XLIII POLISH YEARBOOK OF INTERNATIONAL LAW
2023
DOI 10.24425/PYIL.2024.152295
PL ISSN 0554-498X
e-ISSN 2957-1510

Raquel Cardoso[*]

NAVIGATING TROUBLED WATERS: EVALUATING THE FUNCTION AND MATERIAL LEGITIMACY OF EUROPEAN CRIMINAL LAW[**]

Abstract: *The question of the function of European criminal law has dominated recent doctrinal thinking. In order to answer that question, a thorough study on the guiding principles of criminalisation and their applicability to the European Union's legislative process was necessary. This article focusses first on the concept of legitimacy and the need for a European criminal policy, and then on some principles that already exist in the EU's legal order and their ability to provide said legitimacy. Following the conclusion that the existing principles are insufficient, it is suggested that the harm principle and the principle of protection of legal goods would be more appropriate to evaluate the material legitimacy of European criminal law. For that purpose, the multiple categories of interests that coexist in the EU will be analysed according to the allocation of responsibility for their protection. That distinction will, in turn, lead to the proposal of a three-step process to assess any given instance of criminalisation stemming from the EU. Finally, the practical consequences of such a process will be mentioned in the conclusion.*

Keywords: criminalisation process, function of criminal law, harm principle, legal good, material legitimacy

[*] Assistant Professor (Ph.D.); Faculty of Law of Lusíada University (Portugal); integrated researcher at CEJEIA; email: rcardoso@por.ulusiada.pt; ORCID: 0000-0003-1336-9192. I would like to thank Prof. Pedro Caeiro for his generous comments on an earlier version of this article, as well as the anonymous reviewers and the Editors for their analysis and thorough revision of the text, which greatly improved it.

[**] This article builds on the central topic of the author's Ph.D. dissertation, published in Portuguese: R. Cardoso, *As Funções do Direito Penal Europeu e a Legitimidade da Criminalização. Entre o harm principle e a protecção de bens jurídicos*, Almedina, Coimbra: 2023.

INTRODUCTION

Opting for the adoption of criminal measures is not an evident choice: norms and sanctions as grave as criminal ones inevitably need additional legitimacy. Legitimacy[1] represents the normative conviction that a certain institution or norm must be obeyed; it is therefore a "subjective notion, dependent upon the perceptions (or feelings) of an actor."[2] There are multiple meanings to legitimacy: "input legitimacy" and "output legitimacy",[3] "formal legitimacy"[4] and "material legitimacy". The first pair concerns the evaluation of the law through an *ex ante* and *ex post* perspective: regarding both the possibility of all interested parties participating and the results which the law was expected to achieve and what it accomplished. Formal legitimacy concerns the process of adopting criminal law. Although this aspect was initially contested in the European Union (and it still raises some questions regarding the precise limits of that competence), it is clear, since the Treaty of Lisbon, that there is indeed a competence to produce criminal law.[5] Material legitimacy, however, addresses the question of the specific *content* of the criminal norm: it can be formally legitimate if it follows the correct procedure and respects the whole adoption process, and can still be materially illegitimate if it proposes the adoption or prohibition of behaviour with which the subjects do not agree.[6] Material legitimacy is the aspect I will focus on, as a critical tool to assess criminal law norms.[7]

---

[1] Legitimacy must be distinguished from "power" and "authority": these can exist and be illegitimate, J. Klabbers, *Setting the Scene*, in: J. Klabbers, A. Peters, G. Ulfstein (eds.), *The Constitutionalization of International Law*, Oxford University Press, Oxford: 2011, p. 37.

[2] *Ibidem*, p. 38, commenting on the work of I. Hurd, *After Anarchy: Legitimacy and Power in the United Nations Security Council*, Princeton University Press, Princeton: 2007, p. 7.

[3] Klabbers, *supra* note 1, p. 40.

[4] According to Beetham (D. Beetham, *The Legitimation of Power*, Palgrave Macmillan, Houndmills: 2013, pp. 15 et seq.), legitimacy is first the conformation with certain established rules (legal validity); those rules should in turn correspond to shared beliefs between the one exerting power and their subordinates.

[5] For an extensive analysis of the source of the Union's jurisdictional powers over criminal matters (most recently), *see* P. Caeiro, *Constitution and Development of the European Union's Penal Jurisdiction: Responsibility, Self-Reference and Attribution*, 27(4–6) European Law Journal 441 (2021).

[6] For example, if its content is "odious" or "something substantively unjustifiable" – Klabbers, *supra* note 1, p. 39. In the same vein, C. Mylonopoulos, *Strafrechtsdogmatik in Europa nach dem Vertrag von Lissabon – Zur materiellen Legitimation des Europäisches Strafrechts*, 123(3) Zeitschrift für die gesamte Strafrechtswissenschaft 633 (2011) as well as J. Steffek, *The Legitimation of International Governance: A Discourse Approach*, 9(2) European Journal of International Relations 249 (2003), p. 264.

[7] This concept of legitimacy is thus broader than the presented in I. Wieczorek, *The Legitimacy of EU Criminal Law*, Bloomsbury Publishing, Portland: 2020, p. 12, wherein legitimacy is understood as "coherence with the normative premises for the use of criminal law derived from EU values and general principles." Similarly, but with an emphasis on independence as a premise needed to secure that systemic coherence, L. Mancano, *A Theory of Justice? Securing the Normative Foundations of EU Criminal Law Through an Integrated Approach to Independence*, 27(4–6) European Law Journal 477 (2021).

Acceptance and respect for norms, especially criminal laws, depend not only on the "consent of the subjects"[8] – the adoption of the law through democratic procedures – but also on the legislature's conclusion that these norms are necessary. This necessity is usually based on the fact that an interest or value has such great social significance that it justifies the restriction of the rights and freedoms of citizens that the criminal sanction implies. The *choice* of those interests and values[9] is the core of the matter. When this criminal policy issue is posed in the European setting, the question is whether it can be legitimately handled by the supranational entity instead of the States,[10] that is to say, whether the choice of the values and interests deserving of criminal protection should fall under the supranational entity's remit, *overriding* (and even in some cases, such as in the event of a true European criminal law, *replacing*) the Member States' remit.

1. THE NEED FOR A EUROPEAN CRIMINAL POLICY

In order to determine a function to be fulfilled by European criminal law, we must first know the function of the European Union (EU) itself.[11] There are not many doubts that the EU can roughly be attributed the same functions as a social and democratic state governed by the rule of law: the Union is "founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and

[8] A. Nieto Martín, *Strafrecht und Verfassung in der Ära des Global Law*, in: S. Reindl-Krauskopf, I. Zerbes, W. Brandstetter, P. Lewisch, A. Tipold (eds.), *Festschrift für Helmut Fuchs*, Verlag Österreich, Wien: 2014, p. 348; A. Nieto Martín, *A Necessary Triangle: The Science of Legislation, the Constitutional Control of Criminal Laws and Experimental Legislation*, in: A. Nieto Martín, M. Muñoz de Morales Romero (eds.), *Towards a Rational Legislative Evaluation in Criminal Law*, Springer, New York: 2016, p. 352.

[9] In the same direction, J. Vervaele, *European Criminal Justice in the Post-Lisbon Area of Freedom, Security and Justice*, Università degli Studi di Trento, Trento: 2014, p. 53. I am operating under the common notion that criminal law should have an underlying axiological dimension to its norms. In this sense, the legislator is not (or should not be) completely free in its political decision, since not all interests can be considered deserving of the specific protection granted by criminal law – *see* E. Bacigalupo, *Rechtsgutsbegriff und Grenzen des Strafrechts*, in: M. Pawlik, R. Zaczyk (eds.), *Festschrift für* Günther *Jakobs zum 70. Geburtstag am 26. Juli 2007*, Carl Heymanns Verlag, Cologne: 2007, pp. 12–13.

[10] Nieto Martín, *supra* note 8, p. 349. That is why it is essential for the EU to combine the output legitimacy that it has sought since the beginning of its intervention in criminal matters (e.g. the initial wording: "effective, dissuasive and proportional" measures) with the legitimacy that comes from the fact that it is a community protecting certain values and rights of its citizens. It is this dimension that ultimately grants the Union the constitutional legitimacy criminal law needs – I. Wieczorek, N. Vavoula, *The Constitutional Significance of EU Criminal Law*, 6(1) New Journal of European Criminal Law 5 (2015), p. 6.

[11] The function of criminal law "presupposes a chain of functions that condition one another in this order: the function of the State, the function of the criminal law, the function of the criminal theory" – S. Mir Puig, *El sistema del Derecho Penal en la Europa Actual*, in: B. Schünemann, J. Figueiredo Dias, J.M. Silva Sánchez (eds.), *Fundamentos de un Sistema Europeo del Derecho Penal*, José María Bosch Editor, Barcelona: 1995, p. 28. *See also* A. Almeida Costa, *Function of the Criminal Law*, in: P. Caeiro, S. Gless, V. Mitsilegas (eds.), *Elgar Encyclopedia of Crime and Criminal Justice*, Edward Elgar Publishing, Cheltenham: 2024.

respect for human rights" (Art. 2 of the Treaty on the European Union, TEU), and it is also based on a "social market economy" (Art. 3(3) TEU). In this regard, it does not differ much from the constitutional environment in which national criminal law is created.

That being so, the same limits of material legitimacy should apply: European criminal law should protect certain essential interests without neglecting the protection of European citizens against criminal law itself, in a balance between optimal and minimal prevention. This means that it should be the last resort for the protection of fundamental interests (with a transnational dimension[12]) when it is concluded that no other means of social control can adequately protect them.

