abortion or euthanasia – substantial differences between the national laws can be found in those fields, resulting from diverging concepts of fundamental values. However, differences also exist with regard to the general principles of criminal law and selected aspects of specific offences. Under the ‘pure’ principle of mutual recognition, a State could therefore be obliged to carry out an investigative measure ordered for an act that is not punishable under its own criminal law. This may lead to conflicts between the obligation to execute a request for assistance and deeply enrooted social and ethical values of a society.

(4) Furthermore, the automatic recognition and execution of judicial decisions based on a foreign law can also be criticised from the point of view of democratic legitimacy. The citizens of one Member State have no democratic means to influence the other 26 Member States’ laws of criminal procedure. Nevertheless they can be subjected to those laws even if they do not leave their home country.

c) Intermediate result

The sensitivity of criminal proceedings constitutes an important difference compared to the laws framing the internal market: market regulation does not touch basic values in the way criminal proceedings do. Its main purpose is to balance the interests of coequal market participants, whereas criminal proceedings are characterised by the subordination of an individual to prosecution authorities. Likewise, a lack of legal certainty concerning market regulation is easier to accept because of the less serious consequences those regulations have for people’s lives, compared to the effects of criminal prosecution. Furthermore, the general effect of mutual recognition in the field of market regulation differs from the one in criminal matters. Regarding the internal market, the principle of mutual recognition has a liberalising effect. It strengthens the basic freedoms as enshrined in the Union’s primary law by creating an area where persons and goods can flow freely without interferences by national borders or different national regulations. However, the application of the principle of mutual recognition to criminal matters mainly has the opposite effect: since it serves to recognise and enforce decisions of national courts and authorities that intervene with personal freedoms it restricts the indivi-
dual’s liberty instead of supporting it.\textsuperscript{34} This allows for a first (tentative) conclusion: since cooperation in criminal matters is an area quite different from the original field of application of the principle of mutual recognition, this approach certainly cannot be transferred ‘one to one’.\textsuperscript{35}

3. The interdependence of mutual recognition and harmonisation of national laws

It has already been stated that, apart from facilitating mutual legal assistance, the approximation of the different national laws was also considered crucial for a more effective struggle against crime within the EU. However, the relation between mutual recognition on the one hand and harmonisation on the other was not always as clear: curiously, proponents and opponents of further harmonisation of national criminal laws both infer their arguments from the principle of mutual recognition. In 1998, the UK Government promoted this approach as an alternative to further harmonisation since, like in the internal market, the recognition of foreign standards was expected to make a time consuming harmonisation of differing national provisions unnecessary.\textsuperscript{36} The German Bundesverfassungsgericht also sees limited mutual recognition as a means to preserve the national criminal justice system (which it regards as closely linked to the national identity and sovereignty) from excessive harmonisation efforts by the EU.\textsuperscript{37} According to the Commission, however, mutual recognition often ‘goes hand in hand with a certain degree of standardisation.’ On the other hand, the Commission states that mutual recognition can, to some extent, make harmonisation unnecessary.\textsuperscript{38}

As seen above, mutual trust is considered a prerogative for mutual recognition and it can only exist if there is a certain common basis in all Member States’ systems of criminal justice. In this regard, two\textsuperscript{39} aspects can be distinguished. First, a certain level of approximation of the Member States’ substantive criminal laws is necessary because the certainty that the behaviour would also constitute a criminal offence in its domestic law would make it easier for the requested State to execute a request for assistance. Second, the approximation of national procedural laws is a prerequisite for the development of mutual trust in transnational criminal proceedings within the EU.\textsuperscript{40} In particular, such harmonisation efforts could strengthen legal certainty and guarantee the EU citizens a minimum of procedural standards. With-

\begin{itemize}
\item \textsuperscript{35} For a different concept see B. Schünemann (ed.), A Programme for European Criminal Justice, Cologne, 2006.
\item \textsuperscript{36} Council doc. 7090/99, paras 7 and 8.
\item \textsuperscript{37} BVerfGE 113, 273 (para. 75).
\item \textsuperscript{38} COM (2000) 495 final, para. 3.1.
\item \textsuperscript{39} As a third level on which harmonisation is needed, Mitsilegas (n. 22, pp. 101, 102 et seq.) identifies ‘the very area of law giving rise to judgements whose mutual recognition is required’.
\end{itemize}
out harmonisation there is no basis to justify the extraterritorial effect of foreign judicial decisions which is produced by the obligation to recognise and execute them.\textsuperscript{41} In other words: the principle of mutual recognition cannot be seen as an alternative to the approximation of national laws (as in the internal market), on the contrary it requires a minimum amount of previous harmonisation.\textsuperscript{42} Therefore the new competence to adjust the Member States’ laws of criminal procedure, based on art. 82(2) TFEU, is a welcome development.

A creation of minimum standards could also strengthen the democratic legitimacy of the application of the principle of mutual recognition. Regardless of whether there still is a relevant democratic deficit in the legislation of the EU\textsuperscript{43} harmonisation measures upon which the European Parliament has decided pursuant to the ordinary legislative procedure would allow the citizens to influence the creation of supranational standards that would apply to every national measure in the field of criminal law.

III. EU-legislation on gathering evidence based on the mutual recognition approach

1. The framework decision on the execution of orders freezing property or evidence

The first instrument that implemented the principle of mutual recognition in the field of obtaining evidence was the FWD on the execution in the European Union of orders freezing property and evidence of 22 July 2003.\textsuperscript{44} It addresses the need for immediate mutual recognition of orders intended to prevent the destruction, transformation, moving, transfer or disposal of evidence.\textsuperscript{45} To this purpose, it allows Member States to issue so called freezing orders to secure evidence or facilitate the subsequent confiscation of property, art. 3. The FWD thus aims to maintain pieces of evidence which are already available in one State so that they may be used by other States as well. It does not, however, provide ways for the Member States to exchange the secured pieces of evidence. For this transfer the prosecuting States still have to revert to the traditional system of mutual legal assistance as basically laid down in the conventions on mutual assistance of 1959 and 2000. If the freezing order is transmitted correctly (as provided by art. 4), the judicial authority of the executing State is obliged to execute it without any formality and legal scrutiny (art. 5). A provision of particular relevance is art. 3(2): it abolishes the requirement of double criminality for a catalogue of 32 roughly defined categories of offences such as ‘terrorism’, ‘sabotage’, or ‘computer-related crime’. As a con-

\begin{itemize}
\item \textsuperscript{41} Burchard (n. 19), p. 299, criticises the experimental character of the concept of mutual recognition.
\item \textsuperscript{42} See Peers CMLR2004, p. 35; Zimmermann (n. 27), p. 298, 307; Similar: Fletcher/Lööf/Gilmore (n. 24), p.111.
\item \textsuperscript{43} The German Federal Constitutional Court still sees a fundamental difference between the democratic legitimacy of national parliaments and the EP, BVerfGE 123, p. 276 (paras 271 et seq.).
\item \textsuperscript{44} OJ 2003 L 196/45.
\item \textsuperscript{45} Recital no. 5, FWD 2008/978/JHA, OJ 2008 L 350/72.
\end{itemize}
sequence, Member States cannot deny requests on the ground that the offence for which assistance is sought is not punishable under their national law as long as it falls within one of the categories contained in this so called ‘positive list’. 46

In close preconditions, art. 7 allows the executing State not to recognise and execute a freezing order. That is, for example, if there is an immunity or privilege under the law of the executing state that makes it impossible to execute the freezing order, art. 7(1)(b), or if it is instantly clear that rendering judicial assistance would infringe the *ne bis in idem* principle, art. 7(1)(c). 47 The executing state can postpone the execution if it might damage an ongoing criminal investigation or if the evidence concerned has already been subjected to a freezing order in criminal proceedings, art. 8(1)(a) and (b).

2. The Framework Decision on the European Evidence Warrant

As has already been pointed out, the FWD on freezing orders left the subsequent transfer of the secured evidence to the traditional, time-consuming and barely efficient system of mutual assistance. In order to fill this gap, 48 the Council adopted – after long debates 49 – the FWD on the European Evidence Warrant 50 (EEW) for the purpose of obtaining objects, documents and data for use in criminal proceedings. Its main objective was to replace the traditional system of assistance in criminal matters and to further enhance mutual recognition in the field of gathering evidence. 51 However, the scope of the FWD on the EEW is limited to pieces of evidence that already exist, art. 4 (3). Therefore, the issuing State cannot require the executing State to produce new evidence, for instance by means of interrogations or other types of hearings, bodily examinations, interception of telecommunications or covert surveillance.

Art. 11 provides that the executing authority shall recognise an EEW without any further formality and execute it in accordance with its domestic procedural rules (art. 11(2)). However, the issuing authority can request that formalities which it considers important for the further proceeding are taken into account (*forum regit actum* principle, art. 12). The issuing authority must be satisfied that the obtaining of the objects, documents or data is necessary and proportionate, art. 7(a), and that it could obtain the respective pieces of evidence in a comparable case on its own

46 The vagueness of these categories could invite Member States to abuse the ‘positive lists’, *Klip* (n. 18), p. 353.
47 Another ground for non-recognition exists if the issuing state did not use the form attached to the FWD, art. 7 (1)(a).
48 Recital no. 5 of the FWD on the EEW.
49 The original proposal by the Commission, COM (2003) 688 final, was discussed for more than 5 years in the Council before an agreement on the final text could be reached. On this proposal: A. *Ijzerman*, From the CATS Portfolio: the European Evidence Warrant, in: J. Vervaele (ed.), European Evidence Warrant, Antwerp, 2005, pp. 9 et seq.
51 See recital no. 23.
territory, art. 7(b). In conformity with the general idea underlying the recognition principle, it is thus the issuing State’s duty to ensure that these requirements are met.

Similar to the FWD on freezing orders, there is an exhaustive enumeration of grounds for refusal. One of them applies, for instance, where the execution of the warrant would infringe the *ne bis in idem* principle, art. 13(1)(a). A Member State may also refuse to recognise an evidence warrant that relates to criminal offences which, under the law of the executing State, are regarded as having been committed wholly or for a major part within its territory, art. 13(1)(f)(i). The executing State shall not be allowed to deny execution on terms of double criminality, unless it is necessary to carry out a search or seizure, art. 14(1). Even in the latter case, art. 14(2) abolishes the requirement of double criminality for 32 categories of offences. This technique, well known from other FWDs implementing the principle of mutual recognition, has caused specific problems in the case of the EEW: In 2005 the German law implementing the FWD on the EAW had been declared void by the Federal Constitutional Court. During the proceeding, the opponents of the law had expressed doubts as to the constitutionality of such positive lists due to their vagueness. Although the judges had not based their decision on this aspect, the German delegation feared an analogous ruling against the implementation of the FWD on the EEW and achieved an opt-out-clause for Germany in art. 23(4). Pursuant to this provision, Germany is authorised to define six especially vague categories (terrorism, computer-related crime, racism and xenophobia, sabotage, racketeering and swindling) in a separate declaration and refuse the execution of an EEW unless the issuing authority declares that the respective offence falls within the scope of the definition.

The Member States have to make sure that the parties involved have legal remedies against the recognition and execution of the EEW, art. 18. This provision follows the basic line of the mutual recognition approach and distinguishes between legal remedies in the issuing and the executing State: whereas the reasons for the issuing of the EEW can only be challenged in the issuing State, the manner of its execution shall be controlled by the courts of the executing State.

