

THE DEVELOPING EUROPEAN CRIMINAL POLICY*

BENCE UDVARHELYI

*Senior Lecturer, Department of International Law
University of Miskolc
jogbence@uni-miskolc.hu*

1. Introduction

One of the main principles of the functioning of the European Union is the *principle of conferral*, according to which the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties. The Founding Treaties of the European Communities originally did not contain any express provision in connection with criminal law; therefore it was a common opinion for a long time that the European Communities did not have legal competence in criminal matters. However, it cannot be said that Community/EU law and national criminal law were entirely independent of each other. Due to several factors, criminal law is increasingly becoming the focus of European legislation and European legal instruments already exert influence on the existing national legal frameworks of substantive criminal law and criminal procedure law. With the reformed and renewed framework of the Treaty of Lisbon, this tendency will be even stronger in future.

Although it can be stated that national law is heavily influenced by EU law, the Union still failed to acknowledge criminal policy as an autonomous European policy. However, after the adoption of the Treaty of Lisbon, *European criminal policy* slowly began to develop.

In 2009, an expert group called *European Criminal Policy Initiative* published the *Manifesto on European Criminal Policy*¹ in which it tried to draw up a balanced and coherent concept of criminal policy.² The document listed the *fundamental principles of the European criminal law* (the requirement of a legitimate purpose, the *ultima ratio* principle, the principle of guilt, the principle of legality, the principle of subsidiarity and the principle of coherence). These principles should be recognized as a basis for every single European legal instrument dealing with criminal law.

After the adoption of the Manifesto, the EU institutions also acknowledged the risk of the lack of a coherent European criminal policy and adopted several documents. In these – non-binding – communications and conclusions, the *European Commission*,³ the *Council*⁴

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¹ Manifesto on European Criminal Policy. *Zeitschrift für Internationale Strafrechtsdogmatik*, 12/2009, 707–716.

² SATZGER, Helmut: Der Mangel an Europäischer Kriminalpolitik. Anlass für das Manifest der internationalen Wissenschaftlergruppe “European Criminal Policy Initiative”. *Zeitschrift für Internationale Strafrechtsdogmatik*, 12/2009, 692–693.

³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law [COM (2011) 573 final, 20. 9. 2011].

and the *European Parliament*⁵ also refer to the guiding principles of the European criminal law and intend to delineate guidelines for the future criminal legislation. These documents can be regarded as the first steps of a European criminal policy, which is indispensable for a coherent criminal legislation at the EU's level.

In this article, we intend to present some of the guiding principles of the nascent European criminal policy. Of course, each of these principles can be analysed from several points of views; therefore this paper will only focus on their relevant aspects relating to the European criminal law.

2. The requirement of a legitimate purpose, the *ultima ratio* principle and the subsidiarity principle

The first three general principles have very close relation to each other. Each of these principles intends to answer the question: when, under which conditions the EU is entitled to use criminal law measures, while the other principle we will mention below primary focus on the requirements of the content of the criminal measures.

The *requirement of a legitimate purpose* guarantees the *legitimacy of criminal law*.⁶ According to the Manifesto, the EU legislator can only exercise its criminal competences 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.⁷

According to the *ultima ratio* principle, criminal law only can be used as a *last resort*.⁸ That means European legislator may only demand an act to be criminalised if it is necessary to protect a fundamental interest, and if *all other measures have proved insufficient* to safeguard that interest.⁹ It means criminal law should be reserved for the most serious invasion of interests since less serious misconducts are more appropriately dealt with by civil law or by administrative sanctions.¹⁰

Under the *principle of subsidiarity*, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.¹¹ It means that 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 European

⁴ Draft Council conclusions on model provisions, guiding the Council's criminal law deliberations [16542/2/09 REV 2, 27. 11. 2009].

⁵ European Parliament resolution of 22 May 2012 on an EU approach to criminal law [2010/2310(INI) – P7_TA (2012) 208, *OJ C*, E 264, 22. 05. 2012. 7–11].