Two important things can already be concluded from this: firstly, that European criminal law should be primarily linked to the protection of transnational fundamental interests, whether because they are interests of the EU itself or because they are common interests (of the EU and Member States).[13] Secondly, the *ultima ratio* principle should be strictly observed in the European sphere as well, which, because of the principle of subsidiarity, acquires the quality of a *reinforced ultima ratio* principle: one must resort to European criminal law only when the interests at stake justify it, there are no other sanctions capable of protecting them adequately and State action reveals itself to be inadequate or insufficient.[14]

The increase of European intervention in criminal matters makes it progressively more necessary to define a clear criminal policy, for several reasons. First of all, the gradual unification and harmonisation in the EU will inevitably be accompanied by an increase in its punitive power, as the creation of a common space "leads to the emergence of supranational legal goods and actions that are harmful to them."[15] Secondly, it hardly makes sense to continue to develop European criminal cooperation without a corresponding substantive criminal law framework: this would allow for the identification of a general European attitude towards criminality,[16] as

[12] Mainly because of the principle of subsidiarity. Arguing much the same, M. Kettunen, *Legitimizing European Criminal Law: Justification and Restrictions*, Springer, New York: 2020, pp. 188 et seq.

[13] This significantly narrows down the interests that can be legitimately broached by the EU when compared to those available to States: only the crimes that somehow transcend national borders justify a supranational approach. Concluding the same, Caeiro, *supra* note 5; J.W. Ouwerkerk, *Old Wine in a New Bottle: Shaping the Foundations of EU Criminal Law Through the Concept of Legal Interests (Rechtsgüter)*, 27(4–6) European Law Journal 426 (2022).

[14] In great detail about this double subsidiarity, J. Amaral Rodrigues, *O Direito Penal Europeu e a dupla subsidiariedade. Competência Penal da União Europeia, Condições do seu Exercício e Compatibilidade com o Paradigma da Protecção Subsidiária de Bens Jurídicos*, Almedina, Coimbra: 2019.

[15] A. Silva Dias, *De que Direito Penal precisamos nós europeus? Um olhar sobre algumas propostas recentes de constituição de um Direito Penal Comunitário*, in: J. de Faria Costa, M.A. Marques da Silva (eds.), *Direito Penal Especial, Processo Penal e Direitos Fundamentais: Visão Luso-Brasileira*, Almedina, Coimbra: 2006, p. 337.

[16] H. Satzger, *International and European Criminal Law*, C.H. Beck, München: 2012, p. 64: "whether a general 'tough' or 'soft' attitude towards (a certain type of) crime is adopted, what should be the role of criminal law in the resolution of social problems (keyword: decriminalization), etc."

well as the establishment of a scale of values, something that is currently lacking. It would also contribute to greater trust from Member States towards the EU, which would benefit from a clear definition of the way it intends to use its *ius puniendi*.

It would also be crucial in the resolution (or at least mitigation) of some problems that are usually pointed out when it comes to the execution of the penal competence of the EU – such as the *ad hoc* nature of European criminal law measures, which does not allow for coherence, neither in the national legal systems nor in the European criminal law system that is being built.[17]

It thus becomes necessary to define a set of principles capable of guiding the action of the European legislator. Regarding European criminal law in particular, it is important to recognise the double level of penal authority that broadly corresponds to the double system of legal interests coexisting in the Union and, consequently, to embrace that difference and strive for coherence between the multiple legal systems involved.

2. SOME PRINCIPLES OF EUROPEAN CRIMINAL LAW – CAN THEY HELP?

When looking for the function of European criminal law, one must start by assessing whether there is already some principle of EU law capable of guiding the choices of the legislator, or if indeed there is a need to come up with a new criterion. There is a multitude of EU law principles; only those with some reasonable potential to limit the legislator's activity will be mentioned, and only to the extent that they could be used for that purpose.

The principle of legality (Art. 49 Charter of Fundamental Rights of the EU, CFREU), although with some European particularities,[18] is unavoidable in criminal matters. However, it is not useful as a guiding principle to the question of material legitimacy and the function of European criminal law, since it was designed to de-

[17] A. Suominen, *Effectiveness and Functionality of Substantive EU Criminal Law*, 5(3) New Journal of European Criminal Law 388 (2014), p. 400. In fact, it is possible to discern, according to the legislative act under analysis, a myriad of priorities and agendas, action guidelines and strategies – S. Carrera, E. Guild, *The European Council's Guidelines for the Area of Freedom, Security and Justice 2020: Subverting the "Lisbonisation" of Justice and Home Affairs?*, Centre for European Policy Studies, Brussels: 2014, p. 5.

[18] Practically all of the subprinciples are subject to a different interpretation when in the European legal space. For more on this subject, *see* the opinion of the European Commission, *Towards an EU Criminal Policy: Ensuring the Effective Implementation of EU Policies Through Criminal Law*, Brussels, 20 September 2011, COM(2011) 573 final, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0573 (accessed 30 August 2024); Caeiro, *supra* note 5; M. Huomo-Kettunen, *EU Criminal Policy at a Crossroads Between Effectiveness and Traditional Restraints for the Use of Criminal Law*, 5(3) New Journal of European Criminal Law 301 (2014), pp. 318 et seq. For more on the important role this principle may have in curbing the recent trend towards preventive justice in the EU, *see* V. Mitsilegas, *The EU External Border as a Site of Preventive (In)justice*, 28(4–6) European Law Journal 263 (2022).

termine the necessary conditions for the application of criminal norms (they must be written, approved by a Parliament, certain, previous to the commission of the crime and so on), but not to address the *content* of those norms.

A second possibility is subsidiarity (Art. 5(3) TEU), which is an essential principle in EU law. In its essence, this principle seeks to determine *if* the Union should intervene in a given matter, and together with the proportionality principle it regulates the division of competences between the EU and Member States, defining if and how much legal harmonisation is needed, as well as its content.[19] In criminal matters, this principle determines that the Union must justify the need to adopt criminal measures (at the EU level) every time it intends to do so,[20] and that no measure of a different nature would be able to attain the desired objective.[21]

As a guide to the legitimate content of an incrimination, however, it is not enough: as it lacks an axiological dimension,[22] it is limited to ascertaining, on the one hand, whether the conditions for the EU to exert its power are met and that national action is indeed insufficient (European subsidiarity), and on the other hand, whether there is no other way than to employ criminal law to achieve the objectives (criminal subsidiarity). In fact, the subsidiarity test must always come *after* the determination that an interest is worthy of criminal protection. Otherwise, criminal law may well be within the EU's competences, and it may well be the only means of preventing some undesirable conduct – but it does not necessarily follow that the interest behind criminalisation is a legitimate one.[23]

---

[19] I. Pernice, *Harmonization of Legislation in Federal Systems: Constitutional, Federal and Subsidiarity Aspects*, in: I. Pernice (ed.), *Harmonization of Legislation in Federal Systems: Constitutional, Federal and Subsidiarity Aspects – The European Union and the United States of America Compared*, Nomos, Baden Baden: 1996, pp. 21, 25. With detail about the multiple aspects of subsidiarity in the European sphere, Amaral Rodrigues, *supra* note 14, pp. 171, 190 et seq.

[20] Subsidiarity, in this sense, encompasses two distinct levels of consideration: in the first one (*substantive*), it must be determined which level of authority has the most legitimacy to decide which objectives to pursue; in the second one (*instrumental*), it is determined which would be more efficient in achieving those objectives, *see* P. de Hert, I. Wieczorek, *Testing the Principle of Subsidiarity in EU Criminal Policy: The Omitted Exercise in the Recent EU Documents on Principles for Substantive European Criminal Law*, 3(3–4) New Journal of European Criminal Law 394 (2012), pp. 400–405.

[21] It is nevertheless uncertain who evaluates the necessity of adopting criminal law measures and the methods they employ to do so – V. Mitsilegas, *European Criminal Law and Resistance to Communautarisation after Lisbon*, 1(4) New Journal of European Criminal Law 458 (2010), pp. 477–478.

[22] In recognition of this, de Hert, Wieczorek, *supra* note 20, p. 406: "[a] reshaping of the principle of subsidiarity, which also takes into account moral and normative aspects, would be necessary." What I posit is that it is not really a reshaping of any principle that is necessary, because they are designed to fulfil certain tasks, but rather the formulation of a whole new principle capable of targeting material legitimacy in European criminal law.

[23] The subsidiarity principle is not even capable of determining that *any* interest must be behind a criminal law norm, let alone defining the necessary conditions for those interests to be legitimate. Attempting to assign this task to it would be inadequate and would lead to an improper use of it.

According to the principle of proportionality (Art. 5(4) TEU), criminal law measures must be considered *necessary* (regarding some objective) because there is no other, less burdensome means to attain it; it further verifies whether the prescribed sanctions are *adequate* and *proportional* with regard to that objective and the new infraction. There is an additional European dimension as well: the adopted measures must be proportional to the chosen legislative instrument, meaning that if the EU opts for a Regulation when a Directive would be sufficient to achieve the intended objective, that must be considered disproportionate.[24] Of the three subprinciples of proportionality – proportionality *stricto sensu*, adequacy and necessity – only the last one has the most potential to fulfil a function for European criminal law.[25] However, "necessity" cannot assess the *dignity* of the interest in question, and therefore it cannot provide a criterion for the *choice* of objective; it does not have a value-based critical function in itself.[26]

The *ultima ratio* principle, despite having no written recognition in the Treaties, is still considered an indispensable principle in the EU: the Commission explicitly recognises it,[27] and it is deemed relevant to the evaluation of the "indispensable" character of criminal law concerning the annex competence of Art. 83(2) TFEU.[28] But even if it does offer some sort of guidance with regard to the need to criminalise certain conduct, that guidance is linked with the availability of other, less stringent measures with less impact on the rights and freedom of citizens whilst achieving the same goals. Yet again, this principle cannot inform the legislator as to what

[24] On this specific aspect of proportionality, M. Muñoz de Morales Romero, *El Legislador Penal Europeo: Legitimidad y Racionalidad*, Aranzadi, Navarra: 2011, p. 415. This may not be as relevant in criminal matters yet, since the EU cannot adopt Regulations (at least explicitly); however, in the future, if it can opt for either a Regulation or a Directive, it may become rather necessary to evaluate whether the adoption of the former would be proportional to the criminal measures, the national margin of discretion and the possibility of adjusting to the national legal order.