3. The initiative for a European Investigation Order (EIO)

Mutual assistance in criminal matters will be taken a step further if the initiative of seven Member States (Belgium, Bulgaria, Estonia, Spain, Austria, Slovenia and Sweden) for an EIO is successful. If this directive comes into effect, it will (between the EU Member States) replace the European Convention of 20 April 1959 as well as the EU Convention of 29 May 2000 (art. 29(1) of the initiative). Likewise, the

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52 For more grounds for non-recognition see art. 13, for grounds for postponement see art. 16.
55 This declaration can be found in Council doc. 10100/08.
56 Mitsilegas (n. 22), p. 127 draws the conclusion that with the EEW mutual recognition in criminal matters might have reached its limits.
corresponding provisions of the FWD on the execution of freezing orders shall be substituted and the FWD on the EEW will be repealed, art. 29(2).

a) General idea and scope of application

According to art. 1 of the initiative, the EIO shall be a judicial decision issued by a competent authority of a Member State in order to have one or several specific investigative measures carried out in another Member State with a view to gathering evidence. Issuing authorities can be judges, courts, investigating magistrates or public prosecutors competent in the case concerned, art. 2(a)(i), as well as other authorities defined by the issuing State and acting in their capacity as an investigating authority in criminal proceedings, art. 2(a)(ii).

Pursuant to the FWDs on freezing orders and the EEW, Member States could only be required to freeze and/or hand over pieces of evidence which already existed. By contrast, the new investigation order shall henceforth cover all investigative measures except setting up a joint investigation team and the gathering of evidence within such a team. In its original version, art. 3(2) of the initiative also excluded certain forms of intercepting telecommunication; however, this restriction has been deleted during the negotiations in the Council.

Art. 4(b) and (c) will allow issuing an investigation order also for obtaining pieces of evidence for proceedings brought by judicial or administrative authorities in respect of acts that are punishable under the national law of the issuing State by virtue of being infringements of the law.

b) Procedural questions

From a technical point of view, the most important difference to previous international instruments is the introduction of deadlines for the recognition (30 days after the receipt of the EIO, art. 11(3)) and execution (90 days after the decision on whether to recognise the EIO, art. 11(4)).

Like the EEW and the freezing order, the EIO has to be recognised and executed without formalities, art. 8(1). According to art. 8(2), the forum regit actum principle applies and the executing authority has to comply with the formalities and procedures expressly indicated in the EIO, unless this would be contrary to its fundamental principles of law. Under these circumstances the issuing State can also request that one or several of its authorities assist during the execution, art. 8(3).

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57 OJ 2010 C 165/22.
58 Council doc. 16643/10, p. 17.
59 However, this will only be possible if the decision may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters.
60 Some delegations have suggested to include a time limit for the transfer of evidence after the execution of the EIO, Council doc. 12862/10, p. 9.
61 This shall not imply any law enforcement powers, see recital 11 of the original initiative, which will – following a proposal by the Dutch delegation – probably be added to art. 8(3), see Council docs 12862/10, p. 5 and 16643/10, p. 24.
However, according to the original initiative\(^{62}\) the executing State may have recourse to a different investigative measure than the one indicated in the EIO if the latter does not exist under its national law, art. 9(1)(a), or if its use is restricted to a list or category of offences which does not include the one covered by the EIO, art. 9(1)(b). A particularly interesting provision can be found in art. 9(1)(c). It allows the executing State to choose a different investigative measure if it will have the same result as the one provided for in the EIO by less coercive means. This means that – in this point – the initiative departs from the basic idea of the mutual recognition approach that only the issuing authority has the right to determine whether or not the requirements of a warrant are met in a specific case. However, there are good reasons for this modification of the principle because the executing authority, for which the effects of a particular measure in a specific case are better visible than for the issuing authority, is in a better position to judge the act’s proportionality.

Legal remedies shall be available in accordance with national law. As provided for in the FWD on the EEW, the substantive reasons for issuing the EIO can only be challenged in the issuing State, art. 13.

c) Grounds for refusal and postponement

The executing State shall be allowed not to recognise nor execute an investigation order if there is an immunity or a privilege under its law rendering it impossible to execute the EIO, or if its execution would harm essential national security interests, art. 10(1)(a) and (b). At least with the latter provision the initiative maintains a ground for refusal of more or less political character which already existed in art. 13 (1)(g) FWD EEW. As the mutual recognition approach is intended to avoid the shortcomings of traditional mutual assistance, this may appear a bit outmoded. Another ground for refusal was originally provided for all cases where the required measure is not available in the executing State and cannot be substituted by another one that could produce a similar result, art. 10(1)(c). Finally, the executing authority can deny the execution of an EIO if it has been issued by administrative authorities pursuant to art. 4(a) and (b) and the measure would not be authorised in a similar national case. The execution of an EIO cannot be denied, however, because a similar decision would require judicial authorisation in the executing State. Neither did the original initiative allow for a double criminality test. However, during the negotiations in the Council the system of grounds for refusal has been subject to considerable changes that shall be discussed below (IV.4 and 5).

Furthermore, the executing State can postpone the recognition and execution if otherwise an ongoing criminal investigation or prosecution might be prejudiced or if the pieces of evidence are needed in other proceedings, art. 14(1).

\(^{62}\) Pursuant to a later version, the right to choose a different measure according to art. 9(1)(a) and (b) should be largely excluded, see art. 9a(4), Council doc. 16643/10, pp. 24, 27 and IV.3.a) (1) below.
**d) Specific provisions for selected types of assistance**

Arts 19–27 contain specific provisions for certain investigative measures, for example the temporary transfer of persons held in custody (arts 19, 20), hearings of witnesses or experts by video or telephone conference (arts 21, 22), information on bank accounts and banking transitions as well as monitoring them (arts 23–25) and controlled deliveries (art. 26).

**IV. A critical analysis of the initiative and the latest developments**

In the following paragraph, the initiative for a directive introducing the EIO shall be evaluated with a special view to its consequences for the position of suspects in criminal proceedings. The general idea behind this proposal is to set up a single legal regime for the gathering and transfer of evidence within the EU. This is not a new plan, however. The Commission already defined the elaboration of one comprehensive instrument for all forms of cooperation with regard to evidence in criminal proceedings as its long-term goal in 2003.\(^{63}\) In a recently presented working programme it re-scheduled the issue for 2011\(^{64}\) and has now been overtaken by a group of seven Member States. Since there are currently two FWDs dealing with cooperation in evidence matters, both of which are limited to specific aspects and measures and are thus fragmentary, and since investigative measures not covered by these instruments still follow the complicated traditional system of mutual legal assistance, this initiative is certainly a reasonable step. It needs to be criticised, however, for being presented quite early\(^ {65}\) – the implementation deadline of the FWD on the EEW has expired not earlier than on 19 January and it would have made sense to gain some experience with the functioning of this (already ground-breaking) instrument before substituting it. Apart from these general observations, a closer analysis reveals further shortcomings and inconsistencies of the proposal which ought to be addressed during the ongoing legislative procedure.

**1. Scope of application**

A first aspect that appears at least questionable is the new instrument’s envisaged scope of application. It shall not only be possible to issue an EIO in criminal proceedings in the narrow sense, but also in proceedings brought by administrative and judicial authorities in respect of acts other than criminal offences. The only condition shall be that these acts constitute infringements of the law and can entail sanctions. Obviously the model for this provision was art. 5 of the FWD EEW. As a consequence, even minor wrongdoings, such as banal road traffic offences, could give rise to transnational investigative measures – even measures that seriously

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\(^{63}\) COM (2003) 688 final, p. 11.


\(^{65}\) Of the same opinion: Ambos, ZIS 2010, p. 559.
interfere with the individual’s rights. Obviously this is problematic from the point of view of proportionality.

That an EIO can only be issued if the respective measure could also be taken by the authorities of the issuing State in an entirely national proceeding is not a convincing argument in this respect: Member States will not always agree on what is proportionate – carefully put, some of them are certainly rather ‘generous’ than others when it comes to investigating a breach of the law. In rather liberal countries the execution of an EIO issued for a negligible infringement might even cause constitutional problems. This is why art. 10(1)(d) provides for a ground for non-execution when an EIO that has been issued in a non-criminal proceeding requires a measure which would not be authorised in a similar national case. Yet, even if a measure could be taken in the executing State because it is proportionate in a purely national context, this does not automatically mean that it is also a legitimate tool for cross-border investigations. They burden the suspect with organising his or her defence in at least two States with different languages and different procedural laws. Therefore, even a measure that may be adequate in a national proceeding can be disproportionate in a transnational case.

However, the discussion in the Council has not come to an end yet. An updated text proposed by the presidency in November 2010 contains an additional provision explicitly obliging the issuing authority to make sure that the issuing of an EIO is proportionate for the purpose of the proceeding. It does not appear entirely unlikely – and would certainly be desirable in order to prevent cases of abuse – that art. 4(b) and (c) will be further modified during the further negotiations.

2. ‘Patchwork Systems’ and ‘Forum Shopping’ as dangers for defence rights

Generally speaking, the principle of mutual recognition tends to combine different systems of criminal procedure because the required measure is ordered according to the law of the issuing Member State and executed under the law of another one. Due to the variety of procedural rules in Europe, such a ‘patchwork system’ can weaken the suspect’s position considerably: if the production of evidence in the pre-trial stage is not subject to strict control in the executing State, the latter’s procedural concept may nevertheless be well-balanced and fair if it guarantees essential defence rights in the trial stage. By contrast, the legal conditions for obtaining evidence in the issuing State may be much lower in the trial stage than in the pre-trial stage. If evidence gathered according to the rules of the executing State

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66 Art. 5a(1)(a), Council doc. 16643/10, p. 19. Meanwhile, the Belgian Presidency has proposed to introduce a compulsory validation procedure in order to guarantee that an EIO issued by administrative authorities respects the preconditions set out in the future directive, see Council doc. 17854/10, p. 3.

67 Klip (n. 18), p. 351 speaks of ‘anarchy or a “wild west” scenario, in which any piece of evidence must be admitted as long as it comes from abroad.’

68 S. Gleß (Mutual Recognition, Judicial Inquiries, Due Process and Fundamental Rights, in J. Vervaele [ed.], European Evidence Warrant, Antwerp, 2006, pp. 121 et seq., at p. 124) calls this a ‘specific balance in national legal systems’.
was introduced in a trial in the issuing State, procedural safeguards during the pre-trial stage (e.g. concerning the participation of the defence during the hearing of a witness) would be bypassed. In such a case, there are basically two possibilities: either the piece of evidence gathered in the executing State is declared inadmissible – then the issuing of the EIO would finally have been in vain; or it is admitted – then the suspect would lose essential guarantees in the pre-trial phase.

This dilemma is largely avoided by the initiative for the EIO. Firstly, it does not provide for an obligation of the issuing State to admit the requested evidence in trial. This is not self-evident because the Commission has already made several attempts to introduce such a rule (which were rarely appreciated and criticised by most commentators). Since the initiative does not follow this approach, the courts of the issuing State will not be compelled to use the evidence obtained by virtue of an EIO in trial and it will remain their decision to what extent it shall be admissible. Consequently, infringements of procedural rules during the pre-trial stage can still be remedied. Secondly, the forum regit actum principle, enshrined in art. 8(2) and (3) of the initiative, gives the issuing authority a certain influence on the manner in which the EIO is executed. Therefore, it can make sure that procedural safeguards that are essential for the admissibility of evidence in the issuing State are respected during the execution of the EIO. This way, the proceeding basically follows the rules of the issuing State and all safeguards for a fair trial under its domestic law are maintained. Nevertheless some reservations need to be made: to a certain extent the forum regit actum rule obliges the executing authorities to apply foreign law. This circumstance can be problematic from the point of view of democratic legitimacy and also due to the fact that the officials in charge, usually, would not be sufficiently educated in the issuing State’s law. Furthermore, the compliance with formalities and procedures indicated by the issuing authority is always subject to the condition that this is not contrary to the fundamental principles of law of the executing State. Hence it remains possible that evidence

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70 Burchard (n. 19), p. 280.
produced by virtue of an EIO suffers from procedural deficiencies so that its admissibility in trial can be doubtable.