⁶ KAIAFA-GBANDI, Maria: The Importance of Core Principles of Substantive Criminal Law for a European Criminal Policy Respecting Fundamental Rights and the Rule of Law. *European Criminal Law Review*, Vol. 1/1 (2011), 14.

⁷ Manifesto on European Criminal Policy, 707.

⁸ See further: LUKÁCSI Tamás: Az *ultima ratio* elve az Európai Unió jogában. *Állam- és Jogtudomány*, 2015/2, 20–46.

⁹ Manifesto on European Criminal Policy, 707.

¹⁰ HERLIN-KARNELL, Ester: Subsidiarity in the Area of EU Justice and Home Affairs Law – A Lost Cause? *European Law Journal*, Vol. 15/3 (2009), 356.

¹¹ Article 5(3) TEU.

level. According to the subsidiarity principle, EU can only fulfill the tasks that cannot be fulfilled effectively by actions on local, regional or national level. It has to be ensured that the decisions will be taken as closely to the citizens as possible.¹²

These principles require the EU legislator to *prove the necessity of the application of criminal measures* at EU law. Criminal law has to signify an *added value* compared to other less restrictive measures.¹³

These principles similarly appear in the documents of the EU institutions. According to the *European Commission*, a two steps approach has to be followed when taking the decision on criminal law measures: first the EU legislator have to decide whether to adopt criminal measures at all and second the legislator have to choose the kind of criminal law measures to adopt. When examining the necessity of the criminal measures the legislator needs to analyse whether measures other than criminal law measures, (e.g. sanction regimes of administrative or civil nature), could not sufficiently ensure the policy implementation and whether criminal law could address the problems more efficiently. This will require a thorough analysis in the Impact Assessments preceding any legislative proposal, including for instance and depending on the specificities of the policy area concerned, an assessment of whether Member States' sanction regimes achieve the desired result and difficulties faced by national authorities implementing EU law on the ground. To establish the necessity for minimum rules on criminal law, the EU institutions need to be able to rely on clear factual evidence about the nature or effects of the crime in question and about a diverging legal situation in all Member States which could jeopardise the effective enforcement of an EU policy subject to harmonisation. That is why the EU needs to have at its disposal statistical data from the national authorities that allow it to assess the factual situation.¹⁴

Correspondingly to the Commission the *Council* also emphasises that criminal law provisions should be introduced when they are considered essential for the interests to be protected and, as a rule, be used only as a last resort. For the maximal compliance to the *ultima ratio* principle, the EU legislator has to examine (1) the expected added value or effectiveness of criminal provisions compared to other measures, taking into account the possibility to investigate and prosecute the crime through reasonable efforts, as well as its seriousness and implications; (2) how serious and/or widespread and frequent the harmful conduct is, both regionally and locally within the EU; and (3) the possible impact on existing criminal provisions in EU legislation and on different legal systems within the EU.¹⁵

According to the *Parliament*, the necessity of new substantive criminal law provisions must be demonstrated by the necessary factual evidence. It have to be made clear that (1) the criminal provisions focus on conduct causing significant pecuniary or non-pecuniary damage to society, individuals or a group of individuals; (2) there are no other, less intrusive measures available for addressing such conduct; (3) the crime involved is of a particularly serious nature with a cross-border dimension or has a direct negative impact on the effective implementation of a Union policy in an area which has been subject to

¹² ASP, Petter: *The Substantive Criminal Law Competence of the EU*. Jure Bokhandel, Stockholm, 2012, 184; VALKI, László: Az Európai Unióhoz csatlakozó államok szuverenitása. *Európai Tükör*, 1997/3, 90.

¹³ See: HECKER, Bernd: *Europäisches Strafrecht*. Springer Verlag, Berlin–Heidelberg, 2012, 281; SIMON, Perrine: The Criminalisation Power of the European Union after Lisbon and the Principle of Democratic Legitimacy. *New Journal of European Criminal Law*, Vol. 3/3–4 (2012), 252.