[25] A. Miranda Rodrigues, *Direito penal europeu pós-Lisboa: um direito penal funcionalista?,* 146(4004) Revista de Legislação e de Jurisprudência 320 (2017), p. 332.

[26] *Similarly*, C. Safferling, *Europe as Transnational Law – A Criminal Law for Europe: Between National Heritage and Transnational Necessities*, 10(10) German Law Journal 1383 (2009), p. 1393; A. Nieto Martín, *Saudade of the Constitution: The Relationship Between Constitutional and Criminal Law in the European Context*, 10(1) New Journal of European Criminal Law 28 (2019), p. 32. Also clearly separating the principle of proportionality from the principle of protection of legal goods, Amaral Rodrigues, *supra* note 14, p. 345–349.

[27] *See* European Commission, *supra* note 18. The European Parliament agrees with this opinion: *see* European Parliament resolution of 22 May 2012 on an EU Approach to Criminal Law (2010/2310(INI), 13 September 2013, OJ C 264E/7.

[28] J. Öberg, *Do We Really Need Criminal Sanctions for the Enforcement of EU Law?*, 5(3) New Journal of European Criminal Law 370 (2014), pp. 384 et seq. *See also* Suominen, *supra* note 17, pp. 413 et seq.; M. Kaiafa-Gbandi, *Approximation of Substantive Criminal Law Provisions in the EU and Fundamental Principles of Criminal Law*, in: F. Galli, A. Weyembergh (eds.), *Approximation of Substantive Criminal Law in the EU: The Way Forward*, Editions de l'Université de Bruxelles, Brussels: 2013, p. 94.

those goals should be or whether they are legitimate, nor the parameters to assess that legitimacy.

Effectiveness is a much-valued principle in EU law, and is somewhat applicable to criminal law: this principle appraises whether criminal law measures are indeed effective, if applied, at attaining a certain goal – namely, to combat illegal activities and prevent loopholes in their sanctioning. There are essentially two perspectives at this juncture: either effectiveness relates to the effective implementation of EU law, or it concerns a real criterion in order to justify the adoption of new criminal law measures. The first perspective should not be deemed legitimate – in that case, European criminal law would be but a functional version of itself, voted to mindlessly ensure compliance with other norms regardless of the legitimacy of their content. As for the second perspective, the only thing effectiveness can state is that criminal law measures are an effective means to reach some predetermined goal; however, it is not in a position to determine if that goal is a legitimate one, if what we aim to achieve with those measures has penal dignity or if it justifies the restriction it will impose on the rights and freedom of citizens.[29] This is not a principle capable of great systematic or dogmatic concerns, and its use as a legitimacy criterion would in time lead to the "demolition of the conceptual building of criminal theory."[30] It would also skew criminal law in what pertains to its symbolism:[31] we cannot *censure* something if that something is not directed at some value (other than effectiveness itself).

The final principle to be approached, respect for fundamental rights, has a long history in the context of the EU, and it has a special connection with criminal law since it acts on two different fronts: it simultaneously acts as a *catalyst* and a *limit* to criminal law measures. It also has a greater potential for effectively limiting the legislator regarding the material legitimacy of its criminal law choices, if it states that only criminal measures directed at protecting fundamental rights would be considered legitimate.[32] However, it is incapable of discerning *which*, among all

[29] There is something that illustrates this quite well, although it was not written with European criminal law in mind: "Even when the criminal law is capable of influencing conduct in one direction or another, it may carry with it other consequences that are sufficiently harmful that we would choose not to have such a law. The law may be efficacious but, on balance, bad". *See* G. Dworkin, *The Limits of the Criminal Law*, in: J. Deigh, D. Dolinko (eds.), *The Oxford Handbook of Philosophy of Criminal Law*, Oxford University Press, Oxford: 2011, p. 3.

[30] L.F. Gomes, *Globalización y Derecho Penal*, in: J. Ripollés, J. Cerezo Mir (eds.), *La Ciencia del Derecho Penal ante el Nuevo Siglo. Libro Homenaje al Profesor Doctor Don José Cerezo Mir*, Tecnos, Madrid: 2002, p. 337. For effectiveness as a normative principle, see the criticism of N. Persak, *Principles of EU Criminalisation and Their Varied Normative Strength: Harm and Effectiveness*, 27(4–6) European Law Journal 463 (2022).

[31] Suominen, *supra* note 17, p. 409. *See* the article by T. Elholm, R. Colson, *The Symbolic Purpose of EU Criminal Law*, in: R. Colson, S. Field (eds.), *EU Criminal Justice and the Challenges of Diversity: Legal Cultures in the Area of Freedom, Security and Justice*, Cambridge University Press, Cambridge: 2016, pp. 48 et seq.

[32] This principle, together with that of proportionality, already functioned as a limit to European legislative freedom: *see* Cases C-293/12 and C-594/12 *Digital Rights Ireland*, EU:C:2014:238, paras. 41 et seq. Relating

fundamental rights, need criminal law protection, and so it too appears insufficient to limit the legislator regarding the material legitimacy of criminal law.

3. DIFFERENT LEGAL TRADITIONS

The issues that plague national legal orders are the same as those identified in European criminal law,[33] and the constitutional environment enveloping the latter is not so different from the one existing in Member States. Therefore, there is a real need for some principle of criminal policy to guide the legislator when it comes to the legitimacy of European criminal law measures. But whilst that is true, there are also other concerns at the European level, namely the need to respect the different legal traditions of the Member States.

Although diverse, European legal traditions possess some common traits that allow them to be grouped into three main families:[34] the *German* and *Scandinavian* tradition, the *common law* tradition and the *Napoleonic* tradition. For States that identify themselves with the first of these traditions, the existence of a *legal good* (*Rechtsgut*[35]) subjacent to the criminal norm is an essential condition to assert its material legitimacy – this ensures that criminalisation is directed only at protecting the fundamental interests of a given community, even though it adds little about *how* they are harmed.[36] The common law States, when considering an individual instance of criminalisation, opt to follow the *harm principle*[37] to evaluate its legitimacy. The emphasis is now on the consequence of a given behaviour and the notion that only an individual can actually be harmed (therefore limiting the legitimate circle

criminal law with the protection of fundamental rights, Muñoz de Morales Romero, *supra* note 24, pp. 606–615.

[33] Legislative irrationality (non-assessment of effectiveness, added value of criminal law measures or sufficiency of alternate measures), presumption of the effectiveness of criminal law in general, symbolic content within European criminal law and its functional (or accessory) aspect. *See* Muñoz de Morales Romero, *supra* note 24, pp. 432 et seq.

[34] J. Blomsma, C. Peristeridou, *The Way Forward: A General Part of European Criminal Law*, in: F. Galli, A. Weyembergh (eds.), *Approximation of Substantive Criminal Law in the EU: The Way Forward*, Editions de l'Université de Bruxelles, Brusseles: 2013, p. 126. It must be stressed that this distinction was made bearing in mind the general characteristics of the legal order of the Member States; this does not mean, however, that when a specific Member State belongs to one of the groups, it will automatically ascribe a similar function to its criminal law as all others in the same group.

[35] The legal good can be defined as the "expression of an interest, of the person or community, in the maintenance or integrity of a certain state, object or good that is, in itself, socially relevant and therefore legally recognised as valuable" – J. de Figueiredo Dias, *Direito Penal. Parte Geral. Tomo I*, Coimbra Editora, Coimbra: 2007, p. 114. *See* Ouwerkerk, *supra* note 13, p. 7 for an eloquent summary of the *Rechtsgut* theory.

[36] Recourse to other principles is needed for that; *see e.g.*, F. Sánchez Lázaro, *Evaluation and European Criminal Law: The Evaluation Model of the Commission*, in: A. Nieto Martín, M. Muñoz de Morales Romero (eds.), *Towards a Rational Legislative Evaluation in Criminal Law*, Springer, New York: 2016, p. 215.

[37] Extensively on the harm principle and its foundations, N. Persak, *Criminalizing Harmful Conduct: The Harm Principle, Its Limits and Continental Counterparts*, Springer, New York: 2007.

of holders of the interests), with less attention paid to which interests are harmed. Finally, when a Member State belongs to the Napoleonic tradition, criminal law is regarded as necessary when certain conduct threatens the public order (*ordre public*). Since this is a much more fluid and broader concept, it would not be appropriate to limit the legislator's activity, and that is why it will not be considered further.

The European principles mentioned above, albeit paramount for the criminalisation issue, are not capable of providing a full answer to the question of legitimacy. Confronted with the same conclusion, the Commission,[38] Council[39] and Parliament[40] have all tried to come up with an answer.[41] The specialist literature focussing on this question favours the same doctrines that are internally (nationally) adopted, alternatively mentioning the harm principle[42] or the principle of protection of legal goods.[43] In my opinion, a successful European principle of criminalisation should stem from the legal traditions of Member States, but it is also necessary to adjust it to the specificities of the EU. It is with this purpose in mind that I will suggest a new approach to the legitimacy question[44] that combines both of these aspects.

[38] Communication COM(2011) 573 final, mentioning a twofold approach: the verification of the *ultima ratio* principle and effectiveness in the first moment, followed by the assessment of *which* measures should be adopted, according to the principle of proportionality.

[39] 2979th Council meeting (Justice and Home Affairs), Brussels, 30 November 2009, where the significance of *ultima ratio* is underscored, but this time coupled with the need for the criminalised conduct to cause true harm or seriously threaten the right or interest that is being protected; they should, once again, abide by the proportionality principle. The same is flatly repeated on the Note from the Presidency to the Council of 28 May 2019, *The Future of EU Substantive Criminal Law – Policy Debate*, Council document 9726/19, p. 8. This does not provide a criterion for the *choice* of those interests or rights, but there is at least the mention of some axiological dimension in European criminal law.