Furthermore, the risk remains that the issuing authority might try to circumvent defence rights by sending an EIO to a Member State where the rules for collecting evidence are less strict than in its own legal order. Such a ‘forum shopping’ would not necessarily produce inadmissible evidence because, depending on the issuing State’s law of criminal procedure, the respective pieces of evidence might nevertheless be used in trial. In the FWD on the EEW, this problem was tackled in art. 7 (b), explicitly obliging the issuing authority to make sure that the respective pieces of evidence could be obtained in a similar and purely national proceeding. By contrast, a comparable provision was missing in the original initiative for an EIO. Although some have voiced the opinion that this did not mean any relevant change because the issuing authority would have to check this requirement anyway, it must be stated that in the sensitive field of criminal procedure, it should simply not be taken for granted that basic rules are always respected. Thus it would be a welcome step if the presidency’s proposal to insert an additional art. 5 a – which is comparable to art. 7(b) FWD EEW – was adopted.

3. Irrelevance of requirements and restrictions in the executing state

Although the initiative for an EIO seeks to avoid the creation of ‘patchwork systems’, it must nonetheless be said that this instrument would make specific requirements and restrictions of coercive measures in the executing State irrelevant. Examples revealing the intricacies which may arise from that circumstance can easily be found.

a) Specific requirements of coercive measures

(1) Many procedural systems only allow certain coercive measures if the crime that shall be investigated falls under a special category or list of offences. This can be seen as a specification of the general proportionality requirement because it ensures that measures which particularly interfere with the suspect’s rights will only be used in the case of serious breaches of the law. But when a measure that is admissible for all kinds of offences under the law of the issuing state is ordered in an EIO, the executing State would in principle have to carry it out – even though a comparable action was restricted by its own law to a category or list of offences which does not include the one in question. Under these circumstances, art. 9(1)(b) of the original initiative therefore allowed the executing authority to have recourse to a different investigative measure. If no adequate alternative is available, the executing State should be able to refuse to recognise and execute the EIO pursuant to art. 10(1)(c).

In the latest version of the text, this possibility has unfortunately been limited and

75 Gleß (n. 74), p. 169.
76 Bachmeier Winter, ZIS 2010, 584.
77 This was also claimed by the Finnish delegation, Council doc. 12862/10, p. 6.
shall no longer apply to all kinds of investigative measures.\footnote{78 See art. 9a(3) and (4) as proposed in Council doc. 16643/10.} Apparently this was the ‘prize’ for the introduction of other grounds for refusal (see IV.4 and 5 below). However, there is no good reason for this restriction and the solution in the original initiative appeared preferable.

(2) Several legal orders stipulate that selected coercive measures may only be carried out upon a warrant issued by a judge or a court. This allows for a preliminary impartial control and thus also helps to guarantee the proportionality of measures required by the prosecution authorities. Casting a look at art. 1(1) of the initiative, defining the EIO as a ‘judicial decision’, one might think that problems with this requirement cannot occur. The German version – which like all versions existing in the other official languages must be taken into account\footnote{79 See, e.g. ECJ 17.10.1996, case C-64/95 (Konservenfabrik Lubella Friedrich Bäker GmbH & Co KG v. Hauptzollamt Cottbus), [1996] ECR I-5105, margin no. 17 with further references.} – even uses the word ‘gerichtlich’ (meaning ‘by a court’). Consequently, the EIO seems to cover only measures that have been ordered by a judge. However, art. 2(1)(a) of the proposal explicitly attributes to investigating magistrates, public prosecutors (i) and some other authorities (ii) the competence to issue an EIO. Since art. 1(1) only gives the general definition of the EIO and art. 2(1) deals more specifically with the issuing authorities, the latter provision must be regarded as decisive; the clear German wording of art. 1(1) is obviously due to a bad translation. This means that an EIO, issued by whatever investigating authority, can oblige the executing authority to take measures which, pursuant to its domestic law, usually require a warrant by a judge. Considering that this requirement is meant to guarantee the legality, impartiality and proportionality of serious interferences with fundamental rights, this is a fairly problematic feature of the proposed instrument.\footnote{80 Of the same opinion: Bachmeier Winter, ZIS 2010, p. 587; Vogel/Burchard (n. 28), § 77, margin no. 37.} Until now, the Council delegations do not seem to have entirely realised that this would significantly weaken the suspect’s position compared to a national proceeding in the executing State: during the discussions of the initiative they only expressed the wish that art. 2 (1)(a)(ii) – allowing ‘other judicial authorities’ to issue an EIO – be further clarified\footnote{81 Council doc. 12201/10, p. 7.} and a questionnaire was distributed in order to collect additional information on the kind of authorities that might fall under art. 2(1)(a)(ii) and on the types of measures they could order.\footnote{82 The answers to this questionnaire can be found in Council doc. 13049/10.} Therefore the assumption does not appear too pessimistic that the requirement of a warrant by a judge might lose a lot of its weight in the future.

b) Restrictions of coercive measures

Likewise, the domestic law of the executing State can provide for special restrictions of coercive measures. In Germany, for instance, a seizure is not permissible if the respective assets are kept by persons who have the right to refuse to testify in criminal proceedings, § 97(1), read in conjunction with § 52(1) StPO (German
Code of Criminal Procedure). This is a field of criminal procedure which has not been harmonised at all and, consequently, national rules differ considerably. A provision in the context of hearings by videoconference reveals that the drafters of the initiative for an EIO have been well aware of this circumstance. Art. 21(9) obliges the Member States to ensure that witnesses and experts who are on their territory and shall be interrogated by a foreign authority in a videoconference pursuant to art. 21(1) will have the same right to refuse to testify as if the hearing took place in a national procedure. In other words, these persons will enjoy a double protection and can invoke rights not to testify according to both, the issuing and the executing State’s law.

However, there is nothing equivalent to this important provision for seizure orders. This can lead to delicate conflicts for the executing authorities that can be illustrated by the following examples: according to the German law of criminal procedure, parents-in-law can refuse to give evidence in a criminal proceeding even after their child and the defendant have been divorced, § 52(1) No. 3 StPO, read in conjunction with § 1590(2) BGB (German Civil Code). Because of this, it is also inadmissible to seize evidence at their home. If another Member State does not provide for a similar restriction of seizure orders and demands that German authorities seize evidence from the defendant’s ex-parents-in-law, they would have to comply with this investigation order. As a result, this instrument will make it easier to collect evidence against the suspect and his or her procedural position will be weakened. Apart from this specific problem with the German law, much more striking cases can be constructed: same sex marriages and homosexual partnerships, for instance, are not recognised in all EU Member States. If one of these States issues an EIO aiming at the seizure of evidence from the suspect’s homosexual partner, any other Member State will be compelled to execute it – notwithstanding its own liberal legislation. Naturally, similar problems could arise with regard to objects that the suspected person has entrusted to his or her lawyer, doctor or priest.

A solution could be found in art. 1(3). According to this provision, the (proposed) directive on the EIO ‘shall not have the effect of modifying the obligation to respect the fundamental rights and legal principles as enshrined in Article 6 of the Treaty on European Union […]. This directive shall likewise not have the effect of requiring Member States to take any measures which conflict with their constitutional rules relating to freedom of association, freedom of the press and freedom of expression in other media’. Yet every coercive measure interferes with the suspect’s fundamental rights. If this clause shall not completely undermine the idea of the EIO, it must therefore be construed narrowly, so that only serious conflicts with constitutional rights can suspend the obligation to execute an EIO.83 But would, for example, a seizure from the defendant’s doctor always cause a serious conflict with the funda-
mental right to privacy? Likewise it would not be clear under which conditions a seizure from the suspected person’s lawyer violates the fundamental right to a fair trial.

c) Intermediate result

The preceding paragraphs have revealed that the initiative for an EIO risks undermining the suspect’s position in transnational criminal proceedings. Of course it is to a certain extent part of the rationale underlying the mutual recognition approach that only the prerequisites of the issuing State’s law need to be met in order to have a measure carried out in another Member State. Nevertheless the fact that always the legal order with the less strict requirements for coercive measures will prevail is a worrying one. Therefore the efforts to insert an additional ground for refusal or at least to extend the list of immunities (see 5.a) below) are certainly worthy of consideration.

4. The double criminality requirement

a) Far-reaching abolition in the original initiative

The general part of the initiative, establishing rules for all types of investigative measures, did originally not allow for a double criminality test. On the contrary, the fact that the double criminality requirement was explicitly maintained – under limited circumstances – for investigation orders with regard to information on bank accounts in art. 23(5) – illustrated that this prerequisite should be abolished for all other types of evidence. Thus the executing State would have had to comply with an EIO even though the act for which assistance was sought was not a criminal offence under its national law.

b) Comparison with previous instruments

In the first part of this study it has already been pointed out that the obligation to take investigative measures although the respective behaviour is not a criminal offence in the executing State can be very problematic. Therefore, the abolition of the double criminality requirement is one of the most controversial facets of the principle of mutual recognition. It must be borne in mind, however, that double criminality used to be a prerequisite mainly in the field of extradition law. The European Convention on Mutual Legal Assistance from 1959, for instance, does not

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84 Art. 6(3) TEU, read in conjunction with art. 8(1) ECHR.
85 Art. 6(3) TEU, read in conjunction with art. 6(1) ECHR.
86 See supra II.2.a).
88 Only art. 10(1)(c), read in conjunction with art. 9(1)(b) could have been (but was clearly not intended to be) read in this sense (see also the concerns raised by the Dutch delegation, Council doc. 12862/10, p. 7).
89 A further exception could be seen in art. 27(1), pursuant to which an EIO concerning the gathering of evidence in real time continuously and over a certain period of time could be rejected if the execution of the measure would not be authorised in a similar national case.
provide for a general double criminality requirement, but its art. 5(1)(a) merely allows the signatory States to make the execution of letters rogatory for search and seizure of property dependent on the double criminality of the respective act. Only a few States (e.g. Austria, Estonia and Hungary) have neglected this clause and have made a reservation introducing a general requirement of double criminality.90 As has been shown before, the FWD on the EEW went one step further and abolished the double criminality requirement even for warrants concerning the search and seizure of property, as long as the offence was included in the so called ‘positive list’.

c) Implications for the foreseeability of investigative measures

At this point, the German position with respect to the ‘positive list’ in the FWD on the EEW must be recalled. Since Germany had declared an opt-out for six particularly vague categories of offences included in the positive list, the general abolition of the double criminality requirement envisaged by the original initiative almost appeared as a political affront. Much more regrettable, however, would have been the implications of this step in terms of legal certainty: no citizen of the Union can know all criminal laws of all Member States. Consequently a situation can occur in which an act deemed legal by a citizen is a criminal offence in one of the Member States. So far one might argue that this is not a characteristic of EU law, but rather a ‘normal’ situation because the substantive criminal laws of all States in the world differ considerably. But what is special within the EU is that its Member States have the possibility to enforce their criminal laws outside their territory.91 Therefore citizens could have been subjected to investigative measures although they were not aware that their behaviour was punishable in at least one Member State.92 What made things even worse was that, pursuant to art. 4(b) of the proposal, it shall be possible to issue an EIO in certain administrative proceedings – if it is already difficult for a citizen to know the other Member States’ criminal laws, it is entirely impossible to be aware of all provisions whose infringement can entail administrative sanctions.