¹⁴ Communication from the Commission, 7–8.

¹⁵ Draft Council conclusions, 4–5.

harmonisation measures; (4) there is a need to combat the criminal offence concerned on a common basis, i.e. that there is added practical value in a common EU approach, taking into account, inter alia, how widespread and frequent the offence is in the Member States, and (5) in conformity with Article 49(3) of the EU Charter on Fundamental Rights, the severity of the proposed sanctions is not disproportionate to the criminal offence.¹⁶

3. The Principle of Guilt

The principle of guilt requires that the criminalisation of certain acts must be based 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 (*principle of ultima ratio*); but that it should also be regarded as a guarantee that human dignity is respected by criminal law.¹⁷ The principle of guilt also has close connection with the *presumption of innocence* enshrined in Article 6(2) of the European Convention on Human Rights¹⁸ and in Article 48(1) of the Charter of Fundamental Rights of the European Union¹⁹ as well.²⁰

Until recently in the EU law, the principle of guilt was not an absolute guideline. For a long time, the *judicial practice of the European Court of Justice* does not exclude the possibility of the introduction of *strict criminal liability*.²¹ Strict liability can be defined as a criminal liability which requires only the prohibited conduct, irrespectively of the *mens rea* of the perpetrator.²²

However, the Charter of the Fundamental Rights of the EU, which with the Treaty of Lisbon obtained the same legal value as the Treaties, expressly refers to the principle of guilt. As a consequence, the *Manifesto* also states that 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*.²³ Furthermore, the *Council* also confirms that EU criminal legislation should only prescribe penalties for acts which have been committed *intentionally* or in exceptional cases with *serious negligent*. The criminalisation of an act that has been committed without intention or negligence, i.e., strict liability, should not be prescribed in EU criminal legislation.²⁴ Similar wording can be found in the resolution of the *Parliament* i.e. the European Union could prescribe penalties only for acts which have been committed *intentionally*, or in exceptional cases, for acts involving *serious negligence*.²⁵ Therefore, the recognition of the principle of guilt as a

¹⁶ European Parliament resolution, point 3.

¹⁷ Manifesto on European Criminal Policy, 707.

¹⁸ Article 6(2) of the European Convention on Human Rights: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

¹⁹ Article 48(1) of the Charter of Fundamental Rights of the European Union: "Everyone who has been charged shall be presumed innocent until proved guilty according to law."

²⁰ See further: SCHAUT, Andreas B.: *Europäische Strafrechtsprinzipien. Ein Beitrag zur systematischen Fortentwicklung übergreifender Grundlagen*. Nomos Verlagsgesellschaft, Baden-Baden, 2012, 220–231.

²¹ See for example: Case C-326/88 *Hansen* [1990] ECR I-02911; Case C-7/90 *Vandevenne and Others* [1991] ECR I-04371.

²² KLIP, André: *European Criminal Law. An Integrative Approach*. Intersentia Publishing, Cambridge–Antwerp–Portland, 2012, 203.

²³ Manifesto on European Criminal Policy, 708.

²⁴ Draft Council conclusions, 6.

²⁵ European Parliament resolution, point 4.

principle of the European criminal policy could lead to the alteration of the judicial practice of the European Court of Justice.²⁶

Beside the strict liability, other problematic question relating to the principle of guilt is the *question of the criminal responsibility of legal persons*. There are Member States who rejects the introduction of criminal responsibility of legal persons because it is inconsistent with the principle of guilt.²⁷ However, it can be stated that the EU norms clearly respect the national sovereignty of the Member States in this field, because they only oblige them to sanction the legal persons, but does not refer that the sanctions have to be criminal sanctions. Therefore it is up to the Member States whether they fulfill their obligation by means of criminal law or by other less restrictive measures. In connection with the liability of the legal persons, the *Manifesto* only states that rules concerning criminal liability of legal entities must thus be elaborated on the basis of criminal law provisions at the national level.²⁸

