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Irrationality as a Challenge to European Criminal Policy

Abstract

For years, the European Union (EU) has legislated on criminal matters through Council framework decisions within the third pillar. The Lisbon Treaty recognized the European Union competences for defining crimes and penalties in a number of cases (art. 83 TFEU), harmonizing the national legislations through directives. These norms have had a significant impact on the Member States´ criminal systems. This paper aims to analyze the current EU criminal policy, focusing on its character, peculiarities and deficiencies. The importance of such analysis is undeniable, given the influence that EU legislation has on national criminal policies. This study suggests that the EU criminal policy displays noteworthy signs of irrationality –originating from the law-making process- which may affect the Member States´ internal criminal policy.

I. Introduction

Criminal law is not isolated from the European integration process. Over the past few decades, the EU has acquired competences in the field of substantive and procedural criminal law. After the Lisbon Treaty's entry into force, criminal matters are a shared competence (art. 4 TFEU), conferring the EU the powers to enact legislation related to the definition of criminal offences and the imposition of penalties. This can be considered a weakening of the national sovereignty principle which has become old-fashioned in the post-modern world.

Substantive EU criminal legislation normally adopted the form of framework decisions (under the third pillar), and directives. As is known, these instruments do not have a direct effect, and their transposition is mandatory for Member States. In this regard, harmonisation of EU policies at the national level is a major objective in order to improve police and judicial cooperation in criminal matters. However, some member

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states have been stagnant at transposing European criminal legislation. This has been the case of Spain[1].

The EU criminal legislation has become, to an important extent, crucial in the understanding of internal criminal law in most Member States. Despite this, the studies on criminal policy or criminal legislative policy of most Member States are still highly focused on internal factors and officers. Nonetheless, such an analysis is incomplete due to the increasing importance the EU legislator's role.

European criminal policy and the harmonisation of national criminal legislations prove to be essential in our globalized society. They contribute to the enforcement of mutual trust and mutual recognition principle, and at the same time avoid the so-called 'forum shopping'. Attention should also be paid, however, to other not so positive effects of criminal law harmonisation that also affect and influence the respective national legislation, introducing rationality deficiencies.

This paper aims to analyse the current EU criminal policy, focusing primarily on its character, peculiarities and deficiencies; it will connect the current shortcomings with defects in the EU criminal law-making process. Finally, I will propose the main guidelines to develop a comprehensive legislative rationality model.

II. The Scope of Competence in Criminal Matters in the EU

During the Pre-Lisbon era, there was a heated debate among academics and practitioners about the real extent of the EU's competence to enact criminal legislation.

The Greek Maize sentence (C-68/88) was the first step in the development of European criminal law and had a high political impact[2]. In 1992, the Maastricht Treaty created the pillar structure. The third pillar -Justice and Home Affairs (JHA)- was related to Police and Judicial Cooperation in Criminal Matters. Since then, criminal legislation was set through an intergovernmental procedure within the EU Council, requiring the Member States' agreement[3]. Afterwards, the Amsterdam Treaty created the area of

1 However, the situation changed recently. In the last two reform of Spanish criminal Code 9 framework decisions and 7 directives were transposed (LO 5/2010 of 22 June and LO 1/2015, of 30 March).

2 *A. Nieto Martín*, Posibilidades y límites de la armonización del Derecho penal nacional tras Comisión v. Consejo (Comentario a la STJCE, asunto C-176, de 13-9-2005), in L. Arroyo Zapatero/A. Nieto Martín (dirs.), El Derecho penal de la Unión Europea: situación actual y perspectivas de futuro, 2007, p. 325; *G. Dannecker,* Evolución del Derecho penal y sancionador comunitario europeo, 2001, p. 56; *A. Eser*, De la concurrencia a la congruencia de los ordenamientos penales nacionales. Vías para el acercamiento jurídico en Europa, in J. López Barja De Quiroga /J. M. Zugaldía Espinar (coord.), Dogmática y ley penal. Libro homenaje a Enrique Bacigalupo, 2004, p. 223; *J. A. E. Vervaele*, The European Union and Harmonization of the Criminal Law Enforcement of Union Policies: in search of a Criminal Law Policy?, in M. Ulväng /I. Cameron (eds). Essays on Criminalisation & sanctions, 2014, pp. 187-188; *H. Satzger*, Internationales und Europäisches Strafrecht. Strafanwendungsrecht, Europäisches Straf- und Strafverfahrensrecht, Völkerstrafrecht, 2016, pp. 136-137.

3 This situation was always criticised for the lack of democratic legitimacy –due to the irrelevant role of the European Parliament in the legislative procedure- in such an important area. The

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Freedom, Security and Justice to ensure the free movement of persons and to protect citizens, allowing the EU to enact upon minimum rules to harmonize national legislation on criminal matters (arts. 29 et seq. TEU). This Treaty created a new legislative instrument which would be of relevance to the quick development of the EU's criminal policy: the framework decisions (art. 34, ex Article K.6)[4].

The discrepancy about the possibility –supported by the European Commission and the Parliament and against the Council's opinion- of legislating through directives within the first pillar based on ECT, gave birth to a harsh conflict –so-called 'battle of pillars'- between EU institutions. The controversy was partially solved by the judgment of 13 December 2005 (C-176/03)[5]. The Court ruled in the Commission's favour and annulled the above-mentioned Framework Decision, considering that there was no general competences of the Community in criminal matters,[6] but recognized the possibility to adopt criminal provisions when it concerns an "essential measure for combating serious environmental offences", "necessary in order to ensure that the rules which it lays down on environmental protection are fully effective". This sentence was a step forward for the development of European criminal law. Soon afterwards, the Commission appealed against the Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal law framework for the enforcement of the law against ship-source pollution (C-440/05). The latter was also annulled but this time the Court clarified that the European Community had no competence to establish the type and form of criminal sanctions[7].