d) Discussions in the Council and possible solutions

In the beginning of the debate in the Council, the presidency was reluctant towards some delegations’ wish to maintain the double criminality requirement and estimated its ‘reintroduction […] a step backwards as regards to the current framework of mutual legal assistance as well as in the progressive implementation of the principle of mutual recognition’.93 However, the problems in terms of foreseeability, and presumably also the particular situation in Germany, have obviously led to a

90 All reservations and declarations are available at http://www.conventions.coe.int (last visited March 2011).
91 Supra II.2.b).
92 In its judgment of 03.05.2007, case C-303/05 (Advocaten voor de Wereld), [2007] ECR I-3633, the European Court of Justice did not take into account this transnational dimension of the principle of legality, see Satzger (n. 4), § 10 margin no. 33.
93 Council doc. 12201/10, p.12.
change of mind. On 29 October 2010 the presidency proposed to distinguish several categories of investigative measures according to their intrusive or coercive nature and admitted that at least with regard to some measures ‘the issue of double criminality should require further discussion’. In the latest version of the text, this approach can be found in art. 9a. It (re)allows a double criminality test for almost all investigative measures of coercive character. Yet, with regard to some measures (searches and seizures, body searches, the taking of blood or DNA samples, psychiatric medical examinations, hearings on a compulsory basis and the temporary transfer of persons held in custody) the offence categories of art. 2(2) FWD EAW (the ‘positive list’) shall under no circumstances be subject to verification of double criminality. Of course, one can criticise the details of this proposal; the technique of ‘positive lists’, for instance, is questionable itself (see II.2). But in general, the idea to distinguish between measures of less and more coercive character and to provide additional grounds for refusal for the second group certainly constitutes a major advance compared to the original text of the initiative.

Irrespective of the outcome of this debate an additional measure should be taken into consideration: The most important case in which the problem of foreseeability arises is if the act that the issuing State wants to prosecute has exclusively taken place on the territory of the executing State: then the suspect frequently does not have any reason to expect criminal liability. This is why many conventions in the field of legal assistance and even instruments implementing the principle of mutual recognition contain a ‘territoriality reservation’ allowing to refuse the execution of a request if the respective act has taken place within the territory of the executing State. Such a ground for refusal which would help to ensure the foreseeability of criminal prosecution is missing in art. 10 of the initiative. In the long term, however, only additional harmonisation of national substantive criminal law appears as a satisfactory perspective.

5. Additional grounds for refusal?

Apart from the question of the necessity of a (limited) double criminality requirement or a ‘territoriality reservation’, there is an ongoing discussion in the Council on the insertion of further grounds for refusal. Some delegations – among them the German one – have even stipulated to introduce a wide, general ground for refusal. It

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94 Council doc. 15531/10, p. 3 et seq. In favour of the double criminality requirement at least for searches and seizures also Ambos, ZIS 2010, p. 560.
95 Council doc. 16643/10 (see also the alternative proposal for art. 9a in annex 2). For some measures – e.g. the interception of telecommunications – an optional ground for refusal is introduced if the respective measure would not have been authorized in a similar domestic case. De facto this also allows a double criminality test.
96 See, e.g., art. 4 no. 7(a) FWD EAW and art. 13(1)(e)(i) FWD EEW (supra III.2).
97 Also the German Constitutional Court underlined that the territoriality reservation served the principle of legal certainty in the context of the EAW, see BVerG 113, p. 302.
98 Yet, this harmonisation must respect basic guidelines such as the principles of proportionality, legality, subsidiarity and coherence, see European Criminal Policy Initiative, A Manifesto on European Criminal Policy (www.crimpol.eu, last visited March 2011).
99 For an overview see Council doc. 12862/10, pp. 12 et seq.
cases where the executing authority could not take the required measure in a national proceeding. Since this proposal is somewhat contradictory to the idea of mutual recognition, it has – not surprisingly – been rejected, and indeed it appears a more convincing solution to add some clearly shaped grounds for non-execution of an EIO.\textsuperscript{100} Two proposals that merit a closer analysis are the following:

a) Violation of human rights and proportionality

The delegations of Germany and the United Kingdom have expressed a wish to add grounds for refusal for constellations where the executing State fears a violation of human rights or has doubts regarding the proportionality of the required measure.\textsuperscript{101} In the latter case, art. 9(1)(c) of the initiative leaves the executing State a certain discretion as regards the choice of the measure to be taken. But given the problem that an EIO might have to be recognised even if the required investigative measure is inadmissible according to the executing State's domestic law (e.g. a seizure from the suspected person's lawyer\textsuperscript{102}), at least the wish for a human rights reservation is understandable.\textsuperscript{103} However, the presidency’s reaction allows for the conclusion that the insertion of an additional ground for refusal is not a very realistic option.\textsuperscript{104} Instead, it has suggested to further develop art. 10(1)(a) of the original initiative, which allows to reject an EIO where its execution is impossible due to an immunity or a privilege.\textsuperscript{105} Since it appears questionable whether really all problematic constellations (see, for instance, IV.3.b) above) could be dealt with like this, a possible solution for sceptical Member States could be to transform the European ordre public clause in art. 1(3) into a ground for refusal. This was done by several States in the case of the EAW\textsuperscript{106} and not disapproved by the Commission.\textsuperscript{107}

b) Insufficient solution for ne bis in idem cases

Finally, another ground for refusal should be included in art. 10 for cases where the execution of the EIO would conflict with the principle of ne bis in idem as enshrined in art. 50 CFREU and art. 54 CISA.\textsuperscript{108} The possibility to postpone the execution of an EIO if it prejudices an ongoing proceeding in the executing State is not sufficient: if the trial in the executing State concerned the same offence (i.e. the same material act\textsuperscript{109}) and has been finally disposed of, the defendant may not be

\textsuperscript{100} Council doc. 15531/10, p. 5.
\textsuperscript{101} Council doc. 12862/10, pp. 6 et seq. and Council doc. 12201/10, p. 12.
\textsuperscript{102} Supra IV.3.b).
\textsuperscript{103} See also Bachmeier Winter, ZIS 2010, p. 585: human rights reservation as necessary compensation for the abolition of the double criminality test.
\textsuperscript{104} Council doc. 12201/10, p. 12. As a compromise, the presidency later proposed to provide a possibility for the executing authority to initiate direct communication with the issuing authority, see Council doc. 16643/10, p. 5.
\textsuperscript{105} Council doc. 15531/10, p. 5; see also Ambos, ZIS 2010, p. 563.
\textsuperscript{106} See, for instance, § 73 of the German ‘Gesetz über die Internationale Rechtshilfe in Strafsachen’ (Law on Mutual Legal Assistance in Criminal Matters).
\textsuperscript{107} COM (2006) 8 final, p. 5.
\textsuperscript{108} This has also been claimed by several delegations, see Council doc. 12862/10, p. 8.
\textsuperscript{109} European Court of Justice (ECJ) 09.03.2006, case 436/06 (van Esbroeck), [2006] ECR I-2333, margin no. 36.
prosecuted again in the issuing State (art. 54 CISA). Nevertheless the reason for a postponement (‘ongoing criminal investigation’ in the executing State) would no longer exist and the EIO would have to be executed pursuant to art. 14(2), unless the issuing State decides to withdraw it. In order to avoid this needless formality and to clarify that the ne bis in idem rule applies, it would be desirable to allow the executing State not to comply with the EIO.\textsuperscript{110}

V. Conclusion

The initiative for an EIO is intended to mark an important step towards the creation of an area of freedom, security and justice. Indeed the introduction of a comprehensive instrument for all types of evidence does make sense and the draft shows up some promising tendencies – especially the forum regit actum principle, the right to choose a less coercive measure than the one covered by the EIO and the ‘double protection clause’ for videoconferences. Nevertheless, this study has shown that the initiative still suffers from serious shortcomings. On the long run, the obligation to carry out investigative measures that are not available in a domestic criminal proceeding is likely to cause mistrust rather than to promote the creation of a single judicial area. As has been stated in the first part of this contribution, this dilemma can only be overcome by a far-reaching harmonisation – also in the field of criminal procedure. The measures taken so far, in particular the new directive on the right to interpretation and translation in criminal proceedings,\textsuperscript{111} and the proposal for another one on the right to information in criminal proceedings,\textsuperscript{112} are certainly first steps into the right direction, but they cannot be more than a starting point. Also the further instruments specified in the ‘Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings’\textsuperscript{113} would not solve most of the problems brought about by the EIO. Taking this into account, the European institutions are trying to put the cart before the horse if they seek to further implement the principle of mutual recognition, rather than first approximating the Member States’ procedural and substantive criminal laws.

\textsuperscript{110} The revised text of the initiative (Council doc. 16643/10, p. 28) indeed provides for such an optional ground for refusal.
\textsuperscript{111} COM (2010) 82 final.
\textsuperscript{112} COM (2010) 392 final.
\textsuperscript{113} OJ 2009 C 295/1.
A colloquium to discuss the recently published *Manifesto on European Criminal Policy* was held in Madrid, at the Residencia de Estudiantes, on 9th April 2010. The majority of the members of the European Criminal Policy Initiative were present at the meeting, along with Spanish governmental and judicial authorities and academics from various countries.

The session began with a brief presentation of the *Manifesto* by both Prof. Helmut Satzger (Ludwig-Maximilians-University, Munich, Germany) and Adán Nieto Martín (Castilla–La Mancha–University, Ciudad Real, Spain). The presentation was followed by the first round-table discussion chaired by Prof. Luis Arroyo Zapatero. Alongside him were Álvaro Cuesta (Member of Parliament, President of the Justice Committee), Soledad Mestre (Ambassador on a special mission for Internal European Union Security) and Pedro Crespo Barquero (Prosecutor from the General Secretariat of the Office of the State Prosecutor). They all highlighted the need to rely on a series of recognized criminal principles at European level that should also be of importance for the implementation of community regulations by national authorities. There was unanimity in relation to the difficulties and achievements of the Spanish legislator for the correct transposition of the framework decisions. In particular, Pedro Crespo pointed out that the Spanish legislator had decided not to incorporate the crime of ‘virtual’ child pornography contained in the framework decision on child pornography, on the basis that no “legal good” was infringed. Likewise, he indicated that the introduction of criminal responsibility for legal persons was already a reality following the latest reform of the criminal Code.

The second round-table, chaired by Prof. Luis María Diez Picazo, discussed the principles of subsidiarity and coherence. Prof. Katalin Ligeti from the University of Luxemburg and Prof. John Vervaele from the University of Utrecht opened the discussion. Both speakers criticised the *Manifesto’s* limited scope of application and the decision to chose only the configuration of the limits of criminal policy, leaving to one side its objectives. The *Manifesto* was conceived for the harmonization of human rights in a globalized world. 

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* Instituto de Derecho penal europeo e internacional. This report has been prepared within the framework of the research project of the Junta de Comunidades de Castilla-La Mancha PC 108-0144-0952 under the title “El espacio europeo de seguridad y justicia y los nuevos desafíos para la protección penal de los derechos humanos en la globalización [The European area of Freedom Justice and Security and the new challenges for the criminal protection of human rights in a globalized world].”