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*.²⁹ The legality principle is an inherent element and a general principle of the EU law.³⁰ The principle is formulated in Article 7 of the European Convention on Human Rights³¹ and in Article 49(1)–(2) of the Charter of the Fundamental Rights of the EU³² as well. Furthermore, according to the judicial practice of the European Court of Justice, the principle of the legality of criminal offences and penalties is one of the general legal principles underlying the constitutional traditions common to the Member States.³³

From the principle of legality four requirements and four prohibitions can be derived: (1) the requirement of the application of the criminal law which was in force at the moment of the perpetration and the non-retroactivity rule (*nullum crimen, nulla poena sine lege praevia*); (2) the requirement of legal certainty and the prohibition of an uncertain criminal

²⁶ KARSAL, Krisztina: *Alapelvi (r)evolúció az európai büntetőjogban*. Pólay Elemér Alapítvány, Szeged, 2015, 74.

²⁷ KAIAFA-GBANDI: Op. cit. 31.

²⁸ Manifesto on European Criminal Policy, 708, 711.

²⁹ Manifesto on European Criminal Policy, 708, 711.

³⁰ KLIP: Op. cit. 179.

³¹ Article 7 of the European Convention on Human Rights: “1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.”

³² Article 49 of the Charter of the Fundamental Rights of the European Union: “1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable. 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.”

³³ Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-03633, para 49.

law or sanction (*nullum crimen, nulla poena sine lege certa*); (3) the requirement of a written criminal law and the prohibition of customary law and judicial law (*nullum crimen, nulla poena sine lege scripta*); and the prohibition of the analogical application of criminal law (*nullum crimen, nulla poena sine lege stricta*).³⁴ From the point of view of the European criminal law, the *Manifesto* lists the following three sub-principles: the *lex certa requirement*, the *requirements of non-retroactivity* and the *principle of lex mitior* and the *nulla poena sine lege parlamentaria principle*.

4.1. The *lex certa* requirement

As it is reaffirmed by the European Court of Justice in multiple cases, the general principle of legal certainty requires that rules should be clear and precise, so that individuals may ascertain unequivocally what their rights and obligations are.³⁵ In connection with criminal law, the *lex certa* principle 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*: (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 have to be *foreseeable*.³⁶ Criminal law provisions may not be applied extensively to the detriment of the defendant.³⁷

The *lex certa* requirement is also emphasised by the European Commission, the Council and the European Parliament. According to *Commission*, the principle of legal certainty requires that the conduct to be considered criminal must be defined clearly.³⁸ The *Council* states that the description of conduct which is identified as punishable under criminal law must be worded precisely in order to ensure predictability as regards its application, scope and meaning³⁹ and the *Parliament* also determines that the description of the elements of a criminal offence must be worded precisely to the effect that an individual shall be able to predict actions that will make him/her criminally liable.⁴⁰

However, in the European criminal legislation the observance of *lex certa* requirement could be problematic. According to the *Manifesto*, 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.⁴¹ From the provisions of the *Manifesto*, it follows that it has to be distinguished whether a European criminal law norm was adopted in form of a regulation or a directive. In case of *regulations*, which are directly applicable in every Member States and seek to harmonize entirely the proscriptions of the Member

³⁴ NAGY, Ferenc: A nullum crimen/nulla poena sine lege alapelvröl. *Magyar Jog*, 1995/5, 257–258. See further: ASP: Op. cit. 168.

³⁵ See for example: C-209/96 *United Kingdom v Commission* [1998] ECR I-05655, para 35; Case C-108/01 *Consorzio del Prosciutto di Parma and Salumificio S. Rita* [2003] ECR I-05121, para 89; Case C-255/02 *Halifax and Others* [2006] ECR I-01609, para 72; Case C-308/06 *Intertanko and Others* [2008] ECR I-04057, para 69; Case C-345/06 *Heinrich* [2009] ECR I-01659, para 44.