[40] European Parliament resolution of 22 May 2012 on an EU Approach to Criminal Law (2010/2310(INI), 13 September 2013, OJ C 264E/7, after mentioning some fundamental principles of criminal law, states that European criminal law should be aimed at behaviour that causes harm (pecuniary or non-pecuniary) to society, individuals or groups of individuals.

[41] Emphasizing the lack of inter-institutional coherence, Vervaele, *supra* note 9, p. 55; *see also* C. Harding, J. Öberg, *The Journey of EU Criminal Law on the Ship of Fools: What Are the Implications for Supranational Governance of EU Criminal Justice Agencies?*, 28(2) Maastricht Journal of European and Comparative Law 192 (2021), p. 202. Concluding that none of the European principles offer much help in limiting the content of European criminal law, Ouwerkerk, *supra* note 13, p. 5.

[42] *E.g.* Persak, *supra* note 30.

[43] *E.g.* Ouwerkerk, *supra* note 13.

[44] Thus, departing from the fundamental premise of investigation when compared with two substantial scientific works. The first is that of Wieczorek, *supra* note 7, p. 6, since the author purports to analyse "which legitimacy model of criminal law the EU legal order has embraced and critically assess consistency of EU criminal law with EU constitutional choices", framing "an internal coherence question, rather than a general question asking whether the EU approach to criminalisation is inherently valuable". The second is that of Kettunen, *supra* note 12, p. 1 who seeks to "justify the law as it stands. This is achieved by identifying the appropriate legal basis for the approximation of criminal law", deriving criminalisation principles from the Treaties. My purpose is to propose external criteria that allow for the evaluation and assessment of the fundamental worthiness and material legitimacy of every proposed or existing European criminal law norm.

Since neither the harm principle nor the principle of protection of legal goods is present in the European legal order, it must first be determined if there is a *legal* possibility of adopting either principle at the European level. This seems to be possible and none too problematic *via* Art. 6(3) TEU, given that these principles are part of the "common constitutional traditions" of the Member States.

4. DIFFERENT TYPES OF INTERESTS IN THE EU

There is a common aspect in both criminalisation principles discussed above: criminal law should be directed towards protecting interests. In the legal space of the EU, three types of interests can be identified.[45] The criteria to set them apart rely first of all on their *holdership*: as an entity with its own existence, the Union has its *own*, *proper interests*; as a supranational entity responsible for some aspects that are common to itself and the Member States, there are also *common interests*; and then there are *interests of the Member States* (that exist in the same geographical space).

[45] A brief review of the literature on this topic is in order at this point. G. Grasso (*Comunità europee e diritto penale. I rapporti tra l'ordinamento comunitario e i sistemi penali degli Stati membri*, Giuffré, Milano: 1989, pp. 12 et seq.) made the distinction between "institutional" and "functional" legal interests, as did P. Caeiro (Caeiro, *supra* note 5), who submits that these two categories of interests call for a "differentiated approach regarding the reach of EU intervention and the type of legislative procedure/act adopted". In an earlier work on the topic of "responsibility", the distinction was made between interests that pertained to the EU and interests that "might also be of the Member States' direct concern" – P. Caeiro, *Beyond Competence Issues: Why and How Should the EU Legislate on Criminal Sanctions?*, in: R. Kert, A. Lehner (eds.), *Vielfalt des Strafrechts im internationalen Kontext. Festschrift für Frank Höpfel zum 65. Geburtstag*, Neuer Wissenschaftlicher Verlag, Wein: 2018, p. 652. *Similarly* L. Picotti, *Las Relaciones entre Derecho Penal y Derecho Comunitario: Estado Actual y Perspectivas*, 13 Revista de Derecho Penal y Criminología 151 (2004), pp. 157 et seq. adds a third category (which he then goes on to dismiss and attribute to either the first or second), made up of the Third Pillar's interests: those that were jeopardised by grave forms of transnational delinquency. J. Monar, *Reflections on the Place of Criminal Law in the European Construction*, 27 (4–6) European Law Journal 356 (2022); differentiates between a "functional" and a "constitutional" approach to European criminal law initiatives, based not on the interests that are subjacent to them, but rather on their rationale and purpose. M. Acale Sánchez, *Derecho Penal y Tratado de Lisboa*, 12(30) Revista de Derecho Comunitario Europeo 349 (2008), pp. 358 et seq. apparently sets apart the different interests based on the legislative intervention envisioned in Art. 83 TFEU: those in no. 1 would be truly European legal goods, and those in no. 2 would be "Europeanised" legal goods. A. Bernardi, *Strategie per l'armonizzazione dei sistemi penali europei*, in: S. Canestrari, L. Foffani (eds.), *Il Diritto Penale nella Prospettiva Europea. Quali Politiche Criminali per quale Europa?*, Giuffrè, Milano: 2005, pp. 381 et seq.; adopts the categories of communitarian legal goods, legal goods that have a communitarian relevance, purely national legal goods and, finally, legal goods that are so linked with national culture that their Europeanisation is effectively impeded. A final proposal is the one from C. Safferling, *Europe as Transnational Law – A Criminal Law for Europe: Between National Heritage and Transnational Necessities*, 10(10) German Law Journal 1383 (2009), pp. 1394 et seq., who separates interests directed at protecting the European institutions from those related to essential social values and the protection of the EU's policies. My division will be based on the combination of two different criteria: the holdership of the interest and the attribution of competences.

It should be stressed that this does not correspond to the criteria used in the Treaties to differentiate between the multiple competences of the Union, although this will also be needed in order to set apart the categories of interests ultimately suggested. The EU's competences can be exclusive, shared or accessory without always corresponding to a proper interest of the EU, a common one or a national one, respectively. This means that the natural competence (stemming from holdership) to ensure the protection of a given interest can be altered by the attribution of competences to the EU.

We can draw the first conclusion now: both the holdership *and* the attribution of competences will be relevant, *but not exclusively determinant*, in order to set apart the several categories of interests.

4.1. National interests

National interests are those that have a purely internal relevance: these will typically be present for the majority of criminality, since they only concern the Member State where the conduct occurred and do not have any transnational dimension. These interests should not be interfered with by the EU[46] unless national criminal law affects a European right.[47]

4.2. Common interests

Common interests are those that already existed and first emerged in Member States,[48] and then became shared interests of the EU due to the European project. They are no longer exclusive interests of the Member States because of the emergence of a new dimension that makes them inseparable from the European fact: the existence of common policies (in the domains of labour, health, economy, environment etc.). These interests undergo a *reconfiguration* brought on by the European sphere; the exact measure of division of that interest between the EU and the Member States will then depend on the legislative arrangements regarding the *quantum* of harmonisation, both permitted and exercised.[49] The extent of

[46] *E.g.* Case C-108/80 *Criminal proceedings against René Joseph Kugelmann*, EU:C:1981:36, where national criminal law was allowed to remain, even though there was a more permissive Directive on the matter (in this case, food preservatives).

[47] As in Case C-59/75 *Pubblico Ministero v. Flavia Manghera and others*, EU:C:1976:14, where there was a national interest (import state monopolies) that ceased to exist due to the effects of EU law.

[48] In this vein, Caeiro, *supra* note 45, p. 652: "[the interests] *were already there* before the EU came along, even if they had a different content" (emphasis in the original text).

[49] There are some limits to the exercise of European competences that already stem from the configuration given to them by the Treaties, as is the case with health or the AFSJ. Other limitations emerge from the actual exercise of the EU's legislative competence; that is the case with the shared competences, in which "Member States (...) exercise their competence to the extent that the Union has not exercised its competence" (Art. 2(2) TFEU). If, ultimately, the Union legislates on every aspect of a given subject matter, in practice (and assuming the Union does not cease exercising its competence) it will become an exclusive competence, rather than a shared one.

harmonisation will depend on the pre-emption of the matter as well: the more the Union legislates on a specific subject, the more Member States will be prevented from exercising their competence, which translates to a (gradual) increase in the EU's power of harmonisation and a consequent decrease in the power of Member States within that shared competence. Pre-emption may consequently encompass the power to criminalise conduct.[50]

But the holdership of those interests does not depend on the configuration of the Union's competences:[51] the interest is common because it is effectively shared by all parties, since it cannot be attributed to some Member State or the EU exclusively.[52] Because they are shared interests, a greater respect for the sanctioning options of the multiple Member States is warranted.[53] Concerning interests whose holdership is common but whose competence is solely attributed to the Union, it is doubtful that Member States can exercise their *ius puniendi* unless permitted by the EU.[54]

4.3. Proper interests of the EU

With the creation of the EU, a new political entity, arose new legal goods (or fundamental interests) that were connected to it and belonged exclusively to that entity. These primarily concern its own existence[55] or the proper functioning of its organs and institutions. One example of these new, exclusively European interests can be

[50] Because national measures must be compatible with European objectives, it is not always easy to know when Member States still have a punitive competence to exercise, or the extent of it. Regarding shared competences, consumer law may be a good example: even though some measures, designed to provide a higher level of protection to the consumer, have been implemented in some Member States, they are mostly disapplied, as the EU typically considers these measures to be constraints on the common market. These are the conclusions of a study by V. Mak, *Standards of Protection: In Search of the "Average Consumer" of EU Law in the Proposal for a Consumer Rights Directive*, 18 European Review of Private Law 25 (2010).

[51] This precludes, for example, that an interest may have a mobile nature: holdership demands that the interests be attributed to a subject, regardless of what the *ius puniendi* of that entity may be (at that point in time) in relation to that interest.

[52] Some examples of common interests in criminal law norms include those mentioned in Art. 83(1) TFEU (terrorism, multiple trafficking situations etc.); some interests that, although national, are connected to the common market (corruption, counterfeiting means of payment); or crimes against workers, consumers, the environment and the four fundamental freedoms.