† See [www.crimpol.eu/](http://www.crimpol.eu/).
criminal provisions, i.e. the approximation of substantive criminal law. However, European criminal policy is a much wider concept that should include not only the definition of behaviours and sanctions to be imposed by the, but also the regimes for mutual cooperation, for victim protection, for the penitentiary system, etc. Furthermore, European criminal policy has to achieve certain objectives that should also be defined earlier on, in order to evaluate their efficacy. During the following discussion Prof. Maria Kaiafa-Gbandi and other members of the ECPI-group made the point that European criminal policy evidently covers more fields than a simple approximation of criminal provisions. However, in the Group’s point of view, material criminal law is the basis upon which one must begin to approach the other questions. For that reason, the Manifesto rejects any type of instrumental relation between material criminal law and procedural criminal law and prefers, in consequence, a minimalist approach because, in the words of Prof. Kaiafa-Gbandi, “the research has to start somewhere”. Prof. Vervaele insisted that if the Group had decided to go “step by step”, it should specify as much in the Manifesto. Equally the members of ECPI indicated that if the decision had been taken to place limits on criminal intervention, it was because this had always been the starting point for the configuration of material criminal law.

In relation to the principle of subsidiarity, Prof. Ligeti pointed out that in reality the Manifesto limited itself to reproducing the ‘double test’ envisaged in the Treaty of the European Community (and now also in the Treaty on the Functioning of the EU) to verify its compliance with that principle. This test consists in demonstrating, in the first place, that the objectives of the proposed action may not be reached by the Member States, and in proving, in second place, that actions at the level of the Union may achieve them better. This test has been used since the inclusion of the principle of subsidiarity in the Treaty of Maastricht in 1992; nevertheless this did not entail a reduction of the European Union’s legislation. This is why according to Prof. Ligeti, this test could not effectively limit Community interventions in criminal law. Nevertheless, this view was challenged given the new possibilities offered by the Treaty of Lisbon, as the European Court of Justice will have competency to judge subsidiarity in the case of criminal regulations, and national parliaments will be able to activate the early warning procedure to block a community regulation, whenever a certain number of legislative state assemblies consider that it does not respect the principle of subsidiarity. As a counter-argument, Prof. Ligeti argued, that the jurisdictional power of the ECJ would depend considerably on the formal motivating requirements as to the added value of the legislative proposal which were expected from the European legislator and, fundamentally, the European Commission, when presenting their proposals. The absence in the Manifesto of specific criteria of a quantitative and qualitative nature that would help to verify whether the principle of subsidiarity is upheld was a further criticism noted at the round-table, which was very well received by some members of the Group. In consequence, Prof. Maria Kaiafa suggested the possibility of incorporating an addi-
tional protocol in the Manifesto to include this type of indicator with more and better examples.

With regard to the principle of coherence, Prof. Ligeti criticised the categorization of coherence as a “legal principle” – an incoherence that Prof. Vervaele and Díez Picazo also shared. In their opinion, it is more of a philosophical concept. Moreover, even if it were a “legal principle”, it should be taken into account that coherence cannot only be determined – as the Manifesto appears to do – by the degree or, if you prefer the quantum, of punishment that the European legislator demands from the member States when transposing their community obligations into national law. There are other factors that are even more decisive such as the rules that govern conditional freedom or the design of the penitentiary system itself, which can be more or less flexible or rigid when complying with the penalties. The ECPI-members Thomas Elholm from the University of Denmark and Peter Asp from the University of Stockholm, who took part in the round-table debate, responded that coherence is a “legal principle” because criminal Law is built upon values that are nurtured by the proportional relation of the penalties applicable to different offences in accordance with their seriousness and because it is a determining factor in avoiding unequal treatment between citizens of the different Member States. The problem, Prof. Picazo noted, is that it is very difficult to determine which situations are equal and which are unequal. All the more so if, as Prof. Ligeti pointed out, the system of application and execution of the penalties varies considerably from one to another.

Finally, reference was made to the relation of complementarity between the principles of subsidiarity and coherence. This relation – it was said – could lead to a paradoxical situation that had not been taken into account by the Manifesto: the principle of subsidiarity acts as a brake on Community interventions but also as justification to intervene in more and more fields. In consequence, the coherence of European policies may function as a parameter that will favour greater centralization.

In the second round table, the principles of proportionality and legality were discussed. In relation to the principle of proportionality, Prof. Martin Böse of the University of Bonn (Germany) criticized the Manifesto for determining the concept of fundamental legitimate interest as an interest provided for in the primary law of the Union. With this approach, the concept is considerably limited because the action of the Union is restricted by the principle of the attribution of competences. In this respect, competence should not be confused with the legitimate purpose. As an example of the latter, the speaker referred to the directive on money laundering. This regulation was adopted in the framework of the competences that the Union exercises to protect the common market and to guarantee the stability of the financial markets. However, the legitimate purpose in criminal terms can neither be identified in this competence nor can it – consequently – be identified in the funding Treaties, because the purpose of the criminal offence of money laundering is to deprive the criminal of illicitly gained assets and this interest is not envisaged in
Community Law. In second place, Prof. Böse indicated that the use of criminal law as a means of protecting the efficacy of administrative law may in some instances be justified, as for example in the case of legislation relating to the transport of military armaments. In third place, the speaker made reference to the problems that arise in the Union over compliance with the principle of proportionality. The obligation that falls on the Member States to transpose the Community norms can cause inconsistencies in the European criminal law system, as the European legislator might have respected the principle of criminal proportionality, but the Member States – when implementing the regulation – may go beyond what it specified and be even more punitive. The reason for this incoherence is due to the minimum obligations established in the framework decisions and directives: the States can always go further than the minimum standards with regard to the definition of offences and sanctions envisaged in the Community provisions, thereby infringing the principle of proportionality.

With respect to the principle of legality, Prof. Francesco Viganò of the University of Milan (Italy) made reference to the reserve of the law. In his opinion, the frequently repeated discussion on the democratic deficit from which the EU suffers when introducing criminal law should be overcome. If it was true that the procedure to adopt decisions followed under the Third Pillar was not sufficiently democratic, because no institution that represented the public played a role in it, this situation has been completely changed by the co-decision procedure, as the European Parliament together with the Council now have a relevant decision-making role. This is why the discussion on the reserve of the law does not centre so much on the democratic problem, but more on the reluctance of the Member States to cede sovereignty to a supranational institution in such an especially sensitive field as criminal law. The States oppose any encroachment of their sovereignty in criminal matters because criminal law affects above all their constitutional traditions. However, the speaker noted that matters considered especially sensitive such as abortion, are practically impossible to harmonize as they have no cross-border dimension. And, moreover, although that was the case, normally the framework decisions usually establish clauses that give States a margin of appreciation so as not to punish certain behaviours as criminal offences. On the principle of determination, Prof. Viganò reproduced examples from the Manifesto, in which he criticised a lack of determination in the criminal definition of certain behaviours by the European legislator. This is the case of the framework decision on racism and xenophobia that fails to describe what should be understood by behaviour that is “likely to disturb public order”.

The last person to speak at the second round-table was Prof. Antonio Cuerda Riezu from the Rey Juan Carlos University of Madrid (Spain). The speaker assessed the Manifesto in very positive terms and advised its drafters to offer a more exhaustive explanation of the rules of good government and the inclusion of specific references to the principle of individual criminal responsibility and strict liability. Likewise, he considered it advisable that the Manifesto refers to the problems that arise with
blanket criminal laws. This last suggestion was contested by Prof. Satzger who understood that responsibility for avoiding or at least for making limited use of blanket laws lay with the national and not the European legislator.

Prof. José Luis de la Cuesta of the University of the Basque Country chaired the last round-table. He recommended the inclusion in the Manifesto of a reference to the principle of humanity. Such a mention would imply not only a limitation on the European legislator in terms of the prohibition of torture and the use of inhuman or degrading treatment, for example, but also the acceptance of such principles as resocialization and activation of the rights of victims in criminal proceedings.

The next topic for discussion was the principle of culpability. Prof. Eduardo Demetrio Crespo of the University of Castilla-La Mancha (Spain) and Prof. Anabela Rodrigues of the University of Coimbra (Portugal) both intervened and both agreed on two criticisms. In the first place, they indicated that although it could be implicitly deduced from the Manifesto that the principle of culpability acted as a limit on criminal intervention, it was advisable to indicate this specifically, because otherwise the difference between culpability and prevention might be confused at a dogmatic level. In second place, they recommended a specific rejection of systems of strict liability along the lines of the Anglo-Saxon systems.

In relation to the criminal liability of legal persons, Prof. Rodrigues expressed satisfaction with the approach of the Manifesto, as the criteria for extending criminal liability to firms may only be developed with the consent of the member States. Thus, some European countries – inter alia Portugal and Spain – have been introducing this type of provision in their respective criminal codes to comply with the community commitments.

On the concept of guilt, Prof. Demetrio pointed out that one may not resort solely and exclusively to a normative concept; on the contrary, attention should be paid, in its definition, to social, cultural and historic connotations, etc. everywhere and at all times.

In the debate, the principle of human dignity was stressed as the foundation of guilt. However, Prof. Nieto intervened to point out that perhaps it would be a good idea to establish a clear definition between the guilt of natural persons, the foundation and limits of which should indeed be human dignity, and the guilt of legal persons, the foundation for which could never be the same as in the latter case.

As a conclusion, the participants at the Madrid workshop showed great support for the idea of the Manifesto, though there was some disagreement and criticism as to the details. The ECPI-members promised that the discussion will go on and that all contributions will be taken into account.
The Manifesto on European Criminal Policy in 2011

By the European Criminal Policy Initiative

In December 2009 the “European Criminal Policy Initiative”, an international research group consisting of 14 university professors from ten Member States of the European Union published the so called “Manifesto on European Criminal Policy” in the German Online-Journal “Zeitschrift für Internationale Strafrechtsdogmatik” (www.zis-online.com) in seven languages. The principles and guidelines for a reasonable criminal policy on the European level established therein have attracted great interest throughout the European Union (and also beyond the Union’s borders\(^1\)). The Manifesto has been discussed at international seminars and conferences, commented in numerous articles throughout Europe and even taken into consideration by the European institutions\(^2\).

The Manifesto consists of two parts: The first part exposes the general principles, which are completely rooted in and therefore in conformity with European law. The second part may be even more important for practical use as it contains a critical approach to existing legal acts or concrete proposals for future acts. The purpose of this part of the Manifesto is to check whether the legal acts mentioned here are in line with the demands of the Manifesto or whether amendments are advisable.

The text of the Manifesto printed below has (slightly) been adapted: the second part of the Manifesto – being a kind of “living instrument” – will be continuously adjusted and supplemented by the members of the ECPI according to the legislative progress in the European Union. As to the first part only few editorial amendments have been made, taking into account the entry into force of the Treaty of Lisbon on 1st December 2009 (which was still uncertain at the time when the original version of the Manifesto was finally edited).

Manifesto on European Criminal Policy\(^3\)

Preamble

The undersigned criminal law scholars from ten European countries would like to present their proposal for European criminal policy.