³⁶ *Manifesto on European Criminal Policy*, 708.

³⁷ Joined cases C-74/95 and C-129/95 *Criminal proceedings against X* [1996] I-06609, para 25.

³⁸ Communication from the Commission, 7.

³⁹ Draft Council conclusions, 5.

⁴⁰ European Parliament resolution, point 4.

⁴¹ *Manifesto on European Criminal Policy*, 708.

States, the *lex certa* requirement naturally has to be satisfied.⁴² However a *directive* has to be implemented into the national criminal law; therefore the perpetrator is not held liable based on the supranational norm, but on the domestic criminal norm implementing the provisions of the directive.⁴³ It is therefore highly questionable whether the directive has to fulfill the requirement of legal certainty. However, the answer to this question has to be ‘yes’. The lack of clear delimitation of EU norms would pose a dilemma to national legislators: they either unilaterally adopt a precise definition and risk diverging from the actual objective of the EU and therefore being held responsible before the ECJ; or fail to give a clear description of the offence and thereby violating the *lex certa* requirement. Therefore it is evident that the *lex certa* requirement is addressed to European legislator in case of a directive as well. Otherwise, it would be impossible for the national legislator to abide by its obligation to implement EU law without violating the *lex certa* requirement.⁴⁴

4.2. The requirement of non-retroactivity

According to this sub-principle derived from the legality principle, punitive provisions must *not apply retroactively* to the detriment of the citizen involved. This principle, which also arises from the principle of foreseeability, implies that the European legislator cannot request that the Member States harmonise their criminal law by introducing criminal legislation to apply retroactively. There is only an exception permitted by this basic rule: 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 (*lex mitior principle*).⁴⁵

Both the *principle of non-retroactivity*⁴⁶ and the *principle of the retroactive application of the more lenient penalty*⁴⁷ forms part of the constitutional traditions common to the Member States, therefore they form the part of the general principles of law whose observance is ensured by the European Court of Justice.

4.3. The *nulla poena sine lege parlamentaria* requirement

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.⁴⁸ European criminal law norms are required to have adequate *democratic legitimacy*.⁴⁹

Before the entry into force of the Treaty of Lisbon, the lack of the democratic legitimacy of European criminal law was a huge problem. Firstly, the democratic,

⁴² SCHAUT: Op. cit. 139.

⁴³ See further ASP: Op. cit. 173.

⁴⁴ KAIAFA-GBANDI: Op. cit. 27.

⁴⁵ Manifesto on European Criminal Policy, 708.

⁴⁶ See: Case 63/83 *Kirk* [1984] ECR 02689, para 22.

⁴⁷ Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] I-03565, para 68. See further: HERLIN-KARNELL, Esther: *The Constitutional Dimension of European Criminal Law*. Hart Publishing, Oxford–Portland, 2012, 21–22; KLIP: Op. cit. 185–187.

⁴⁸ Manifesto on European Criminal Policy, 708.

⁴⁹ MUSIL, Andreas: Umfang und Grenzen europäischer Rechtssetzungsbefugnisse im Bereich des Strafrechts nach dem Vertrag von Amsterdam. *Neue Zeitschrift für Strafrecht*, 2/2000, 70; SCHAUT: Op. cit. 119.

parliamentary control was insufficient and ineffective. Neither the European Parliament nor the national parliaments could exert adequate competences in the legislative procedure. There was no co-decision with the European Parliament, which often could only take place after a compromise has been reached in the Council with considerable difficulties. Secondly, the judicial protection of citizens against the Union's action in the field of police and judicial co-operation in criminal matters was also unduly limited.⁵⁰