The entry into force of the Lisbon Treaty in 2009 was the last step in the European criminal law's development, removing the pillar structure –and hence also abolishing the third pillar and the category of the framework decision- and clarifying the scope of competence between the EU and the Member States (arts. 2, 3 and 4 TFEU)[8]. Articles 82 and 83 TFEU provide a clearer legal basis in criminal matters. Article 82.2 indicates the competences for the approximation of national procedural legislation –by means of directives and in accordance with the codecision procedure-; and article 83.1, following the same criteria, provides competence for the harmonisation of criminal offences and

Lisbon Treaty put an end to that situation –despite that some critics still remain-, establishing the codecision procedure as the ordinary legislative procedure.

4 *V. Mitsilegas*, EU Criminal Law, 2009, p. 13 et seq.

5 The European Commission appealed against the Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law. The story behind the annulment action was the following: in 2001 the European Commission proposed a draft Directive on this same issue on the basis of article 175 ECT, setting up the possibility of criminal sanctions in the most serious cases. The Council refused the draft and decided to address the issue with the Framework Decision 2003/80/JHA. The dispute was whether the competence lies in the frame of the first pillar (article 175 ECT) or in the third pillar (article 34 TEU). See *Nieto Martín*, (fn. 2), p. 327; *A. Klip*, European Criminal Law. An Integrative Approach, 2012, pp. 172-173.

6 *Vervaele*, (fn. 2), pp. 191-193.

7 *Klip*, (fn. 5), p. 172 et seq; *M. Fletcher, / R. Lööf,/ B. Gilmore*, EU Criminal Law and Justice, 2008, p. 179 et seq.

8 *O. Costa/N. Brack*, How the EU really works, 2014, p. 178 et seq.

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sanctions[9] "in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis."[10]

Article 83.2 TFEU provides the possibility of setting by means of directives for minimum rules in regards to the definition of criminal offences and criminal sanctions, when it "proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures". This is the ancillary competence. It still remains the discussion of whether other articles, such as 325 TFEU, provide a legal basis for criminal law competence[11].

There is no doubt that the construction of EU competence under the Lisbon Treaty allows a broad interpretation and also an expansion of the EU criminalisation powers.

III. The Criminal Policy Agenda of the European Union.

Interestingly, clear criminal policy lines never existed in the EU[12]. The strategy in the area of Freedom, Security and Justice from the Treaty of Amsterdam is included in the European Council multiannual programme: Council Conclusions in Tampere, from 1999-2004; The Hague Programme, from 2004-2009 and Stockholm Programme, from 2010-2014. All of them express the need to legislate in some especially serious areas, such as trafficking in human beings, women and child sexual exploitation, money laundering, drugs trafficking, terrorism, among others. All in all, those are mainly the same criminal behaviour qualified as "Euro Crimes" in the article 83.1. TFEU.

It is also interesting to observe that some issues come in and out of the political agenda rapidly. This can be explained by various factors. Mainly, the European criminal policy used to be addressed by the Member States through the Council of Minis-

9 The Lisbon Treaty does not distinguish between competence to define criminal offences and competence to set penalties. Therefore, the problem remaining from the judgment of 23 October 2007 is no longer relevant. *H. G. Nilsson*, Some reflections on the development of an EU criminal policy on Directives and the sanctions contained therein, in M. Ulväng /I. Cameron (eds). Essays on Criminalisation & sanctions, 2014, p. 165.

10 Such areas are terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

11 See, among others, *A. Klip*, Towards a General Part of Criminal law for the European Union, in A. Klip (ed.) Substantive Criminal Law on the European Union, 2011, p. 26; *P. Asp*, The substantive criminal law competence of the EU, 2012, pp. 142 et seq.; *Satzger*, (fn. 2), pp. 119-120; *K. Tiedemann*, Wirtschaftsstrafrecht. Besonderer Teil mit wichtigen Rechttexten, 2011, p. 42.

12 See *Vervaele*, (fn. 2), p. 214 et seq.; *J. W. Ouwerkerk*, Criminalisation as a last resort: a national principle under the pressure of europeanisation?" New Journal of European Criminal Law (NJECL*)* 3-4, 2012, p. 233; *Klip,* (fn. 5), p. 26; *S. Miettinen,* Criminal Law and Policy in the European Union, 2012, p. 236; *S. Peers*, EU Justice and Home Affairs Law, 2006, pp. 402 et seq; *E. Demetrio Crespo*, Sobre la armonización de las sanciones en la Unión Europea, Revista Penal, nº 16, 2005, p. 52; *Satzger*, (fn. 2), pp. 138, 150-151. Also the European Parliament in his resolution of 22 May 2012 "On an EU approach to criminal law" complains about the fragmentary approach to the field of criminal law (point 11).

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ters. This is a political body, whose agenda is very volatile[13]. This situation could have been changed after the Lisbon Treaty due to the current relevant role of the European Commission in the creation of the legislative agenda. However, the Commission does not seem to be deeply involved in the creation of a new agenda after the end of the Stockholm Programme[14], with the exception of some vague guidelines in the European Agenda on Security for the period 2015-2020 (published on April 28th, 2015)[15], such as "tackling terrorism and preventing radicalisation", "disrupting organised crime"[16] or "fighting cybercrime."