[53] Caeiro, *supra* note 45, p. 657 mentions the need for extra consideration with regard to some fundamental principles such as necessity, proportionality, subsidiarity and coherence.

[54] A clear example is given by competition law: although it is an exclusive competence of the EU, and unfair commercial practices are punished with administrative sanctions in the European legal order, Art. 30(1) of Regulation (EU) No 596/2014 of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC [2014] OJ L 173/1, allows for the existence of criminal sanctions in Member States.

[55] "Si une communauté est légitimée à exister, elle est aussi légitimée à défendre son existence" – C. Sotis, *«Criminaliser sans punir». Réflexions sur le pouvoir d'incrimination (Directe et indirecte) de l'Union européenne prévu par le traité de Lisbonne*, 4 Revue de science criminelle et de droit pénal comparé 773 (2010), p. 780. Regarding the legal goods theory, the political entity may legitimately defend its own existence because it fosters and conditions the existence of other legal goods deemed fundamental to the people or the community, thereby maintaining the integrity of those interests.

the protection of the EU's financial interests. On the one hand, these ensure the very existence of the Union through the protection of its own resources; on the other hand, they provide the opportunity to bestow grants and subventions on Member States and private subjects, wherefore their protection will end up benefitting more than just their holder.[56] Whether regarding revenue or subvention, these are legal goods that exist only in the EU,[57] and their relevance is such that they have always been the target of attempts at legislative unification (or at least greater harmonisation).[58]

Concerning the correct functioning of the European institutions – which naturally conditions the EU's ability to perform its tasks – what is at stake is the very *impartiality* of the EU, its integrity and good administration.[59] Here would be included crimes of corruption committed by EU staff (or misappropriation of money, fraud or the use or disclosure of professional secrets), as well as perjury before the European Court of Justice (ECJ), which can be justified by the need to guarantee trust in public authority[60] and the proper administration of justice in the EU.

As for the execution of European policies, even though some may eventually need penal intervention, these will rarely represent a true legal good of the EU. If there is an interest with penal dignity, it will more often than not be a common one, and its need for criminal protection at the EU level will most certainly spring from some transnational dimension it acquired, be it because of the Union's action or because of the pernicious effects of that conduct.[61] Some examples include competition, transport, consumer protection, the environment, financial services[62] and others in which criminalisation may prove necessary to protect collective fundamental

[56] In this vein, P. Caeiro, *Perspectivas de formação de um Direito Penal da União Europeia*, in: E. Correia (ed.), *Direito Penal Económico e Europeu: Textos Doutrinários*, Coimbra Editora, Coimbra: 1998, p. 529; F. Palumblo, *Studi di Diritto Penale Comunitario*, Giuffrè, Milano: 1999, p. 46.

[57] The "Euro" leads to a more complicated analysis. If it is true that it exists only because of the EU, it is also true that whatever is meant to be protected through the protection of the Euro (the legality of monetary circulation, trust in the currency or even public faith) also belongs to the Member States which use it as their currency. A solution for these cases will be suggested below.

[58] The last attempt was made on the occasion of the first Commission proposal for the PIF Directive: the legislative basis for that proposal was Art. 325 TFEU. If it had been successful, this legal basis could have been progressively used to further harmonise or even unify the legal regime for the protection of these financial interests.

[59] G. Salcuni, *L'Europeizzazione del Diritto Penale: Problemi e Prospettive*, Giuffrè, Milano: 2011, pp. 21 et seq.

[60] Another example where public authority emerges as a proper interest of the EU is the recent European Commission, *Proposal for a Council Decision on adding the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) of the Treaty on the Functioning of the European Union*, Brussels, 25 May 2022, COM(2022) 247 final, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2022%3A0247%3AFIN (accessed 30 August 2024). *See also* Caeiro, *supra* note 5.

[61] On the transnational nature of some interests, J. Öberg, *Normative Justifications of EU Criminal Law: European Public Goods and Transnational Interests*, 27(4–6) European Law Journal 408 (2023), pp. 417 et seq.

[62] *Ibidem*, pp. 418–419, aggregates both rationales (holdership of the Union and transnational nature of the interest) into one justification for the intervention of the EU. Although I do not disagree with the end result, I find it necessary to establish to whom the interest belongs first, since that will have consequences regarding the type of measure the Union is legitimised to adopt (*e.g.* in order to completely harmonise or even unify the legal provisions, or opt for a less intrusive harmonisation).

interests. That responsibility will fall under the supranational entity's remit because of the transnational dimension of these interests, and therefore their protection at the national level is impossible, insufficient or unsatisfactory.

Because they are shared, a parallel national policy is most likely to exist; for that reason – and also in accordance with the principle of subsidiarity – it is essential for the EU to intervene only when those interests are considered essential to the existing European project of integration, or when they have some special relevance to the Union.

4.4. Criterion of the responsibility to protect and its relationship with the function of European criminal law (the "first step")

The conclusion that there are several types of interest coexisting in the European space led to the consideration that perhaps one principle of criminalisation would not be enough to respond to all their different necessities without distorting the principle or the true interest behind the need for criminal protection.[63] It is also important to acknowledge the crucial differences in the Union's *ius puniendi* (when compared to that of the Member States), since those interests may need a different legislative intervention according to the harmonisation level they require: the nature of the interest should justify the cases in which it is more favourable to *maintain the difference* among Member States versus those in which a more pressing need for a *unifying* action is identified.

Two criteria were already mentioned to tell those interests apart (holdership and attribution of competence), neither of which was deemed to be singly satisfactory. However, if both are combined, a much more relevant and complete criterion emerges: that of the *correct allocation of responsibility*[64] *for the protection* of the interest.

The first step of my proposed criminalisation process would be to identify the holdership of the interest, so that the degree of harmonisation (permitted or desirable) can be determined. If it is a purely *national* interest, it will not matter to the

[63] Although not referring to the EU, R.A. Duff, *Towards a Theory of Criminal Law?*, 84(1) Aristotelian Society Supplementary 1 (2010), p. 20, had already drawn a similar conclusion: "Rather than search (in vain) for a suitable refined master principle, we should recognize something that is hardly surprising: that we have different reasons for criminalizing different types of conduct (...). The proper task for a theory of criminalization is, rather, to assemble and clarify the different kinds of consideration that should be relevant in different contexts."

[64] The idea that an entity is responsible for the protection of interests is not new. When the EU was created, it became "co-responsible" for the protection of some interests, be it because they were its own, or because it shared some aspect of them with Member States – *see* P. Caeiro, *The Relationship Between European and International Criminal Law (and the Absent(?) Third)*, in: V. Mitsilegas, M. Bergström, T. Konstadinides (eds.), *Research Handbook on EU Criminal Law*, Edward Elgar Publishing, Cheltenham: 2016, pp. 587 et seq.

issue of European criminalisation, given the fact that the EU is not legitimised to take action, since it is not responsible for its protection in any way.

If it is a *common* interest, two situations can occur. If it is an interest not yet fully harmonised, the EU should opt for measures that approximate criminal law but also leave a greater margin of discretion to the Member States, so as to respect their legal traditions and internal policy choices. If it is an interest whose protection is solely attributed to the EU, or already so harmonised that it has been *pre-empted*, since the autonomous action left for Member States is minimal (or even dependent upon the EU's authorisation), it may require stronger harmonisation or even, if at all possible, unification – precisely because Member States will no longer be able to legislate without incurring the risk of interfering with the Union's objectives.

Finally, if it is a *proper* interest of the EU, there is no doubt that the Union should be the one to define the whole of the criminalisation parameters, resorting even to unifying those norms so as to prevent inconsistencies in its protection across the EU.[65]

Consequently, it can be concluded that there is no substantial difference between proper interests and pre-empted common ones when it comes to the responsibility for their protection: only the EU should, or can, determine its exact contours.[66] This first step ultimately serves the purpose of identifying the interests that could underpin the criminalisation at stake, the entity responsible for their protection and the level of harmonisation they could require.

5. MATERIAL LEGITIMACY AND THE FUNCTION OF EUROPEAN CRIMINAL LAW

As in the national setting, functionalism must be thoroughly rejected, despite certain characteristics of European criminal law that may point to it.[67] Employing criminal law merely to ensure respect for other norms not only does not make sense, but due to the nature of criminal law measures, it would also not restrict the legislator's freedom at all. Trying to limit it with resort to other principles of EU law

[65] Due to being true "original" European legal goods, having come into being *because of* the EU, some authors submit that the Union should be the only one responsible for the definition and extent of their protection – *see* Caeiro, *supra* note 45, pp. 652–655; B. Schünemann, *The Contribution of Scientific Projects to a European Criminal Law: An Alternative Project for a European Criminal Law and Procedure*, in: M. Cherif Bassiouni, V. Militello, H. Satzger (eds.), *European Cooperation in Penal Matters: Issues and Perspectives*, CEDAM, Padova: 2008, p. 126.

[66] Though it must be cautioned that unification requires more careful consideration when pre-empted common interests are at stake, as there is a greater need to respect the previous options of the Member States.

[67] *See e.g.*, the analysis by S. Braum, *Are We Heading Towards a European Form of "Enemy Criminal Law"? On the Compatibility of Jakob's Conception of "an Enemy Criminal Law" and European Criminal Law*, in: F. Galli, A. Weyembergh (eds.), *EU Counter-Terrorism Offences: What Impact on National Legislation and Case-Law?*, Editions de l'Université de Bruxelles, Brusseles: 2012, pp. 237–250.

has been deemed insufficient as well: it is not so much a matter of whether the EU *can* criminalise certain conduct, but rather if it *should* criminalise it. In line with the above arguments, and given the European legal traditions, there are two viable principles for evaluating the material legitimacy of criminal law: the principle of protection of legal goods and the harm principle. What must now be assessed is the *adequacy* of their usage in the EU.