The Treaty of Lisbon tried to satisfy the principle of democratic legitimacy with the reinforcement of the role of the European Parliament and the national parliaments. The Treaty introduced the ordinary legislative procedure in the areas of criminal law, which means legal acts can be adopted through co-decision between the European Parliament and the Council, by qualified majority voting, on the basis of proposals issued by the European Commission. The European Parliament therefore became co-legislator. The role of the national parliaments was also strengthened; they have to be informed from every legislative act as early and as thoroughly as possible. The Lisbon Treaty also enhanced the judicial control, the European Court of Justice obtained with some exceptions full jurisdiction over the former third pillar policies.⁵¹

Therefore it can be stated that the *EU's democratic deficit was reduced although not completely eliminated* by the Treaty of Lisbon.⁵² According to the *Manifesto*, the democratic legitimacy of European criminal law could be further increased with the facilitation of a broader civil society participation in the legislative process.⁵³

5. The principle of coherence

Because criminal law deeply intervenes in the private sphere of the citizens, it is of particular importance to ensure that every criminal law system has a *certain degree of inner coherence*. 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. Furthermore, inner coherence is necessary to ensure acceptance of criminal law.⁵⁴

The principle of coherence has two dimensions: therefore we can speak about vertical and horizontal coherence. *Vertical coherence* refers to the relation between the EU and the Member States. In connection with this, it is an indispensable requirement for European criminal law to *respect the coherence of the national criminal law systems*. The Treaty on the European Union also declares that the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental

⁵⁰ LADENBURGER, Clemens: Police and Criminal Law in the Treaty of Lisbon. A New Dimension for the Community Method. *European Constitutional Law Review*, Vol. 4/1 (2008), 24–25.

⁵¹ See in details: FLETCHER, Maria: EU criminal justice: beyond Lisbon. In: ECKES, Christina–KONSTADINIDES, Theodore (eds.): *Crime within the Area of Freedom, Security and Justice*. Cambridge University Press, Cambridge, 2011, 18–25.

⁵² KAIAFA-GBANDI, Maria: Approximation of substantive criminal law provisions in the EU and fundamental principles of criminal law. In: GALLI, Francesca–WEYEMBERGH, Anne (eds.): *Approximation of substantive criminal law in the EU. The way forward*. Editions de l'Université de Bruxelles, Bruxelles, 2013, 99.

⁵³ Manifesto on European Criminal Policy, 708.

⁵⁴ Manifesto on European Criminal Policy, 708. See further: MYLONOPOULOS, Christos: Strafrechtsdogmatik in Europa nach dem Vertrag von Lissabon – Zur materiellen Legitimation des Europäischen Strafrechts. *Zeitschrift für die gesamte Strafrechtswissenschaft*, 3/2011, 643.

structures, political and constitutional, inclusive of regional and local self-government.⁵⁵ In connection with criminal law, the Treaty on the Functioning of the European Union also emphasises that the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.⁵⁶ The coherence of the national criminal law systems could be undermined especially in case of the *harmonization of the criminal sanctions*. Therefore, the *Manifesto* explicitly states that 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. However, several examples can be cited, when the minimum-maximum penalties prescribed by different EU directives could only be implemented contrary to the criminal law system of the Member State concerned.⁵⁷

Beside the observance of vertical coherence, the European Union is also required to respect the principle of *horizontal coherence*. It means that during the adoption of criminal law measures the European legislator has to pay regard to the framework provided for in different EU instruments. Therefore the EU 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 are satisfactory from this point of view. In connection with horizontal coherence, it is problematic that the EU criminal law norms are not so differentiated, which means that they prescribe the same penalty for conducts that are not equally detrimental to society (e.g. trafficking in human beings and counterfeiting of euro). Of course, the EU legislation usually prescribe minimum harmonization, therefore the Member States remain free to introduce penalties which are more severe than the minimum-maximum penalties in the EU directive. In this case, however, they are forced to at least partially raise the penalties, which interfere with the principle of vertical coherence again.⁵⁸