On the contrary, the European Commission aims to force Member States to comply with the criminal *acquis*, especially after the end of the transitional period on December 1, 2014. Under the third pillar frame, neither the Commission nor the Court had the power to control the compliance of the framework decisions. The Treaty of Lisbon includes a transitional regime in protocol 36. After a period of five years, which ended on December 1, 2014, the European Commission could initiate an infringement procedure against defaulting Member States (Article 258 TFEU) in relation to framework decisions[17]. Now, the Commission has full competence to control the harmonisation of national legislation in the field of criminal law, and is seen to be concentrated on this task due to the well-known lack of implementation of the framework decisions[18]. Therefore, the Commission is now focused on the infringement procedure or on the

13 *Carammia et al*., Analyzing the Policy Agenda of the European Council, Perspectives on Europe (PoE*),* 2012, p. 44. An in-deep study in *Costa/ Brack*, (fn. 8), p. 233 et seq.

14 In the Communication of 2011 "Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law" the Commission dealt with the implementation of European policies in the field of criminal law, focusing on some priority areas, such as economic crime, fishing policy, data protection, environmental protection…. However, some other areas formerly relevant –food security, corruption, intellectual property…-are now not included. See *Vervaele*, (fn. 2), pp. 211-214. Terrorism is clearly another issue which comes in or out the political agenda depending on the circumstances.

15 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "The European Agenda on Security" (COM(2015) 185 final). Available in: https://ec.europa.eu/anti-trafficking/eu-policy/european-agenda-security_en.

16 Under this title, referring to *serious and organised cross-border crime,* the Commission mention almost every area of criminalisation of article 83.1. TFEU: trafficking in human beings, smuggling of migrants, trade in firearms, drug smuggling, environmental crime, fraud, corruption, counterfeiting and economic crime.

17 See *G. Grasso*, The instruments of harmonisation of national Criminal Law, their enforcement and the role of the Court of Justice, New Journal of European Criminal Law (NJECL), 2015, pp. 495-496; *Mitsilegas* (fn. 4), p. 41.

18 So it is expressed in many official documents, such as the Report "The End of the Transitional Period for Police and Criminal Justice Measures Adopted before the Lisbon Treaty. Who Monitors Trust in the European Justice Area?" It was created by academics on the instructions of the Parliament LIBE Committee (Committee on Civil Liberties, Justice and Home Affairs),)(see pp. 36-37), or in the Commission "2014 Annual Report "Monitoring the application of Union law" (see pp. 23-24). See also *Mitsilegas* (fn. 3), p. 55.

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so-called *Lisbonisation*[19] strategy of the third pillar[20], and does not pay enough attention to digging deep into criminal policy lines. The Commission 2016 and 2017 Work Programmes[21] only plan limited reforms, such as the replacement of Framework Decision 2002/475/JHA of June 13th on combating terrorism[22], trying to combat the last terrorist attacks, and another reform related to fraudulent use of false non-cash payment instruments.

The economic situation, which concentrates the most legislative efforts, may be another reason to explain the lack of interest of the European institutions in criminal policy. Despite the intention of the EU in developing a clear and coherent criminal policy –as manifested in certain documents or interinstitutional agreements- this has been so far, as Vervaele says, of limited success[23]. The situation is not expected to change, taking into account the political crisis triggered by the *Brexit*, and the need to face the difficulties resulting from it.

In any case, by observing the activities of EU institutions and the enacted criminal law norms, it is possible to detect some key features of the current criminal policy. These characteristics have important consequences in Member States' criminal policies. Some of them may present problems or create handicaps for the process of shaping a rational criminal policy, as already happens in the national systems. It is frequent to see, as we shall describe below, that the European legislator acts in an improvised way at expanding criminal law into new fields, usually with the infringement of fundamental principles of substantive criminal law.

IV. Main Challenges with the Current European Criminal Law Policy

Some of the problems or defects in the EU Criminal policy are mainly the same as those happening within the Member States. National and European legislators are not completely independent but interconnected (political representatives, civil society, etc.). For that reason, the repetition of some features –or defects- of the national criminal policy can considerably be expected at the EU level. As Nieto Martín points out,

19 The so-called *Lisbonisation* is a practice consisting in turning former third pillar framework decisions into directives. Thus, the Commission, after the end of the transposition deadline, could enforce the obligations of legislating upon the Member States, which was not possible with the third pillar instruments before 2014.

20 This issue has been addressed more extensively in Grasso (fn. 17); Satzger, (fn. 2), pp. 137-139.

21 Commission Work Programme 2016 «No time for business as usual» (COM (2015) 610 final) and Commission Work Programme 2017 «Delivering a Europe that protects, empowers and defends» (COM (2016) 710 final).

22 . The draft directive proposal has finally been approved and became the Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017.

23 *Vervaele*, (fn. 2), p. 224. See also *Klip*, (fn. 5), p. 168.

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the European criminal law was born sadly at the worst moment[24]. However, some of those defects are specific to EU Law and the functioning of EU Institutions.

1. Progressive Expansion of the Criminal Law Field into New Matters.

Over the past few years, the discussion about the EU Institutions' lack of competence to enact legislation in the criminal law field has become outdated, and accordingly substituted by a new one: the expansion of the EU criminal law via harmonisation[25].

The usual kind of justification for the current expansion of criminal law is the continuous necessity of the EU to combat new risks created or increased by globalisation. Crime has become a global phenomenon in modern society, so the measures used to combat it must be legislated on a common basis. The harmonisation of domestic criminal systems seems to be essential to avoid the appearance of so-called 'criminal havens', in the understanding that Member States have no individual capacity to deal with this new kind of crime or criminals[26].

Indeed, there is no doubt that globalisation -which makes possible the fast movement of persons, goods, services, capital and information- increases the likelihood of cross-border crimes. The cooperation in criminal matters is a need in modern societies but it does not necessarily equate with the harmonisation of substantive criminal law.