This Manifesto is based on the principles rooted in the common European Enlightenment tradition, namely

- in recognition of the fact that the spirit of Enlightenment is the major contributor to and the motor of European civilisation and current integration, and that it should guide us in the preservation of European culture and future cooperation between European countries; and

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\(^1\) See e.g. the translation into the Georgian language, Turava, European Criminal Law, Tbilisi 2010, p. 523-539

\(^2\) See preface of the Vicepresident of the European Commission Reding, EuCLR 2011, p.5 (this edition)

\(^3\) By the European Criminal Policy Initiative; for further information see www.crimpol.eu.
being convinced that criminal law legislation must adhere to the highest standard of democratic legitimacy and the rule of law (Rechtsstaatlichkeit) and that the future of European security can only be safeguarded within a system based on the concepts of democracy, freedom and fundamental legal principles.

This Manifesto reflects the dynamics of European integration, calling attention to the fact that substantive criminal law and criminal procedure law are increasingly becoming the focus of European legislation. At present, European legal instruments used for the harmonisation of criminal legislation already exert influence on the existing national legal frameworks of substantive criminal law and criminal procedure law. Due to the amendments brought about by the Lisbon Treaty this tendency will be even stronger in future. The European institutions making criminal policy decisions on a large scale have failed to acknowledge criminal policy as an autonomous European policy. As a consequence they do not follow a coherent concept of criminal policy.

The Manifesto Group is convinced that Europe needs a balanced and coherent concept of criminal policy based on a number of fundamental principles (as listed below). These principles should be recognised as a basis for every single legal instrument which deals with or which could influence criminal law. The European legislator has to justify the relevance of its proposals in relation to the principles and standards of good governance. The criminal law principles constitute an integral part of the shared European criminal law tradition and can be derived from the normative structure of the European Union (EU).

I. The fundamental principles of criminal policy

1. The requirement of a legitimate purpose

The legislative powers of the EU in relation to criminal law issues should only be exercised in order to protect fundamental interests if:

(1) These interests can be derived from the primary legislation of the EU;
(2) The Constitutions of the Member States and the fundamental principles of the EU Charter of Fundamentals Rights are not violated, and
(3) The activities in question could cause significant damage to society or individuals.

The requirement of a legitimate purpose can be derived from the European principle of proportionality. European legislation can be regarded as legitimate and proportionate only if criminal law is used in order to safeguard the fundamental interests of its citizens.

In accordance with the requirement of good governance the EU legislator has to provide a detailed justification for its legislation, including a thorough explanation of why the interests in question shall be regarded as being of fundamental importance, and why the act marked as a criminal offence shall be considered to have a considerable negative impact on the interests concerned. Enforcement of the
objectives and policies of the European Union cannot, by itself, legitimise the
criminalisation of an act.

2. The *ultima ratio* principle

Since the European Union places the individual centre stage, the European legislator may only demand that an act be criminalised if it is necessary in order to protect a fundamental interest, and if all other measures have proved insufficient to safeguard that interest.

Only if this condition has been satisfied can criminal law be regarded as ‘necessary’ and in conformance with the European principle of proportionality. This is also due to the fact that criminal sanctions entail social stigmatisation which significantly affects citizens’ rights, including the rights expressed in the EU Charter of Fundamental Rights. Furthermore, excessive use of criminal sanctions and criminalisation leads to a decline in the efficiency of criminal law.

Bearing in mind the principles of good governance, it is the responsibility of the European legislative bodies to justify their use of criminal sanctions as the last resort of social control.

3. The principle of guilt (*mens rea*)

European legislation requiring the Member States to criminalise certain acts must be based, without exception, on the principle of individual guilt (the principle of *nulla poena sine culpa*).

This requirement captures not only the fact that criminalisation should be used solely against conduct which is seriously prejudicial to society, but that it should also be regarded as a guarantee that human dignity will be respected by criminal law. Furthermore, the requirement of individual guilt is in conformity with the generally accepted perception of guilt within the system of administrative sanctions in the EU and can also be inferred from the presumption of innocence in Art. 48 (1) of the EU Charter of Fundamental Rights.

As a consequence the European legislator has to justify that the requirements in European legislation as to the sanctions permits the imposition of penalties which correspond to the guilt of the individual and which are not disproportionate to the criminal offence.

This does not predetermine the answer to the question of whether legal entities can be held criminally liable. There is a decisive difference between guilt of an individual and that of a legal entity. Rules concerning criminal liability of legal entities must thus be elaborated on the basis of criminal law provisions at the national level.

4. The principle of legality

In order to respect the fundamental rule of law requirements a criminal law system must adhere to the principle of legality. This principle, including its different
sub-principles, is regarded as a general principle of law, as codified in Art. 6 (3) of the Treaty on European Union or in Art. 7 (1) of the European Convention on Human Rights as well as in Art. 49 (1) of the EU Charter of Fundamental Rights. For the purposes of criminal policy three central requirements which should be respected by the European legislator can be derived from this principle.

a) Subprinciple 1: The lex certa requirement

In European legal reasoning the principle of legal certainty requires that an individual shall be able to predict actions that will make him criminally liable. This means that criminal law provisions must define offences in a strict and unambiguous way. This implies above all utmost clarity: the normative proscriptions should be understandable ‘on their own’. Under any circumstances the norm must ensure that (1) the objective and (2) the subjective prerequisites for criminal liability as well as (3) sanctions which could be imposed if an offence is committed are foreseeable.

Although the subsidiary character of harmonisation work at EU-level necessarily requires that the Member states have a certain degree of latitude in drafting the details of implementation (which implies a certain degree of vagueness as regards European legislative acts), the lex certa requirement is nevertheless important for EU legal instruments as a general principle of law and a fundamental element of any criminal law system based on the rule of law.

The smaller the margin of freedom at the level of implementation, the more important it is that the European legislative acts satisfy the lex certa requirement. If a certain European legal instrument seeks to fully harmonise the proscriptions in the Member States, it should satisfy the lex certa requirement in the same way as if it were a criminal law provision.

When a rule which obliges the Member States to take criminal law measures refers to other European provisions, the abovementioned requirements must be applied to the relevant European legislation taken as a whole. Otherwise it will be almost impossible to create national provisions that meet the lex certa requirement.

b) Subprinciple 2: The requirements of non-retroactivity and the principle of lex mitior

Punitive provisions must not apply retroactively to the detriment of the citizen involved. This principle, which also helps to reinforce foreseeability, implies that the European legislator cannot request that the Member States harmonise their criminal law by introducing criminal legislation to apply retroactively.

An exception to this basic rule is permissible only when retroactive criminal law benefits the offender. Criminal law provisions which come into effect after the commission of the offence, but which are favourable to the offender (i.e. according to which the act is not punishable or carries a lighter penalty than before), can be applied as a basis for conviction without violating the requirement of non-retroactivity (the lex mitigor principle). The lex mitigor principle is recognized by all Member
States, but there are differences as regards its normative status, especially as regards the question of whether the principle is of constitutional character. In the case law of the European Court of Justice (Case Berlusconi) as well as according to Article 49 (1) of the EU Charter of Fundamental Rights, the principle is considered, however, to be of utmost importance. The European legislator is therefore bound by this principle and cannot, by means of instruments of harmonisation, oblige the Member States to apply the law that was applicable when the offence was committed if this law has been altered afterwards in a way which is favourable for the defendant.

c) Subprinciple 3: Nulla poena sine lege parlamentaria (no penalty without a law)

Since criminal law is the most intrusive of the institutions of state control, in a democratic society it must be justified by reference to as direct participation as possible by the people in the legislative process. To the extent that the EU does not have, or does not make use of, a competence to make supranational criminal legislation, the competence to adopt criminal law provisions remains the preserve of the Member States (i.e. their national Parliaments). Due to the fact that the European legislator can issue binding instruments which national Parliaments must comply with, constraints that impact on the freedom of national legislatures are placed on them. This means that even instruments of harmonisation must be justifiable from the point of view of democracy. As far as European instruments limit the freedom of the national legislator, the harmonised criminal law provision cannot be justified on the grounds of democracy at the national level. This makes it necessary to strengthen democratic legitimacy at the European level by a more active role of the European Parliament in the Union’s legislative process.

The wider application of the co-decision procedure provided for in the Lisbon Treaty is therefore – at least from the point of view of democratic legitimacy – most desirable.

In order to achieve a satisfactory level of democratic legitimacy in regard of secondary legislation with criminal law implications, and to ensure wide acceptance of such measures, the institutions involved in the legislative process must – also now after the changes provided for by the Lisbon Treaty have come into effect – make sure that the national parliaments are informed in any case as early and as thoroughly as possible. This will enable the Member States to actually influence the final form and content of the instruments (and the voting of their representatives in the Council). Before legislative decisions are made an equal co-operation between the Member states and the European institutions and among Member states is necessary for installing a sufficient level of democratic control. This is essential in order to respect the ‘good governance’ principle since it ensures that the results are transparent and reasonable as regards legal policy. It will also facilitate broader civil society participation in the legislative process.
5. The principle of subsidiarity

Instruments which are relevant for criminal law and which are enacted on the basis of shared competences in accordance with the general rules of EU law must meet the requirement of subsidiarity. According to this principle the EU legislator may take action only on the condition that the goal pursued

(1) cannot be reached more effectively by measures taken at national level and
(2) due to its nature or scope can be better achieved at Community level.

Accordingly, the national legislator will be given priority in relation to the European legislator to the extent that the Member state is capable of dealing with a given issue. In this way the citizens will be brought closer to decision making in criminal legislation.

The principle of subsidiarity is of special importance in the area of criminal law, since criminal law is also a value system, and as such it is a component part of the ‘national identities’ of the Member states, which must be respected by the Union in accordance with Art. 4 (2) of the Treaty on European Union.

The test of subsidiarity should be applied separately in every single case, i.e. in relation to every instrument and each part of that instrument. Legislative measures must be thoroughly justified in accordance with the protocol on subsidiarity (Protocol no. 2 of the Lisbon Treaty); the national parliaments must be involved as provided for therein.

6. The principle of coherence

The invasive character of criminal law makes it especially important to ensure that every criminal law system is a coherent system. Such inherent coherence is a necessary condition if criminal law is to be able to reflect the values held to be important by society collectively and by individuals and their understanding of justice. Inner coherence is, furthermore, necessary in order to ensure acceptance of criminal law.

When enacting instruments which affect criminal law, the European legislator should pay special attention to the coherence of the national criminal law systems, which constitute part of the identities of the Member states, and which are protected under Article 4 (2) of the Treaty on European Union (vertical coherence). This means, first and foremost, that the minimum-maximum penalties provided for in different EU instruments must not create a need for increasing the maximum penalties in a way which would conflict with the existing systems. In addition, the European legislator must pay regard to the framework provided for in different EU-instruments (horizontal coherence, cf. Art. 11 (3) Treaty on European Union).

To be in line with the principle of good governance before enacting any illegal instrument the European legislator should evaluate the consequences for the coherence parameters of the national criminal law systems, as well as for the European legal system, and on this basis explicitly justify the conclusion that the legal instruments is satisfactory from this point of view.
II. Annotations to the fundamental principles of criminal policy

The above mentioned principles can and should be guidelines for a reasonable legislation as regards criminal policy aspects. As such they can be used to examine already enacted and proposed legal acts in respect of their justification on a criminal policy level. The examination points out the practical relevance and urgency of our requirements. The following part of the Manifesto emphasizes on the one hand already existing commendable approaches for a good criminal policy which can be exemplary for further legislation in the field of criminal law. On the other hand, however, it points out the weak spots that need a correction pursuant to our guidelines.