5.1. Protection of legal goods in the EU

Although the concept of legal goods is unknown in several Member States,[68] it does not appear that there are any insurmountable obstacles to its use in the European legal order, since there are interests in need of protection, a constitutional axiological order to be used as a reference and a court with the capability to serve as a constitutional court, in order to determine the compatibility of the criminal norms with the material constitution of the EU.

What is more controversial is the function this legal good would perform within the supranational legal order. Some authors believe one of its main functions would be to vertically delimit the competence of the EU – that is to say, it would help in setting apart those that could bear European intervention from those that should remain in the exclusive remit of the States.[69] It would potentially contribute to the delimitation of Art. 83(2) TFEU: the "necessity" requirement of that article would be evaluated against the legal good, and criminal law would be deemed necessary when the seriousness of the legal good's violation would so stipulate.[70]

This is not, in my opinion, the main function of the legal good in the supranational sphere. I believe the legal good can discharge a much more relevant function in determining the *quantum* of the European intervention: is it an interest that requires more harmonisation or less? Is it so connected to the EU that it warrants a unified regime? This would remain true for the delimitation of Art. 83(2) TFEU: is it a policy so harmonised that it necessitates a more intense intervention from the EU, given that an autonomous action of the Member States is already precluded? Or is it a policy not yet fully harmonised, that can permit a more diverse approach?

To be in line with the principle of protection of legal goods, the identified interest should have a European constitutional standing, meaning that it must derive

[68] Mylonopoulos, *supra* note 6, p. 649.

[69] Muñoz de Morales Romero, *supra* note 24, p. 319; Nieto Martín, *supra* note 8, p. 349; Salcuni, *supra* note 59, p. 34.

[70] Salcuni, *supra* note 59, pp. 74 et seq. (restricting the function of European criminal law to the protection of legal goods). H. Satzger, *Europäische Autopsie – eine Untersuchung der rechtsstaatlichen Leichen im Fundament der europäischen Strafrechtspflege*, in: R. Hefendehl (ed.), *Empirische und dogmatische Fundamente, kriminalpolitischer Impetus. Symposium für Bernd Schünemann zum 60. Geburtstag*, Carl Heymanns Verlag, Cologne: 2005, p. 307; and Ouwerkerk, *supra* note 13, p. 11.

from the EU's Treaties (understood as a material constitution).[71] The use of this principle would have some clear advantages, such as the precise identification of the protected interests in those areas largely removed from Member State competence, the determination of the necessary *quantum* of harmonisation and the mandatory connection to constitutional values of the EU, alongside the possibility of protecting some interests of the EU itself,[72] as long as they are considered legitimate[73] in light of this principle. Beyond conferring greater coherence to the legislative activity, it would also serve as the "constitutional compass"[74] capable of pointing out those interests that deserve penal protection (thereby justifying the restriction of fundamental rights and freedoms of citizens), and those whose protection can be satisfied through a different approach, such as administrative sanctions.

5.2. The harm principle in the EU

The basic idea associated with the harm principle is already recognised in the EU despite the lack of a precise reference to it.[75] The contribution of this principle is centred on its focus on personal interests and the undesired consequence of harm. The practical implications for the EU would be significant since it would limit its legislative action to behaviours that create harm,[76] and would reduce the criminalisation of acts that represent only a remote danger (something that the principle of protection of legal goods cannot do as effectively). It also allows the harms subject to criminalisation to be weighed against those resulting from said criminalisation,[77] which is an extremely important dimension to be considered, especially at the EU

[71] This is in line with the majority of the literature on the subject (*see also* Ouwerkerk, *supra* note 13, pp. 12 et seq.). Consequently, it would be possible for the European "Constitutional Court", the ECJ, to control the legitimacy of criminal law.

[72] Clarification is needed at this point: the principle of the protection of legal goods allows for the protection of collective legal goods when these are fundamental interests of the community. For that reason, it would be legitimate, from the point of view of this principle, for the EU to defend its existence by criminalising certain conduct that jeopardises it.

[73] Questioning precisely the legitimacy of certain interests and the present situation at the EU level, Harding, Öberg, *supra* note 41, pp. 204, 211.

[74] E. Herlin-Karnell, *European Criminal Law as an Exercise in EU "Experimental" Constitutional Law*, 20(3) Maastricht Journal of European and Comparative Law 442 (2013), p. 464.

[75] Writing about "SOCTA", L. Paoli, *How to Tackle (Organized) Crime in Europe? The EU Policy Cycle on Serious and Organized Crime and the New Emphasis on Harm*, 22(1) European Journal of Crime, Criminal Law and Criminal Justice 1 (2014), p. 4. *See also* the analysis by Persak, *supra* note 30.

[76] In reference to international criminal law, but mentioning the same idea, K. Ambos, *The Overall Function of International Criminal Law: Striking the Right Balance Between the Rechtsgut and the Harm Principles*, 9 Criminal Law and Philosophy 301 (2015), pp. 321 et seq.

[77] *Similarly* Paoli, *supra* note 75, p. 5. With a practical example (hate crime and hate speech), N. Persak, *Criminalising Hate Crime and Hate Speech at EU Level: Extending the List of Eurocrimes Under Article 83(1) TFEU*, 33(2) Criminal Law Forum 85 (2022), pp. 111–113.

level, because of its particular *ius puniendi* (for example, the current lack of a competence to decriminalise).

There are advantages concerning Art. 83(2) TFEU as well: when a common interest is at stake (and so the need for supranational criminal measures is not evident), the harm principle will effectively channel European criminal law towards a greater consideration of the citizens, since they are the only legitimate holders of the protected interests for this principle. It would therefore contribute to protecting the citizen from criminal law itself – since it focusses on the protection of individual interests, it would limit European action to (transnationally relevant) behaviour that harms those interests, and would restrict penal intervention to harmful conduct, rather than allowing the criminalisation of merely dangerous behaviour.[78]

One of the difficulties in using this principle lies, conversely, in the fact that it would be extremely difficult to justify a new instance of criminalisation when no specific harm to another person can be found,[79] and that would make it impractical for the EU to protect its existential interests relying on this principle alone.

This combination of advantages and disadvantages led to the conclusion that, in parallel to the different types of interests, a differentiated use of these criminalisation principles would be more appropriate, given the particularities of the European legal order.[80]

5.3. The differentiated function of European criminal law ("the second step")

Once the interest to be protected by criminal law is identified (the first step), its nature would determine the legitimacy principle to be applied in the second step. The principle of protection of legal goods would be applied to proper interests and pre-empted common interests (because if they are already so strongly harmonised that an autonomous action in Member States is precluded, the responsibility to protect them will not differ from that which exists regarding proper interests). The

[78] According to Silva Dias, *supra* note 15, p. 349, that would be indispensable to European criminal law, so as not to spread criminalisation to conduct prior to harm, illegitimately anticipating European criminal liability.

[79] N. Boister, *An Introduction to Transnational Criminal Law*, Oxford University Press, Oxford: 2012, p. 7.

[80] It was recently proposed, much in the same vein as the contribution of Ambos, *supra* note 76 for international criminal law, that European criminal law should combine both the harm principle and the legal good in order to assess its legitimacy – S.S. Buisman, *The Future of EU Substantive Criminal Law: Towards a Uniform Set of Criminalisation Principles at the EU Level*, 30 European Journal of Crime, Criminal Law and Criminal Justice 161 (2022). The problem with that proposal is that, by combining the tests of both principles, it would unbearably reduce the legitimate use of criminal law in the EU: for instance, how could it protect its financial interests if there is no harm to "others" (individuals)? There are also some other inconsistencies regarding European and criminal issues (principles) that were not sufficiently considered, namely why some harms are considered EU harms (*Ibidem*, p. 168), exactly why some legal goods make up the "core" of EU criminal law, what is the criterion for differentiating them (environment and financial interests are the examples given) and why they do not appear to need "legitimisation" regarding the use of criminal law for their protection (*Ibidem*, p. 169).

harm principle would be applied to common interests not as strongly harmonised, so as to limit the EU's action to the defence of its citizens, and in order to lessen the impact of a potentially functionalised European criminal law (to the enforcement of European policies and their effectiveness). This distinction would also correspond to the degree of harmonisation that is intended or allowed by those interests: the more limited the Member State's action is, the stronger the tendency towards harmonisation; hence, the legal good to be protected should be specified as well. Conversely, the more legislative latitude remaining with the Member States, the less justification there would be for extensive harmonisation; therefore, it would be enough to follow an analysis of the harms caused by the conduct in question, without it being necessary to precisely determine the legal good affected by it.

This would in turn enable the Member States that adopt the concept of legal goods to transpose European criminal law in a way that entails the minimum possible costs of systematic coherence: as long as the harmonisation minimums of the Directive are met, these Member States can internally opt for the legal good they consider to be affected by that criminalisation (within the margin of appreciation left to them), and likewise adjust it, as best as possible, to the sanctioning levels that exist for conduct that affect that same legal good. The application of the harm principle in these cases would allow Member States to opt for the preventive protection of that interest (such as crimes of concrete or abstract endangerment), as long as such is not prohibited by the Union.

This is therefore a solution that adds flexibility to the minimum criminalisation adopted at the European level, whilst mitigating the criticism regarding the hardening effect European criminal law has on national criminal law. By focussing its attention on European citizens and the conduct that causes them harm when the interest is common, national criminal law will only be harsher (in terms of preventive criminal legislation[81]) if it so chooses (the criticism regarding sanctioning minimums would remain unchanged since it is not a question that can be resolved *in totum* through a principle directed at the material legitimacy of criminal law). With this bifurcated approach, it is possible to combine the most positive aspects of both, respect the multiple legal traditions and allow for the coherence of the European and national legal orders.