The existence of new risks is an argument used in many occasions as an umbrella term and without empirical evidence support. The EU legislator often refers to global crime without considering that some criminal behaviours regulated by the EU are common crimes, with the only particularity of displaying a transnational component[27].

There are reasons to believe that harmonisation of substantive criminal law is used often due to its symbolic effect, rather than –or in addition to- some other measures that could be more effective[28]. The European legislator seeks to project an image of strength against transnational crime through substantive criminal law. For that reason,

24 *A. Nieto Martín*, La armonización del derecho penal ante el Tratado de Lisboa y el programa de Estocolmo. European Criminal Policy Initiative y el Manifiesto sobre Política Criminal Europea, Revista General de Derecho Penal (*RGDP)*, 2010, p. 3.

25 *A. Nieto Martín*, El Derecho penal europeo: una aproximación a sus problemas actuales, in L. Arroyo Zapatero /A. Nieto Martín (dirs), Piratas, mercenarios, soldados, jueces y policías: nuevos desafíos del Derecho penal europeo e internacional, 2010, p. 229; *C. Sotis*, Il diritto senza codice. Uno studio sul sistema penale europeo vigente, 2007, pp. 165-167.

26 *S. Romeo Malanda*, Un nuevo modelo de Derecho penal transnacional: el Derecho penal de la Unión Europea tras el Tratado de Lisboa, Revista de Estudios Penales y criminológicos (*REPC)*, 2012, pp. 315-317; *B. Hecker*, Europäisches Strafrecht, 2015, p. 21.

27 *J. Vogel*, Derecho penal y globalización, Anuario de la facultad de Derecho de la Universidad Autónoma de Madrid (*ADUAM),* 2005, pp. 115-117. Also, critically *A. Klip*, European Criminal Law. An Integrative Approach, 2009, p. 25. Related to the concept of cybercrime, see *Y. Naziris*, A Tale of Two Cities' in three themes. A critique of the European Union's approach to cybercrime from a 'power' versus 'rights' perspective, European Criminal Law Review (EuCLR), nº 3, Heft 3, 2013, pp. 332-333.

28 As Sotis has pointed out, EU criminal law has an important aim because Europe is searching for its identity and there is a risk to build this identity by means of criminal law. *Sotis*, (fn.

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EU institutions usually do not dig deep to explain the reasons for choosing criminal law measures over others. This aspect has been analysed by Ouwerkerk, who draws attention to the lack of justification for resorting to criminal law, breaching the last resort principle[29]. Commonly, the sole statement of the European Commission or the Council about the existence of a problem, whose solution needs the harmonisation of domestic criminal legislation, is good enough to serve as a motivated legal purpose[30]. Recently, the EU Institutions have recognised this lack of justification in the criminal law-making[31].

Furthermore, the expansion of criminal law produced at the request of international bodies is highly connected with new risks in modern societies and the oversized perception of them[32]. The feelings of insecurity and continuous danger affect the European Union's citizens, as is always shown in the Eurobarometer reports. Over the years, criminality has become one of the main concerns for European citizens, despite the variation produced by eventual incidents (e.g. terrorist attacks)[33]. The European Institutions are urged to act and show the citizens their constant effort in the fight against crime, and they very often consider that the most effective way to show that is through criminal law.

25), pp. 162-163. See also, *J. Vogel*, Estado y tendencias de la armonización del Derecho penal material en la Unión Europea, Revista Penal (*RP*), 2002, p. 118; *M. Kubiciel*, Ciencia del Derecho penal y política criminal europea, Revista de Derecho Penal y Criminología *(RDPC),* 2013, p. 31; *F. Galli*, Content and impact of approximation: The case of trafficking in human beings, in F. Galli/A. Weyemberg, (eds). Approximation of substantive Criminal Law in the EU. A way forward, 2013, p. 198; *R. Kert/A. Lehner*, Content and impact of approximation. The case of drug trafficking, in F. Galli/A. Weyemberg, (eds). Approximation of substantive Criminal Law in the EU. A way forward, 2013, pp. 186-187. A similar approach in *E. Herlin-Karnell*, European Criminal Law as an Exercise in EU 'Experimental' Constitutional Law, SSRN Electronic Journal, January 2013, p. 452.

29 *Ouwerkerk*, *NJECL* 2012, pp. 232-234.

30 *Klip*, (fn. 5), pp. 175-176; *Kubiciel, RDPC* 2013, pp. 33-34; *P. Simon*, The criminalisation power of the European Union after Lisbon and the principle of democratic legitimacy. New Journal of European Criminal Law (NJECL), Vol.3, Issue 3-4, 2012, pp. 248.

31 See "Council Conclusions on model provisions, guiding the Council's criminal law deliberations Justice and Home Affairs" of 2009, "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Towards an EU Criminal Policy" of 2011 and "European Parliament resolution of 22 May 2012 on an EU approach to criminal law".

32 *J. M. Silva Sánchez,* La expansión del Derecho penal. Aspectos de la política criminal en las sociedades posindustriales, 2001, p. 28 et seq.

33 Terrorism and crime appears as fifth and seventh concerns of citizens, respectively, in the results of 2015 Eurobarometer (Nr. 83). This datum represents a significant increase from the previous 2014 Eurobarometer (Nr. 82). The terrorist attack in France in early 2015 may explain the broad increase of concern regarding terrorism. Text available in http://ec.europa.eu/COMMFrontOffice/PublicOpinion/index.cfm/Survey/index#p=1&instruments=STANDARD.