1. Undoubtedly there are several legal acts that meet the requirement of a legitimate purpose:
   - For example the legislative acts on combating trafficking in human beings seek to protect fundamental legitimate interests. The use of deceit, coercion or even force for the purpose of sexual or labour exploitation of vulnerable persons is not acceptable within an area of freedom, security and justice. Such conduct violates the victim’s core individual rights (physical integrity, freedom of will, sexual self-determination, labour), also protected by the Charter of Fundamental Rights of the European Union.
   - Furthermore the Convention on the protection of the European Communities’ financial interests and its protocols pursue a legitimate purpose, namely the preservation of the financial independence and capacity of the European Union.

However, there are legal acts that do not seem to respect the requirement of a legitimate purpose:
   - The Framework Decision on combating the sexual exploitation of children and child pornography undoubtedly pursues a legitimate concern of criminal policy, namely the protection of the minors involved. However, in its Art. 1 (b) (ii) and (iii) the framework decision goes far beyond that aim by involving the depiction of adults appearing to be a child and realistic images of a non-existent child, for example by computer animation (virtual child pornography). Such depictions do not directly harm a minor, as the represented person is either an adult or not even an existent person. No evidence has been provided yet that such depictions cause indirect danger for minors. To act in accordance with our demands the European legislator should furthermore make an effort to justify the need for the provision (if necessary on the basis of empirical investiga-

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tions). Only then the extent of criminalisation can be justified by a “legitimate purpose”.

- According to the **Framework Decision on the fight against organised crime**\(^7\) the Member States are to criminalise either participation in the criminal activities of a criminal organisation, Art. 2 (a), or the agreement of particular offences, Art. 2 (b), (comparable to the Anglo-Saxon model of “conspiracy”). However, the interests that may be harmed and thus the legitimate purpose remain vague. The provision prescribes a minimum–maximum penalty of four years but it is not apparent which kind of illegal activities or particular offences are included by the provision. The provision only requires the members of the criminal organisation to act with the intention to obtain, directly or indirectly, a financial or other material benefit. This describes the motivation of the perpetrator, not the legitimate purpose which the conduct is aiming at. Hence the provision does not sufficiently reveal its aim (except for the diffuse fight against organised crime). The Member States do not receive a clear impression of what they have to criminalise. In any case, if no further explanations are presented the European legislator violates the principle of good governance.

2. The **principle of ultima ratio** which can be derived from the (European) principle of proportionality has been respected in the following legal acts:

- The **Directive on providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals**\(^8\) demonstrates a positive trend: According to Art. 9 of this directive only particular cases which go beyond the mere infringement of the prohibition of illegal employment, Art. 3 (1), constitute a criminal offence. The Member States only have to punish illegal employment if committed in aggravating circumstances such as: the continuous and persistent infringement, the simultaneous employment of a significant number of illegal staying third-country nationals, the illegal employment of a minor, particularly exploitative working conditions or employment with the knowledge that the illegally staying third-country national is a victim of trafficking in human beings. For the mere infringement of the prohibition of illegal employment, established in Art. 3 (1), sanctions of a non-criminal character (for example administrative sanctions) are sufficient. The legislator has (intentionally?) taken into account the principle of proportionality and hence the principle of ultima ratio.

- The **Framework Decision on attacks against information systems**\(^9\) requires the Member States to punish the illegal access to information systems (Art. 2) the hindering or interruption of the functioning of an information system (Art. 3) and different kinds of data interference (Art. 4). To limit the extension of criminal liability the legal act excludes so called minor cases. Furthermore the Member States may decide whether they want to criminalise the attempt to

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commit the offence established in Art. 2.\textsuperscript{10} It is questionable, whether such provisions are sufficient to limit the extension of criminal liability. Still the European legislator is steering in the right direction. Such provisions make it possible for the Member States to reconcile the required legislative measures with their existing provisions concerning their scope. They are furthermore in accordance with the principle of coherence.

- According to Art. 2 (2) of the \textbf{Framework Decision on illicit drug trafficking}\textsuperscript{11} the Member States are not obligated to punish acts which are (exclusively) related to the perpetrator’s own consumption. Given the different approaches of drug policy and different significance of narcotics offences in the Member States, it should be acknowledged that by this exclusion the European legislator gives the Member States a certain leeway in respect of their criminal policy. However, there are still examples showing that the European legislator does not continuously pay attention to the principle of ultima-ratio and that he ignored the justification required by the principle of good governance.

- The amending \textbf{Framework Decision on combating terrorism}\textsuperscript{12} requires the Member States to classify the following conduct as offences linked to terrorist activities: the public provocation to commit a terrorist offence, the recruitment and training for terrorism, as well as the aiding or abetting, inciting and attempting. The provision is also supposed to counteract the tendency of using the internet as a “virtual training camp” for terrorists. However, the provision criminalises conduct that is committed before the actual commission of a terrorist offence. The European legislator leads the Member States to a criminal law that tries to prevent even mere dangers for legally protected interests. The provision criminalises conduct only leading to a criminal attitude of other persons or only supporting such an attitude (\textit{super-pre-preventative criminal law}). Such extended criminal liability (\textit{Vorverlagerung der Strafbarkeit}) abandons the requirement of even an abstract danger for a legally protected interest and hence is not compatible with the European principle of proportionality (and derived from that the principle of ultima ratio) which is an essential guideline for criminal policy.\textsuperscript{13} As long as a certain conduct does not even constitute a present danger for legally protected interests, its criminalisation is not necessary. In any case the European legislator should give – in accordance with the principle of good governance – a detailed justification why he did not impose a less severe measure, such as increasing monitoring of the internet or obligating operators of websites.

- A similar critical extension of criminal liability is evident in the \textbf{Framework Decision on combating fraud and counterfeiting of non-cash means of

\textsuperscript{10} Regrettably different in that point the Propopsal for a Directive on attacks against information systems and repealing Council Framework Decision2005/222/JHA, COM (2010) 517 final.
\textsuperscript{13} Similar tendencies of such extended criminal liability can be found in many other framework decisions, for example in Art. 2 (c) of the Framework Decision on combating fraud and counterfeiting of non-cash means of payment, 2001/413/JHA, OJ 2001 L 149, p. 1.
The provision is supposed to cover the whole range of activities that together constitute the menace of organised crime in this regard (recital no. 8). The Members States are obligated to criminalise even the making or obtaining of objects that only hypothetically could be used for the commission of an offence. Given the marginal risk potential at this early stage it takes more than the mere reference to organised criminality to comply with the requirement of good governance.

- The **Framework Decision on the fight against organised crime** is not limited to criminal organisations with a certain degree of organisation. According to Art. 1 no. 2 the instrument includes every association that is not randomly formed nor does it need to have formally defined roles for its members, continuity of its membership, or a developed structure. Hence the obligation to criminalise goes further than required by the antisocial nature of organised crime which can hardly be justified considering the principle of proportionality.

- The **Directive on the protection of the environment through criminal law** shows similar problems. The legal act requires the Member States to criminalise conduct that infringes other prohibitions community law. This obliges to criminalise wrongdoing of merely formal character. According to Art. 3 (c) of the directive it already constitutes an illegal shipment of waste if the shipment effects without notification to all competent authorities concerned (compare Art. 2 no. 35 (a) of the Regulation (EC) 1013/2006) or in a way which is not specified materially in the notification or movement documents (compare Art. 2 no. 35 (d) and (g) (iii) of the Regulation (EC) 1013/2006). The criminalisation of administrative offences does not comply with the European principle of proportionality and its sub-principle, the principle of ultima ratio. Furthermore, in such cases no interests that require protection by means of criminal law are at risk.

- The **Framework Decision on combating corruption in the private sector** is not supported by any arguments why less severe means to prevent corruption in this field do not suffice, such as civil claims for compensation or comprehensive compliance measures (for example the establishment of the four-eyes principle for the award of contracts or the regular replacement of employees in contracting departments). The European legislator has not sufficiently considered his duty to give reasons for the use of criminal law as a last resort for social control.

3. There are some examples of legal acts in the field of criminal law that respect the **principle of guilt**:

- In some Member States rules on criminal liability for legal persons would not be compatible with their concept of the principle of guilt, forming the basis of their

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national criminal law system. There are framework decisions that obligate the Member States to impose sanctions on legal person. However, it should be positively noted that as yet it is up to the Member States whether they fulfil this obligation by means of criminal law. An example is Art. 6 of the Framework Decision on combating corruption in the private sector.\(^\text{18}\) Such reserve should be maintained.

Furthermore it should be acknowledged that some legal acts require the offence to be committed intentionally, for example the Framework Decision on combating fraud and counterfeiting of non-cash means of payment\(^\text{19}\), Art. 4 (1), and the Convention on the protection of the European Communities’ financial interests.\(^\text{20}\) However this important requirement rests on shaky foundations and can easily be circumvent, due to the fact that Art. 1 (4) of the Convention allows to infer the intentional character from objective circumstances.

Regarding the principle of guilt it is furthermore alarming that the legislator does not pay attention to the fact that the penalty scale should be in due proportion to the dangerousness of the offence.

The Framework Decision on combating terrorism\(^\text{21}\) requires the Member States to criminalise the directing of a terrorist group, Art. 2 (2) (a), and the knowing participation in the activities of a terrorist group, for example by supplying information or material resources or by funding its activities, Art. 2 (2) (b). In its Art. 5 (3) the provision establishes a maximum sentence of not less than fifteen years for the offences listed in Art. 2 (2) (a) and for the offences listed in Art. 2 (2) (b) a maximum sentence of not less than eight years. Regarding the principle of guilt respectively the proportionality of penalty scales it may be problematic that terrorist groups are not necessarily targeted on the commission of grave offences (such as attacks at a person’s life or physical integrity, hostage taking or the production of weapons of mass destruction). In fact they may only be directed towards the threatening to commit terrorist offences, Art. 1 (1) (i).

As regards the “participation in the activities of a terrorist group” the framework decision establishes a maximum sentence of not less than eight years, regardless of whether the group target the commission or only the threatening to commit terrorist offences. No expression is given to the fact that the different kinds of participation vary in their dangerousness. The legislator did not sufficiently regard the severity of guilt.

As to the “directing of a terrorist group” it is even more questionable whether the principle of guilt has been respected. On the one hand Art. 5 (3) reduces the minimum–maximum penalty for the directing of a terrorist group that refers only to the threatening to commit terrorist offences (eight years instead of fifteen).


\(^{20}\) OJ 1995 C 316, p. 49.

Given that the mere threatening to commit is less dangerous than the commission of a terrorist offence, the reduction of the sentence is commendable. On the other hand, the legislator establishes the same minimum-maximum sentence for both the leader of the group and the follower who participates in a terrorist group directed towards the mere threatening. Unfortunately the legislator failed to reduce the sentence for these participants. By establishing the same minimum-maximum penalty for offences causing different social damages the European legislator violates the principle of guilt, respectively the requirement of proportional penalties.

In its Art. 3 (1) the 2009 Proposal for a Framework Decision on preventing and combating trafficking in human beings established a minimum-maximum penalty of six years. This sentence should apply to “offences referred to in Art. 1 and 2”. Art. 1 comprised the obligation to criminalise certain acts, Art. 2 required the Member States to punish the instigation, aiding, abetting or attempt. Hence the Commission envisaged the same minimum-maximum penalty for the commission of the offence on the one hand and for the participation or the attempt on the other hand. This is hardly consistent with the principle of guilt which requires a sentencing according to the participant’s personal responsibility. With good reason aiding and abetting is punished less severely (at least optional) in many national criminal law systems.