6. Conclusion

The Manifesto on European Criminal Policy was an incredibly significant milestone in the history of European criminal law. It was the first attempt to establish a *coherent European criminal policy* by determining the *guiding principles of the European criminal law*. Of course, the aforementioned principles form the part of the common legal heritage of the Member States, they can be found in several international treaties (e.g. European Convention on Human Rights) and they are also parts of the basic legal principles of the EU law (they can be directly derived from the EU law). Therefore it can be argued that the enumeration of these principles once more was not so inventive. However, the real problem is that in practice the European legislator does not fully respect the listed principles.⁵⁹

Therefore, the second part of Manifesto *examines the legislative practice of EU* and seeks to answer the question whether the adopted EU criminal law norms correspond to the aforementioned general principles. The Manifesto points out both *positive and negative examples* with which it aims to eliminate the weak points and negative tendencies. At the

⁵⁵ Article 4(2) TEU.

⁵⁶ Article 67(1) TFEU.

⁵⁷ Manifesto on European Criminal Policy, 708, 715.

⁵⁸ Manifesto on European Criminal Policy, 708, 712, 715.

⁵⁹ ASP, Petter: European Criminal Law – Challenges in the Future. In: BERGSTRÖM, Maria–CORNEILL, Anna Jonsson (eds.): *European Police and Criminal Law Co-operation*. Hart Publishing, Oxford–Portland, 2014, 62.

end of the document the authors conclude that the analysed examples show some *alarming tendencies* which must be observed and not be ignored. Therefore criminal law must not be adopted without pursuing a legitimate 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. If these entailed risks are not acknowledged in time, the authors fear to be confronted with criminal laws that contradict the fundamental principles.⁶⁰ Of course, this critique cannot be interpreted as a “euro-sceptical” point of view.⁶¹ The authors of the Manifesto rather intend to emphasise the importance of a coherent, harmonious European criminal policy.

With the publication of the Manifesto, a process began at the EU’s level. The institution of the European Union followed the example of the Manifesto and adopted documents in which they tried to determine the key features of the European criminal policy. Their content is very similar, each of these non-binding documents refers to the *fundamental principles of European criminal law* (the *ultima ratio* principle, the principle of subsidiarity, the principle of guilt, the principle of legality the principle of coherence etc.), and tries to draw up *guidelines for the European legislation when and how to adopt criminal law provisions*. However, the differences in the policy approaches of EU institutions towards substantive criminal law are also noteworthy. The European Commission attempted to demonstrate the added value of EU criminal law and focused primarily on the criminal competences of the EU enshrined in the Treaty of Lisbon, particularly in Article 83(2) TFEU. The Member States in the Council emphasised the conditions and limits of the exercise of EU criminal competences, therefore they rather aimed to pre-empt the supranationalisation brought forward by the Treaty of Lisbon. The European Parliament highlighted the need for EU criminal law to comply with fundamental rights.⁶²

Despite these minor contradictions the aforementioned documents have outstanding importance. No criminal legislation can lack a coherent criminal policy. These documents can be regarded as the *first steps in the development of an autonomous European criminal policy*. If the European legislation complies with the principles laid down in these documents, we can hope that it could lead to a coherent criminal legislative practise in the European Union.

⁶⁰ Manifesto on European Criminal Policy, 709–715.

⁶¹ PRITTWITZ, Cornelius: Lissabon als Chance zur kriminalpolitischen Neubesinnung. Das Manifest zur Europäischen Kriminalpolitik. In: AMBOS, Kai (Hrsg.): *Europäisches Strafrecht post-Lissabon*. Universitätsverlag Göttingen, Göttingen, 2011, 32.

⁶² MITSILEGAS, Valsamis: EU Criminal Law Competence after Lisbon: From Securitised to Functional Criminalisation. In: ARCARAZO, Diego Acosta–MURPHY, Cian C. (eds.): *EU Security and Justice Law. After Lisbon and Stockholm*. Hart Publishing, Oxford–Portland, 2014, 127.