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2. Improvisation in Criminal Law-making

As stated above, the legislative decisions in substantive criminal law of most Member States are sometimes taken under social or political pressures. The EU bodies are not unfamiliar with this problem, especially in some heated areas such as terrorism or organised crime, in which a clear criminal policy is absent and legislation is rapidly approved whenever some sort of "crisis"[34] takes place. The fight against terrorism, for instance, started to become a top concern within the EU after the 11-S terrorist attacks in the US[35]. For instance, the extraordinary European Council on September 21st, 2001, adopted an agreement that included a counterterrorism action plan, and soon afterwards the Framework Decision 2002/475/JHA of June 13th, 2002, on combating terrorism and other cooperation measures were also approved. Thereafter, the focus on terrorism gradually decreased until the terrorist attacks in Madrid on March 11th, 2004. As a result, terrorism became a priority in The Hague Programme and new cooperation measures were approved.

Something similar happened after the attack in the London underground on July 7th, 2007. Then, under the British presidency of the Council of Ministers, and with the intention of showing leadership and strength against terror, new EU legislation was adopted, including the Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism. After the last terrorist attacks in Paris against the Charlie Hebdo magazine, on November, 2015, the EU has renewed its concern and adopted new measures of control and cooperation. In the field of substantive criminal law we find the recently approved Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism, which replaces the above-mentioned framework decisions.

This trend to improvise in criminal law-making is directly related to one of the most serious problems in the EU policy-making: the lack of a clear and fixed criminal policy within EU Institutions. This is partially due to the fact that for years (under the third pillar), the legislative decisions in the field of criminal law were the responsibility of the Council of Ministers, or proposed by the Member States. There were no lines of common policy, and in some occasions, the States tried to introduce internal issues in the EU agenda. The most significant example in the criminal law field is the well-known Dutroux case, which resulted in Belgium's action to enact European policies against sexual abuse[36].

34 *J. Argomaniz*, El proceso de institucionalización de la política antiterrorista de la Unión Europea, *CIDOB d'Afers Internacionals*, 2010, pp. 127 et seq.; *Mitsilegas* (fn. 4), p. 33.

35 *M. Fernández Rodríguez*, La amenaza terrorista en la Unión Europea: reacción legislativa común y estatal", Revista Aequitas (*RA)*, 2012, p. 123; *Argomaniz*, *CIDOB* 2010, p. 128; *D. Ordoñez Solís*, El Espacio Judicial de Libertad, Seguridad y Justicia en la Unión Europea, Revista de Estudios Políticos (REP), nº. 119, 2003, pp. 475-476; *M. Fletcher/R. Lööf/B. Gilmore* (fn. 7), p. 47.

36 *M. Muñoz de Morales Romero*, El legislador penal europeo: legitimidad y racionalidad, 2011, pp. 254-256.

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Thus, we can observe that criminal policy, despite its importance and serious consequences is not as carefully created as it should, even at the EU level.

3. The Importation of Features from the *Law and Order* Approach

As we can see, many of the deficiencies of criminal policy within the different Member States can be traced in the European sphere. In fact, most European political representatives working on criminal law-making processes come from top-level institutions in the Member States. Due to rigorous trends in the national criminal policy in most Member States, it comes as no surprise that many of the national criminal policy irrationalities are spread throughout the EU.

In most Western states, a new criminal policy model has gradually been established: the so-called 'Law and Order' approach. Díez Ripollés has described the main characters of this model in detail[37]. We will proceed to list and briefly explain some of the social concerns that have contributed to this model's expansion within the EU's criminal policy.

a) The increase of citizen´s feelings of insecurity is due to new risks within the so-called 'Risk Society'. This belief makes citizens adopt a more punitive attitude, both at the national and EU levels; reports such as the Eurobarometer, which are used to reflect public opinion, establish crime as one of the main concerns for EU citizens[38].
b) The increasing importance of victims´ interests, and the tendency of victims to take part in the criminal proceedings through associations or lobbies. This phenomenon may also happen within the EU, which tries to strengthen the participation of civil society in EU policy. In the field of criminal law, for instance, the NATV (Network of Associations of Victims of Terrorism)[39] has exerted an important influence since its creation in 2008. NATV drafted the Bill of Rights of Victims Terrorism and took part in the creation process of the Directive 2012/29/EU of the European Parliament and the Council of 25 October 2012, establishing minimum standards on the rights, support and protection of victims of crime, and replacing the Council Framework Decision 2001/220/JHA.
c) Political parties often attempt to gain political advantage from the fight against crime. For example, the political measures to fight against terrorism taken by the

37 Many academics draw attention to this phenomenon internally, while referring to it with different denominations, such as model of punitive populism and Enemy criminal law. However, these are only partial manifestations of a broader phenomenon such as the establishment of the *Law and Order* approach. See *J. L. Díez Ripollés,* La política criminal en la encrucijada, 2007, p. 69 et seq.; *J. L. Díez Ripollés,* The "Law and Order" Approach in Spanish Criminal Justice Policy, Revue électronique de l'Association Internationale de Droit Pénal, (ReAIDP), 2007, p. 5 et seq.

38 See above, section IV. 1.

39 http://www.europeanvictims.net/.