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Regarding the wording of the legal acts in the field of criminal law, positive approaches must be noted in respect of the lex certa-principle (a sub-principle of the principle of legality):

- It is positive if the European legislator seeks a clear definition of the conduct that has to be criminalised by the Member States. A good example is Art. 3 (1) (c) of the Framework Decision on protection against counterfeiting in connection with the introduction of the euro. This instrument requires the Member States to criminalise the import, export, transport, receiving or obtaining of counterfeit currency. In addition the notion of “currency” is separately defined in Art. 1 of the framework decision. In a similar way Art. 2 (1) (a) of the Framework Decision on illicit drug trafficking instructs the Member States to criminalise the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of drugs. It must be acknowledged that the European legislator tries to define the material elements of the offence by numerous and to some extent concrete terms. However, the other side of the coin shows that the ambition to embrace every possible conduct in the catalogue of offences can lead to overlapping terms. A clear distinction between the modalities of the offence (for example

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23 In this respect the Proposal for a Directive on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA, COM (2010) 95 final cannot be criticised.
distinction between offering and offering for sale respectively delivery, dispatch and transport) is not possible. Furthermore it is questionable whether or not such an extensive obligation to punish complies with a reasonable criminal policy (whereas this is not an aspect of the lex certa-requirement, but of the principle of ultima-ratio).

- It deserves being mentioned that European institutions have sought to achieve a higher level of definiteness and clarity when transposing international law provisions set by other international organisations into EU law. For example Art. 1 (1) (c) of the Framework Decision on combating trafficking in human beings clarifies the wording of the corresponding United Nations protocol. An act shall be punishable under the UN protocol and the framework decision where there is an „abuse of authority or of a position of vulnerability“. The framework decision renders this more precise by requiring that the person have „no real and acceptable alternative but to submit to the abuse involved“. It may be disputed whether this amendment has made the provision sufficiently clear. But in any case the efforts made by the European legislators must be expressly acknowledged.

Nevertheless there are numerous legal acts which give rise to criticism. Some examples:

- Pursuant to Art. 1 (b) (ii) of the Framework Decision on combating the sexual exploitation of children and child pornography depictions of real persons of age appearing to be minors are considered child pornography. Whether or not a person of age appears as a minor cannot be described legally. Naturally the transition from juvenile to adult appearance takes place seamlessly – an eighteen year old woman may look like seventeen (whatever this means). This criterion will not lead to foreseeable results and is not suitable for the use in criminal law provisions.

- Under Art. 1 (2) of the Framework Decision on combating certain forms and expressions of racism and xenophobia Member States may choose to punish only conduct which is either carried out in a manner likely to disturb public order. It remains unclear to what this refers. While it is desirable that the European legislator confers a margin of appreciation on the Member States, it is equally problematic that they do so by providing the Member States with unclear legal terms.

- According to Art. 2 (1) of the Framework Decision on combating corruption in the private sector Member States are to punish both the giving and receiving sides of business corruption. It is crucial that the receiving person


should perform or refrain from performing any act in breach of that person’s duties. Art. 1 of this framework decision defines a „breach of duty“ rather broadly. This term shall be understood according to national law but should as a minimum standard cover „any disloyal behaviour constituting a breach of statutory duty, or (...) a breach of professional regulations or instructions (...)“. In order to estimate the consequences in criminal law those who offer or promise the advantage must be capable of foreseeing the entire scope of duties which the national law imposes on the recipient. This comprises statutory law (including case law) and the legal duties derived from the individual employment contract. The lack of clarity is derived from the framework decision itself and can neither be remedied by rendering the transposing acts more precise nor by allowing the Member States to limit the framework decision’s scope of application pursuant to its Art. 2 (3) to conduct involving distortions of competition in relation to the purchase of goods or commercial services.

- The Directive on the protection of the environment through criminal law\textsuperscript{30} raises a similar problem: It describes punishable conduct by several cross-references and thereby practically forces the national legislator to repeat these in the implementing act. This will impede the finding of justice. Multiple references between national and European law might even render it infeasible particularly due to varying wordings of this directive in other official languages and differing standards of interpretation for European and national law. Alternatively Member States could deduce the punishable conduct from the cross-references and enact many single criminal offences without them. Such an approach however is hardly practical for national legislators and not permissible when referencing Community (Union) law with direct effect. It would furthermore entail the risk of missing a combination of references and the member state would then violate its obligation to fully transpose the directive.

5. Many critics claim a neglect of the principle of subsidiarity which limits the EC / EU competence to harmonise national criminal law provisions. The legal acts relating to criminal law have in the past respected this principle to some extent.

- Exerting criminal law competences on a European level is especially justified when the EC (or EU respectively) aims at protecting its own financial or other supranational interests (e. g. protecting the Euro against counterfeiting).
- The principle of subsidiarity is also respected in fields of criminal law which involve crimes that are by trend committed transnationally and cannot be prevented on national level only. Crimes concerning international terrorism and the environment belong to this category because in the former case the offenders’ organisation and in the latter case the impact of the offence do not stop at borders. Although the principle of subsidiarity will most likely be met in these cases this does not imply that all aspects of these crimes have to be dealt with on an international level.

Previous attempts by the Member States in other international fora in order to harmonise certain fields of criminal law may also indicate that the principle of subsidiarity is upheld. Before the adoption of the **Framework Decision on combating trafficking in human beings** similar efforts had been made by the United Nations and the Council of Europe. Whether the principle of subsidiarity demands a solution on a national level must still be scrutinised for every single provision.

However the following examples show that the principle of subsidiarity is still not observed in many cases:

- The **Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law** requires the Member States to ensure that any racist public inciting to violence (Art. 1 (1) (a) – (b)) or denying of the Holocaust or other acts of genocide (Art. 1 (1) (c) – (d)) are punishable crimes. Art. 29 (1) and (2) TEU forms the current legal basis for the framework decision. However the European legislator did not substantiate well why this competence is not limited by the principle of subsidiarity especially considering the different cultural and legal traditions of the Member States in this regard. Instead the legislator argued that European minimum standards are justified because judicial cooperation among Member States must be improved (recital no. 4) and because they constitute a threat against certain groups of persons (recital no. 5). However improving judicial cooperation is not an end in itself. If this argument was valid, then the principle of subsidiarity would not have a scope of application in the field of criminal law because reducing the differences between national criminal law systems naturally simplifies judicial cooperation. It is not apparent that judicial assistance would be hampered without harmonising criminal law provisions. The framework decision expresses the common wish to take a stand against undoubtedly undesirable behaviour. But criminal law should not be abused for symbolic acts. In any case the principle of subsidiarity has not been applied seriously here.

- Furthermore Art. 4 of the this framework decision (on combating certain forms and expressions of racism and xenophobia) and Art. 5 (2) of the **Framework Decision on combating terrorism** also give cause for concern. Both provisions require the Member States to punish offences more severely if—

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35 This is not contested by the European legislator, cf. para. 6 of the recitals.
in the case of the former framework decision – they are committed in racist or xenophobic motivation or – in the case of the latter – with a terrorist intent. Although these provisions impose relatively “soft” obligations on the Member States, which might all in all be sensible and conform to their practice, they are not (and can hardly be) supported by arguments why a solely national solution does not suffice.

- In general almost all of the concerned legal acts formally state in one sentence that the principle of subsidiarity has been (allegedly) observed, e.g. recital no. 7 of the Framework Decision on the fight against organised crime: “Since the objectives of this Framework Decision cannot be sufficiently achieved by the Member States, and can therefore, by reason of the scale of the action, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity (...).” However neither are the objectives of the framework decision named nor is empirical evidence provided for the assumption that the Member States lack the possibility of sufficiently achieving these objectives.

- Finally our request for observing the principle of coherence can also be made clear by means of concrete legal acts. It must be noted that the Member States have so far been left some space in order to preserve the principle of (vertical) coherence.

- The European institutions have until now refrained from requiring the Member States to introduce criminal law sanctions for legal persons (cf. recital no. 7 of the Framework Decision on combating corruption in the private sector; cf. supra the principle of guilt).

- For once the European legislator has tried to avoid interfering with national penalty systems. When deliberating upon the Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence the legislator considered introducing minimum-maximum-penalties of twelve years in Art. 1 (3). This would not have been compatible with Swedish criminal law as the maximum penalty for the corresponding offence in Sweden was four years and the highest fixed-term custodial sentence at all was ten years. In the course of the deliberations the minimum-maximum penalty was set to eight years and Art. 1 (4) of the framework decision was introduced which allows Member States to impose a lower maximum sentence if this is “imperative to preserve the coherence of the national penalty system”. This provides a good example for how the Member States’ interests in keeping a coherent criminal law system can be safeguarded. However in practice the European institutions are far from consequently following a (vertically and horizontally) coherent approach in criminal law policy.

If framework decisions lack clauses like the one described above, the sanctions imposed in compliance with EU law might be out of sync with the rest of the finely balanced criminal sanctions. Art. 5 (3) of the Framework Decision on combating terrorism\textsuperscript{41} set the minimum-maximum-penalty for directing a terrorist group or participating in the activities of such a group to fifteen years and put the Finnish criminal law under pressure because the longest deprivation of liberty for a fixed term had amounted to twelve years before. The framework decision could only be transposed by implementing a maximum sentence of 12 + 3 years contrary to the Finnish criminal law system.

As shown above European legal acts sometimes establish the same sentence for conduct that is socially detrimental in different ways. Art. 3 (2) (a) of the Framework Decision on combating trafficking in human beings\textsuperscript{42} requires a minimum-maximum-penalty of eight years if a victim’s life was deliberately or by gross negligence endangered when committing a trafficking offence. The same minimum-maximum-penalty is set for fraudulent making or altering of currency according to Art. 6 (2) of the Framework Decision on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro\textsuperscript{43}. This exemplifies that the criminal law activities undertaken by the Union lack (horizontal) coherence.\textsuperscript{44} The Member States remain free to introduce penalties which are more severe than the minimum-maximum-penalties if they consider the respective conduct more detrimental. They are however forced to at least partially raise the penalties which interferes with the principle of vertical coherence.\textsuperscript{45}

The lack of horizontal coherence can – again – be shown with the Framework Decision on combating terrorism\textsuperscript{46} which does not distinguish between the participation in a terrorist group directed towards the committing and the threatening to commit terrorist activities, whereas the minimum-maximum penalty for the directing of a terrorist group that refers only to the threatening to commit terrorist offences is reduced to eight years. Hence in such cases the same minimum-maximum-penalty is applied to both, the leader of the group and the follower.

7. The examples show that European legislation has only partly amounted to unacceptable or at least critical results. Although the line to unbearable consequences has not been crossed some alarming tendencies must be observed and not be ignored: criminal law must not be adopted without pursuing a legitimate

\textsuperscript{44} Weyembergh, Approximation of criminal laws, the Constitutional Treaty and The Hague Programme, p. 1586.
\textsuperscript{45} The new Proposal for a Directive on preventing and combating trafficking in human beings, COM (2010) 95 final, raises the minimum-maximum compared to the now existing Framework Decision; this is – on the one hand – consequent with a view to establishing horizontal coherence, on the other hand this approach follows a wrong basic orientation and causes problems as to the vertical coherence and the principle of proportionality.
purpose; the principle of ultima ratio must not be neglected; the Member States must not be obliged to pass imprecise national criminal laws; the legislation must not answer every social problem with passing increasingly repressive acts and consider this as a value in itself.

These worrisome tendencies can also be perceived on a national level but are significantly amplified by European developments. If the entailed risks are not acknowledged in time, we fear to be confronted with criminal laws that contradict our fundamental principles.

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