The ideal process, now having in mind steps one and two, would be as follows: first, it should be determined if the interest underlying criminalisation is a *proper* interest of the EU, since the responsibility for its protection is attributed entirely to the Union and the degree of harmonisation permitted or required by those interests

[81] On the topic of preventive justice and tendencies in the EU, Mitsilegas, *supra* note 18. *See also* denoting the "move towards the adoption of 'preventive' criminal law by the EU", V. Mitsilegas, *EU Criminal Law*, Hart Publishing, Portland: 2022, p. 628.

interferes the most with Member States' autonomy. If the answer is affirmative, then the European penal norm should be justified using the principle of protection of legal goods, so as to specifically determine what the Union intends to protect and whether, or why, that is a relevant and worthy interest (in light of the Treaties).

If it is not a proper interest, then it must be ascertained whether it is a *pre-empted common* interest. In the case of an affirmative answer, and once again because of the Union's predominant responsibility to protect it and the harmonisation level that may be required, the principle of protection of legal goods should be applied – this would establish, for the same reasons, if that interest is indeed relevant or if it is merely a policy interest that does not require the intervention of criminal law, precisely because it lacks penal dignity.

Finally, if the identified interest is merely *common*, then the European criminalisation should be guided by the harm principle in order to limit the Union's intervention to the protection of its citizens' interests (guaranteeing their maximum freedom) and to behaviours that cause real harm, given the shared responsibility for its protection. This would reduce the functionalisation of European criminal law and the preventive criminalisation in the European sphere, and it would allow for a better integration of supranational law into national legal orders because it grants them the opportunity to determine the legal good they consider to be at stake because of that conduct (again, if they wish to do so) and to adjust the sanctioning levels accordingly, within their margin of discretion.

The intention of this alternate application of both principles is to preserve Member States' freedom where it can be preserved, and at the same time to delimit the Union's penal action in order to attune it to its legal specificities. That is why pinpointing a legal interest in the first two cases is not problematic (even in light of the different legal traditions): the legislative action left to the Member States was already marginal, and a much more substantive justification can be demanded from the EU as to why criminalisation is needed and legitimate in that case.

A) Brief practical consideration – proper interests

Proper interests are those *of* the EU, and they are the ones for which it bears full responsibility to protect. As these are essentially the Union's interests, no Member State can, on its own, legitimately determine the way they must be protected,[82] hence the need for more acute harmonisation or even unification[83] (that is admittedly more

[82] That is true even with regard to the principle of assimilation: the Union determined that its interests should be protected the same way each Member State protects their own – but that was still the will of the EU.

[83] Because unification is the legislative action with the most consequences for Member States' discretion, it would only be justified when there are existential interests of the EU at stake. For more *see* Muñoz de Morales Romero, *supra* note 24, pp. 329 et seq.

of a future perspective). Some examples include the protection of its financial interests, the probity of its staff or the proper administration of its justice.

These interests should be protected equally throughout the EU, and they should benefit from criminal law protection (when necessary) in the same manner that exists for States – that is to say, the Union should be able to determine the criminal norms applicable to individuals, and these should appear in a Regulation.[84] This would ensure that sanctioning conduct that is harmful to the EU itself would not involve discrepancies within its territory, as these norms would not need to be transposed, thereby providing more coherence both for national criminal law systems and the European legal order.

The *ius puniendi* of the Union would thus manifest as either a true supranational criminal law or as a European criminal law that would slowly harmonise internal norms in the domains that do not require a unitary approach. This distinction would also be important in the context of the European Public Prosecutor's Office's (EPPO): when it acts within areas of the Union's exclusive interest, it would be justified and preferable for the EPPO to have at its disposal identical criminal norms in every Member State, instead of having to operate according to the national transposition.[85] As for the crimes that correspond to common interests (if such a responsibility were to be attributed to it), since they may require a different criminal law approach depending on the reality of each Member State, the EPPO could, without many drawbacks, take those differences into account and work with the national transposition laws.[86]

B) Brief practical consideration – pre-empted common interests

This group will comprise the interests that are common regarding their holdership, but their legal protection is for some reason attributed to the Union, either because they belong to an exclusive competence of the EU or because, given the amount of harmonisation measures, an autonomous action of the Member State is completely precluded or extremely unlikely to be accepted by the EU.

---

[84] In the same vein, Caeiro, *supra* note 64, p. 596; Caeiro, *supra* note 56, p. 530; and Caeiro, *supra* note 5. *See also* Satzger, *supra* note 70, p. 310; B. Weiβer, *Strafgesetzgebung durch die Europäische Union: Nicht nur ein Recht, sondern auch eine Pflicht?*, 161(8) Goltdammer's Archiv für Strafrecht 433 (2014), p. 83 et seq.; S.R. Malanda, *Un nuevo modelo de Derecho Penal Transnacional: el Derecho Penal de la Unión Europea tras el Tratado de Lisboa*, 32 Estudios Penales y Criminológicos 313 (2012), pp. 381 et seq.

[85] For true uniformity, there would have to be some concepts of the general part of criminal law and procedural equality, as well as the same rules regarding the execution of the sentence. A project of such dimensions would still be distant, but it would be important for the EPPO – for now and for the protection of these interests – to be able to carry out its activity whilst working with the same legal norms in every Member State.

[86] Also agreeing with a differentiated approach, U. Sieber, *Die Zukunft des Europäischen Strafrechts*, 121(1) Zeitschrift für die gesamte Strafrechtswissenschaft 1 (2009), p. 8.

In this group, *any area of activity* of the EU can be considered, since it is only through legislative analysis that one will be able to ascertain whether a certain domain is largely excluded from State action.[87] If it is *completely* excluded from independent State action, then the responsibility for the protection of that interest will be wholly attributed to the EU, just as it happens with the proper interests. In that case, an eventual unification could be justified depending on the matter (for instance, crimes connected with the Euro); otherwise, it will only determine a stronger harmonisation, since Member States will already be largely excluded from autonomous regulation.

A simple example of this type of interest is provided by the conservation of marine biological resources, which is an exclusive competence of the EU (Art. 3(1) (d) TFEU) under the common fisheries policy. One cannot say that this is a proper interest of the EU – either because it is an interest that exists at the international scale or because only some of the Member States (the coastal ones) would be in a position to jeopardise (and, correspondingly, protect) that interest. Regardless, the responsibility for its protection lies solely with the Union.[88] Regarding the type of measures, if the goal is to protect marine biological resources, then legislative unification would not be necessary, for multiple reasons,[89] and the option for harmonisation should be considered.

C) Brief practical consideration – common interests

This last group of interests features all the interests that are common, but in which harmonisation does not go so far as to preclude autonomous activity of the Member States; some clear examples are given in Art. 83(1) (§2) TFEU. These are usually interests with some European relevance because of their transnational dimension, or because of the difficulty of combating the conduct that harms them at only the national level. Therefore, it "is not because the European peoples share the same set of values, as an ethical community"[90] that the EU can enact criminal law mea-

[87] For example, the Commission has already identified some areas that would eventually benefit from a criminal law approach, such as fraud, the Euro, transport, data protection, customs and fisheries, among others. These domains, although some may be more difficult to classify, are generally common with regard to their holdership, but their attribution to the Union differs greatly; for example, the regulation of the Euro is removed from Member States' competence, fisheries are one of the most harmonised areas, and so on.

[88] Illustrating this, *Conservation of Marine Biological Resources: Commission Requests Portugal to Respect the Exclusive Competence of the EU Under the Common Fisheries Policy*, European Commission, available at: https://oceans-and-fisheries.ec.europa.eu/news/conservation-marine-biological-resources-commission-requests-portugal-respect-exclusive-competence-2018-01-26_en (accessed 30 August 2024).

[89] On the one hand, this does not have the same impact on all Member States: only those with fishing rights are in a position to harm that interest and have the need to legislate on that. On the other hand, the behaviour in each Member State can vary greatly, which can effectively demand a much more flexible approach.

[90] Caeiro, *supra* note 5, p. 18.

sures to protect some dimensions of these interests, but rather because the EU is "better placed (given its resources, expertise and incentives) than Member States to protect"[91] them.

As a consequence, for this group the interests justify less harmonisation and, in order to curb the functionalisation and progressive expansion of European criminal law (without the possibility to regress and decriminalise), European penal intervention should be limited to the criminalisation of behaviour that causes actual harm to its citizens. This would effectively lead to the reconsideration and revision of multiple norms that criminalise conduct in which no legitimate interest is discernible,[92] that anticipate criminal protection (sometimes incomprehensibly)[93] or that are blatantly wrong in their formulation.[94]

5.4. Who determines which interest?

The answer to this question will once again be a consequence of the preceding steps of this criminalisation process. When there is a proper, or pre-empted common interest at stake, given the fact that the responsibility to protect it is solely the EU's, the Union should be the one to define (using the principle of protection of legal goods) what exactly it aims to protect with European criminalisation. In this case, where the interest is more precisely defined and Member States have no autonomous possibility of protecting that interest, they should not be able to change the interest defined by the EU, thus directing the European criminalisation towards another interest for which it was not envisioned.

This is not as problematic as it may seem. Since the States' discretion was already truly limited, it is not a problem that the interest is defined in the supranational sphere as well – in fact, this is the right place to specify it, since the Union will be the one to determine the whole (if it is able to legislate through Regulations) or the majority of its protection regime. Besides, these interests generally originate predominantly technical norms, so it is unlikely that they will conflict with cultural factors, thus intolerably interfering with national internal coherence. Establishing a true, independent criminal legal order in the EU would also allow for the comparison of crimes and sanctions

[91] Öberg, *supra* note 61, p. 421.

[92] *E.g.* Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography [2011] OJ L 335/1, Art. 5 (7).

[93] *E.g.* Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism [2017] OJ L88/6, Art. 13 and Art. 14 (3).