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UK Council presidency can be seen as proof of strength and leadership –addressed mainly to the British citizens- soon after the terrorist attacks of 2005 in London. Looking at the political programme of the main EU parties, it is noticeable how all of them present crime as one of their main priorities, and how they usually promise more and more rigorous measures in order to deal with crime and achieve *better* security.

d) Civil society´s participation in the law-making process can nowadays be considered a global phenomenon. Although this can result in socially beneficial outcomes, such as citizen interest in political issues and law-making processes, it may also present some downsides, such as an increase in the punitive attitudes. For instance, the European Parliament, the sole direct representative chamber in the EU, tends to amend Commission's draft proposals to include more punitive clauses, criminalising new conducts, or with establishing tougher sanctions[40]. The Lisbon Treaty provides for the possibility that a million citizens from different Member States could draft a European Citizens´ Initiative (art 11.4 TEU, also developed by the Regulation (EU) 211/2011 of the European Parliament and of the Council of February 16th, 2011 on the citizens' initiative). There are still very few initiatives which have succeeded, and none of them in the field of criminal law. However, if that happens in the near future, it is likely that the tendency would be in favour of increasing sanctions and criminalising new behaviours.

e) Finally, we should mention the renewed interest in imprisonment penalties in most Western countries and in the EU. Many framework decisions or directives impose the obligation to establish prison terms in some cases. Initially, it was only required that the penalties be effective, proportionate and dissuasive, as said in the Greek Maize judgement[41]. But progressively, European criminal legislation has become more delimitated with regards to criminal sanctions. The Council conclusions on the approach to apply regarding approximation of penalties, adopted on April 24th and 25th, 2002 (Document Droipen 33) finally established 4 levels to determine criminal sanctions: 1) Penalties of a maximum of at least between 1 and 3 years of imprisonment; 2) Penalties of a maximum of at least between 2 and 5 years of imprisonment; 3) Penalties of a maximum of at least between 5 and 10 years of imprisonment; 4) Penalties of a maximum of at least 10 years of imprisonment. Since then, most instruments normally follow these indications to determine sanctions in criminal matters.

40 *Vervaele*, (fn. 2), p. 216; *A. Weyemberg/S. De Biolley*, Approximation of substantive Criminal Law: The new institutional and decision-making framework and new types of interaction between EU actors, in F. Galli/A. Weyemberg, (eds). Approximation of substantive Criminal Law in the EU. A way forward, 2013, p. 29.

41 Still several directives do not establish the type and level of criminal penalties in the field of EU criminal law. See *J. Öberg*, The definition of criminal sanctions in the EU, EuCLR, 2013, p. 295.

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4. Minimal Regard for Fundamental Criminal Law Principles

Needless to say, criminal systems in most Western countries, especially those from the continental law tradition, share a block of principles and guarantees originated in the 19th century constitutionalism. Many of them tend to be enshrined in national constitutions or even in the international conventions of human or fundamental rights. Nonetheless, as the European criminal law is still a relatively new discipline, traditional criminal law principles are still largely underdeveloped in this area[42]. In addition, there is no common position among academics and Institutions about which principles should rule EU criminal law.

In 2009, a group of academics from 10 different EU countries (European Criminal Policy Initiative) signed a Manifesto for a European criminal policy[43]. This document aimed to make an evaluation of EU criminal policy, considering its merits as well as its deficiencies. They also detailed some common principles, based on the above-mentioned traditional criminal guarantees that could rule EU criminal policy, such as the principle of last resort or *ultima ratio*, the principle of guilt, the principle of requirement of legitimate purpose, the principle of legality, the principle of subsidiarity and, finally, the principle of coherence. These same principles could act as criminalisation guidelines for current EU criminal policy´s health.

The past and current criminal law policy in the EU has, to a considerable extent, not been respectful of those legal principles or guarantees. This is, for example, seen in the case of the requirement of a legitimate purpose. The Council Framework Decision 2008/913/JHA of November 28th, 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, established the obligation to criminalise conducts such as publicly inciting to violence or hatred that are directed against a group of persons or a member of such a group, committed by public dissemination of writings, pictures, etc., publicly condoning, denying or trivialising crimes of genocide, crimes against humanity and war crime (art. 1). The criminalisation of these behaviours can be seen as a significant expansion of the scope of criminal law, jeopardising legal interests, and therefore deserving a widespread disapproval amongst academics.

This also happened in the Council Framework Decision 2004/68/JHA of December 22nd, 2003, on combating the sexual exploitation of children and child pornography, which criminalised (article 1 b) iii) the so-called virtual pornography: “realistic images of a non-existent child involved or engaged in the conduct mentioned in (i)”. It is also child pornography the representation of a “real person appearing to be a child involved or engaged in the conduct mentioned in (i)”. This provision has recently been replaced by Directive 2011/92/EU of the European Parliament and of the Council of 13 De-

42 Despite some of them have been recognised by the TJEUor the EU institutions. See. *J. A. E. Vervaele,* European Criminal Law and General Principles of Union Law, RPL, nº 5, 2005, p. 2.

43 See Manifesto on European Criminal Policy (MECP), ZIS, 2009, pp. 707-709. (http://www.crimpol.eu/.).

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cember, 2011, on combating the sexual abuse and sexual exploitation of children and child pornography, which expands even more this criminalisation scope. Thus, Article 2 c) iv) of the Directive considers as child pornography, the realistic images of a non-existent child engaged in sexually explicit conduct, and also "any depiction of the sexual organs of any person appearing to be a child, for primarily sexual purposes". It is controversial whether such behaviours could violate minors' indemnity or sexual freedom and produce a serious injury, raising questions regarding the fulfilment of the requirement of legitimate purpose[44].

Disavowing the principle of *ultima ratio*, EU criminal provisions usually provide no adequate justification for explaining why criminal law is considered the most effective way to deal with some crimes instead of using other non-penal sanctions or measures, which are less invasive for fundamental rights[45]. For example, the Council Framework Decision 2008/919/JHA of November 28th, 2008 amending the Framework Decision 2002/475/JHA on combating terrorism, regulates behaviours such as public provocation to commit a terrorist acts, "whether or not directly advocating terrorist offences", and training and recruitment for terrorism, which does not necessary involve a harmful result. The characterisation of these behaviours as a terrorist offence marks an advancement of the barriers of criminal protection, which is hardly compatible with the *ultima ratio* principle[46]. The same can be said about other norms, such as the Directive on Preventing and Combatting Trafficking in Human Beings, and the Proposal for a Directive on the Fight Against Fraud to the Union's Financial Interests by Means of Criminal Law (COM (2012) 363 final)[47].

The principles of guilt and proportionality can also be unobserved by instruments which treat in the same way behaviours of different severity[48]. For instance, the Council Framework Decision 2002/475/JHA of 13 June, on combating terrorism, equates behaviours of diverse severity as serious offences against the life, or kidnapping or hostage taking, and others of minor entity such as disruption of supplies or the threat to commit terrorist offences (Article 1.1). This norm also sets a wide regulation regarding the participation in terrorist activities (supplying information, material resources or "by funding its activities in any way"), with knowledge that they will be used in terrorist activities. The maximum sentence for the last behaviour shall be no less than

44 See *M. Kaiafa-Gbandi*, Approximation of substantive criminal law in the EU and fundamental principles of criminal law, in F. Galli/A. Weyemberg, (eds). Approximation of substantive Criminal Law in the EU. A way forward, 2013, pp. 91-92.

45 In this direction and pointing to the need to develop criminalisation criteria in order to comply with this principle, see *Ouwerkerk*, NJECL 2012, pp. 233-234.

46 See MECP, ZIS 2009, pp. 710-711. Those offenses were included in the Spanish Criminal Code by one of the last reforms (LO 5/2010) and has been recently reformed by LO 2/2015.

47 See *H. Satzger/F. Zimmermann/G. Langheld*, The Directive on Preventing and Combatting Trafficking in Human Beings and the Principles Governing European Criminal Policy – A Critical Evaluation, European Criminal Law Review (EuCLR), nº 3, 2013, p. 111; *M. Kaiafa-Gbandi*, The Post-Lisbon approach towards the main features of substantive criminal law: developments and challenges, European Criminal Law Review (EuCLR), nº 5, 2015, Heft 1, p. 9.

48 MECP, ZIS 2009, p. 712; *Kaiafa-Gbandi* (fn. 44), pp. 109-110.

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eight years in prison. The Council Framework Decision 2008/841/JHA of October 24th, 2008 on the fight against organized crime, also provides a very broad description for the conduct of involvement in a criminal organization, including active participation, provision of information or material resources, any form of financing or the conduct "consisting in an agreement with one or more persons that an activity should be pursued, which if carried out, would amount to the commission of offences referred to in Article 1, even if that person does not take part in the actual execution of the activity" (Article 2). As can be seen from the aforesaid, they were unequal behaviours in terms of severity, some of them being mere preparatory acts, and their assimilation by the EU legislator could be a violation of the principles of culpability and proportionality.

More recently, Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011, on preventing and combating trafficking in human beings and protecting its victims, and replacing the Council Framework Decision 2002/629/JHA, matched different behaviours to define the crime of trafficking: "recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation"[49]. The same can also been said of Directive 2013/40/EU, on attacks against information systems[50].

The certainty principle -an important component of the principle of legality- is also often ignored when certain EU criminal norms provide excessively broad and undetermined offence definitions, usually raising doubts about their correct interpretation. This lack of determination can be seen in the Council Framework Decision 2004/757/JHA of 25 October 2004, laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking[51], -inspired by former UN Conventions-[52], in the Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011, on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework De-

49 The same opinion in *Satzger/ Zimmermann/Langheld*, EuCLR 2013, pp. 212-213.

50 Also critical of the situation, *Naziris*, EuCLR 2013, p. 343.

51 See article 2. 1.: "(a) the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of drugs; (b) the cultivation of opium poppy, coca bush or cannabis plant; (c) the possession or purchase of drugs with a view to conducting one of the activities listed in (a); (d) the manufacture, transport or distribution of precursors, knowing that they are to be used in or for the illicit production or manufacture of drugs.".

52 On the contrary, Prof. Kaiafa-Gbandi considers that this norm is –against the rule- determined. See *Kaiafa-Gbandi* (fn. 44), p. 105.

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cision 2002/629/JHA[53]; as well as in the Directive 2008/99/EC of the European Parliament and of the Council of 19 November, 2008 on the protection of the environment through criminal law[54]; and in the Directive 2013/40 EU on attacks against information systems[55]. The introduction of undefined terms such as "otherwise exploiting a child for such purposes" also could constitute a violation of the principle of legal certainty in Directive 2011/92/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, and replacing Council Framework Decision 2004/68/JHA[56].

The systematic violation of the principle of subsidiarity by many EU criminal legislative instruments is nowadays one of the most criticized aspects of EU criminal law. This principle has a special significance, as it also determines the criminal competence of the EU[57]. Unfortunately, it is quite normal to find statements such as the following: "[Whereas] Given that the objectives of the proposed action cannot be sufficiently achieved by the Member States unilaterally, and can therefore, because of the need for

53 "The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation". (Article 2).

54 See article 3: "The discharge, emission or introduction of a quantity of materials or ionising radiation into air, soil or water, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants"; "the collection, transport, recovery or disposal of waste, including the supervision of such operations and the aftercare of disposal sites, and including action taken as a dealer or a broker (waste management) (…)" "the shipment of waste,(…); "the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used and which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants; the production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage (…)"; "the killing, destruction, possession or taking of specimens of protected wild fauna or flora species, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species"; "trading in specimens of protected wild fauna or flora species or parts or derivatives thereof (…); "any conduct which causes the significant deterioration of a habitat within a protected site".