[94] *E.g.* the criminalisation of migrant smuggling that results from the "Facilitators Package": Council Framework Decision 2002/946/JHA of 28 November 2002 on the Strengthening of the Penal Framework to Prevent the Facilitation of Unauthorised Entry, Transit and Residence [2002] OJ L 328/1; Council Directive 2002/90/EC of 28 November 2002 Defining the Facilitation of Unauthorised Entry, Transit and Residence [2002] OJ L 328/17.

and the perception of which interests are the most valuable for the EU, which would increase coherence in the EU regarding its own scale of values and constitutional dimension (since the most valuable interests with constitutional standing should correspondingly be attributed the harshest sanctions when disrespected).

When a truly common interest is at stake, Member States should be free to pursue criminal protection for the interests they believe were harmed (with the conduct described in the incriminating norm), as long as their choices do not interfere with the objectives defined at the European level. By making use of the harm principle, supranationally it is enough to establish that certain conduct involves harm to people and should be prevented, and that the most appropriate way to achieve that is through a common approach to criminalisation. The *precise* definition of the legal good or interest affected by such conduct would concern only the States, and they would be able to do so within their margin of discretion, allowing for an easier incorporation of the European policy into the internal legal order (with less disruptive potential).

6. CONSIDERING OTHER FUNDAMENTAL PRINCIPLES (THE "THIRD STEP")

The third and final step in the criminalisation process would be to confront the intended criminalisation with other fundamental principles of criminal law – for example, all of those analysed above (legality, subsidiarity, proportionality, *ultima ratio,* etc.). In this respect, it is imperative for the legitimacy of an European incriminating norm that, in addition to having a legitimate interest, it is also deemed necessary, proportional, non-discriminatory, effective, respectful of fundamental rights and legal traditions of the Member States and mindful of the requirements of the principle of legality.[95] Even if none of these principles is primarily directed at the question of material legitimacy, they are essential for other fundamental aspects of the criminal matter and should be acknowledged by the European legislator at this moment. Only after ascertaining that all of these principles are respected should the EU proceed with the intended criminalisation.[96]

[95] With its European particularities: these requirements will be less demanding in European criminal law than they will be later in the national transposition law, because only the latter will be directly applicable to subjects. If, however, the Union ever legislates through Regulations in the field of criminal law, they will have to obey all of the mandates of this principle, since it will actually be directly applicable law.

[96] There are other principles that should be respected by the criminal legislator, such as the principle of guilt, resocialisation, human dignity, presumption of innocence, respect for the rights of defence etc. – *see e.g.* Satzger, *supra* note 16, pp. 83 et seq.; Mir Puig *supra* note 11, p. 30; S. Moccia, *La politica criminale del Corpus Juris: dal Corpus Juris al Diritto Penale Europeo?*, in: A.S. Franco (ed.), *Escritos em Homenagem a Alberto Silva Franco*, Editora Revista dos Tribunais, São Paulo: 2003, pp. 391 et seq. These principles, although relevant, were not mentioned because they are not primarily directed at the initial criminalisation process and its legitimacy.

7. THE OTHER FUNCTIONS OF EUROPEAN CRIMINAL LAW IN BRIEF

There are other functions (besides the protection of relevant interests) that can be fulfilled by adopting European criminal measures; however, they are *not enough* to justify that adoption *without* the corresponding legitimate interest. Criminal legislation that only fulfils one of these functions without having a legitimate interest behind it will consequently lack material legitimacy.

First, there is the effectiveness component: harmonisation avoids great discrepancy in punitive stances regarding the same facts when applied to different Member States. A harmonised criminal response contributes further to the predictability of criminal law (from the point of view of the subjects), which is paramount given the freedom of movement; it is also important for the simplification of mutual recognition, since more commonalities between the legal orders will improve trust between them.[97]

European criminal law fulfils an important symbolic function as well, seeing that it is a normative field directed at *sanctioning* undesirable conduct (which implies censure). However, this should not be the main reason why criminal law is adopted.[98] This symbolic function furthers (or is expected to favour) the development of a common identity at the EU level, one that is specific to the EU and distinct but complementary to the multiple national identities. This identity is incrementally shaped through the commitment to certain values (protected by criminal law) and the rejection of others (penalised through criminal law).[99]

CONCLUDING THOUGHTS – CONSEQUENCES STEMMING FROM THIS PROCESS

In conclusion, what are the consequences of this process? What if the criminalisation of certain conduct at the European level has no underlying legitimate interest? This question is of even greater concern in the EU legal order, due to its particularities: neither the European nor the national legislator has the competence to decriminalise something that was adopted in the EU, making it all the more important

[97] *See* Malanda, *supra* note 84, pp. 361 et seq. regarding the functions of harmonisation.

[98] Concluding the same, Kettunen, *supra* note 12, p. 188.

[99] There are already some examples of merely symbolic legislation in the EU: *e.g.* the incriminations of racism and xenophobia (Council Framework Decision 2008/913/JHA of 28 November 2008 on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law [2008] OJ L 328/55); for further analysis, *see* Wieczorek, *supra* note 7, pp. 172 et seq. In such cases, it is important to consider *what type of criminal law* we want for the EU, as the adoption of purely symbolic criminal law can result in the symbolic "labelling" of offenders – E. Herlin-Karnell, *Effectiveness and Constitutional Limits in European Criminal Law*, 5(3) New Journal of European Criminal Law 267 (2014), p. 272.

that every European measure is materially legitimate and necessary. However, the perpetual preservation of crimes in the European criminal circuit is not rationally defensible – *quid iuris* when no-one seems to have enough power to determine its non-exercise (or, more to the point, the *cessation* of its exercise)?[100]

One of the suggested solutions was to use the emergency brake mechanism in order to reject proposals that contain criminal norms that do not protect any fundamental interest, or even the possibility of concluding internally that there is no need to employ criminal law with regard to certain conduct defined in the EU.[101] These solutions do not seem feasible: the first because it would require a fundamental aspect of the Member State's legal order to be violated (and consequently the acknowledgment that the harm principle or the principle of legal good is a fundamental aspect of that legal order), and the second because it is questionable whether a Member State can autonomously determine the lack of a fundamental interest in criminalisation proposed by the EU and conclude that the employment of criminal law is *unnecessary*, since the matter at hand (especially when the interests are proper) is not fully within its legislative competence.

Another solution could be found by comparing the proposed criminal law with fundamental rights: by determining its disproportionate incompatibility with them, that argument could be used to remove the offending norm from the European criminal system.[102] The problem with this, be it with the incompatibility with a fundamental right or even with the proportionality principle, is that it can be difficult to argue the illegitimacy of criminal law when the question is actually centred on the *lack* of an interest worthy of penal protection.

Following the suggestion in States where the principle of protection of legal goods is adopted,[103] it is my opinion that there should be a jurisdictional control of European criminal law norms if their material legitimacy is questioned.[104] The most appropriate forum for this would be the ECJ: this is the court responsible for deciding on the interpretation and validity of European law[105] and assessing

[100] Critically regarding the loss of relative value of the sanction at the European level, Sotis, *supra* note 55, p. 779. The easier path would be to grant the European legislator the competence to decriminalise; this will be much more needed as the Union makes use of its annex competence, when it concludes, sooner or later, that there are crimes which should not be considered crimes.

[101] Both suggestions by Satzger, *supra* note 70, pp. 308 et seq.

[102] Similar to what was suggested by the German Constitutional Court regarding the control it could exercise on the compatibility of European legislation with the principle of guilt (German Constitutional Court, *Lissabon Urteil* 2BvE 2/08, 30 June 2009, para. 364), but in an expanded way, in order to encompass all fundamental rights.

[103] Constitutional Courts are the ones who can determine the illegitimacy of a given norm, since the legal good must be constitutionally founded.

[104] Questioning the sufficiency of the existing system of control by the ECJ (Caeiro, *supra* note 5, p. 17).

[105] This seems to be the constitutional justice model which we are gradually opting for in the EU, with the centralisation of the constitutional questions in the ECJ – Salcuni, *supra* note 59, pp. 453–460.

compatibility with the constitutional order of the EU. The conclusion that there is no fundamental interest in need of criminal law protection would render the criminal norm illegitimate, and it should consequently be removed from the European legal order.[106]

Although at present a *strict* jurisdictional control is not to be expected, given the ECJ's fear of treading on the competence of the legislative power,[107] in future, as the ECJ takes on more constitutional tasks and in light of the genuine need for a critical European criminal law, it may be legitimate to believe that this court will play a leading role in the recognition of a European decriminalising competence. This would maintain the European criminal system in synchrony with the society it intends to regulate, whilst preventing the accumulation of criminal infractions that are (or have always been) unnecessary.

It is thus submitted that these principles of criminalisation and this process, in which due consideration is given to the different interests that coexist in the EU and the special aspects of the European legal order, would substantially contribute to the rationalisation of European criminal law. The differentiated approach to criminalisation would moreover ensure more coherence, maintain Member States' margin of discretion where possible and grant the correct forum the responsibility to protect relevant interests. By providing the legislator with substantial principles, the use of criminal law exclusively for functional motives would finally be prevented and less merely symbolic criminal law would be adopted, making it less subject to deserved criticism.

[106] This removal would have different consequences for Member States depending on the type of legislative act and the moment in time regarding its intended transposition. If the criminal norm was part of a Directive not yet transposed, Member States would not have to transpose it; if, however, it had already been incorporated into the national legal order, it is doubtful that the ECJ's judgment would entail the invalidity of the national criminal norm, because by this point it is real national law. In this case, its elimination would be dependent upon the will of the Member State, and the ECJ would only be able to determine its inapplicability if the question of its compatibility with the European legal order was raised. Should the illegitimate criminal norm be part of a Regulation, the judgment of the ECJ would of course entail its removal from the national legal order as well, as Regulations are not supposed to be transposed.

[107] The reluctance to control the choices of the European legislator can be gleaned from cases regarding the principle of subsidiarity, given the eminently political character of those choices – *see e.g.* E. Herlin-Karnell, *The Constitutional Dimension of European Criminal Law*, Hart Publishing, Portland: 2012, p. 115; Muñoz de Morales Romero, *supra* note 24, pp. 346 et seq.