55 See *Naziris*, EuCLR 2013, pp. 340-342, 353.

56 So is provided in article 4.4: "Causing or recruiting a child to participate in pornographic performances, or profiting from or otherwise exploiting a child for such purposes". And in article 4.5: "Causing or recruiting a child to participate in child prostitution, or profiting from or otherwise exploiting a child for such purposes".

57 As the criminal cooperation is a shared competence, the EU can only legislate in criminal matters where Member States cannot do so with the same effectiveness.

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reciprocity, be better achieved at the level of the Union"[58]. There could be strong reasons to justify a criminal intervention, especially in very serious and cross-border offences but it is also true that to comply with this principle further justification is required, explaining why the harmonisation of criminal law is the best means to fight against such kinds of criminality[59].

Finally, it should be noted that some criminal penalties established by European norms may violate both the principle of horizontal coherence related, to the Community Law itself, and vertical coherence, with respect to Member States´ legal systems. For instance, the latter is at stake in the Council Framework Decision 2008/919/JHA of 28 November 2008, amending Framework Decision 2002/475/JHA on combating terrorism, which constrains Member States to impose imprisonment penalties of at least 15 years (as a maximum limit) in some cases. This commitment happened to be problematic to Finland, whose legal system did not provide for such serious imprisonment sentences. Thus, the Finish legislator was forced reform his penal system in order to implement the standard[60]. The principle of vertical coherence in many EU criminal norms can also be questioned, especially in those relating to protection against trafficking and child pornography, which provide over 10 years or five to 10 year prison sentences, respectively, in some cases[61]. This means that in some jurisdictions, such as in Spain, these crimes can reach or even exceed other sentences for more serious crimes not subject to harmonisation[62]. Some criminal provisions may also present problems related to vertical coherence when there was no clear distinction between authorship and participation behaviours[63].

It is likely that the continuous carelessness about the basic principles of criminal law can be seen as a result of the particular form of development of criminal matters within the EU. At first, due the well-known competence conflicts to enact substantive crimi-

58 See inter alia, Framework Decision 2002/475/JHA on combating terrorism; Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organized crime; Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law; Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

59 *Satzger/ Zimmermann/Langheld*, EuCLR 2013, p. 116.

60 See MECP, ZIS 2009, p. 715.

61 See, inter alia, Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims and Directive 2011/92/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.

62 This also happens after the transposition by que Spanish LO 1/2015 of the Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA. Those offences, whose penalties can reach 3 to 5 years of imprisonment (articles 264 y 264 bis), can be disproportionate compared with other non-harmonized offenses. See, *N. J. de la Mata Barranco*, Derecho penal europeo y legislación española. Las reformas del Código penal, 2015, p. 98.

63 *Satzger/ Zimmermann/Langheld*, EuCLR 2013, pp. 116-117.

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nal law, the EU focused on the need to improve police and judicial cooperation in criminal matters. The approximation of substantive criminal law has been and continues to be a way of improving transnational cooperation in judicial and police matters, ruled by effectiveness criteria[64]. Nevertheless, in the past few years the European Commission and the European Parliament seem to be showing more interest in addressing these problems and achieving a coherent criminal legislation in accordance with some basic principles and guarantees[65]. However, it remains to be seen whether it will result in a more rational EU criminal policy.

5. *Technocratisation* of EU Criminal Law

What do we mean when we talk about technocracy? The answer to this question is anything but obvious. The concept of technocracy is far from being clear and unquestioned. Most definitions maintain that it consists of the subordination of politics to technical knowledge, under the search of the idea of effectiveness. This kind of public policy approach, focuses mainly on the pursuit of a technical or scientific truth and makes political decisions irrelevant, leaving no room for the debate. This phenomenon is criticized for different reasons, the most important related to the lack of democratic legitimacy and the fallacy of the objectivity –technical decisions are to a significant extent rooted in ideological factors. Nevertheless, this phenomenon is so far rare at the national level. For instance, in Spain legislative decisions on criminal matters usually originate in the Executive, which proposes draft bills, and the intervention of experts and think-tanks in the legislative process is still rather low[66].

On the contrary, at the EU level, criminal norms usually happen to be very technical and tend to avoid high political profile. To illustrate, this can be said of the Framework

64 See *E. Herlin-Karnell*, Effectiveness and constitutional limits in European Criminal Law» New Journal of European Criminal Law (NJECL), 2014, p. 269 et seq.; *Herlin-Karnell*, SSRN 2013, pp. 448-452. *S. Melander*, Effectiveness in EU Criminal Law and its effects on the general part of Criminal Law, New Journal of European Criminal Law, (NJECL), 2014, pp. 277-279; *V. Mitsilegas*, From overcriminalisation to decriminalisation. The Many Faces of Effectiveness in European Criminal Law, New Journal of European Criminal Law, (NJECL), pp. 418-420; A. Suominen, Effectiveness and functionality of substantive EU Criminal Law, New Journal of European Criminal Law (NJECL), Vol.5, Issue 3, 2014.

65 Or, at least, it is clear from the Commission communication of 2011 and Parliament's resolution a year later in declaring that the criminal law must respect a number of principles. Some of the principles contained therein match the manifest´s, although there is still some disagreement between the two institutions. It remains to be seen whether these statements of intent have an impact on forthcoming directives on criminal matters. See "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Towards an EU Criminal Policy" of 2011, "European Parliament resolution of 22 May 2012 on an EU approach to criminal law" and Communication "Better regulation for better results. An EU agenda" of 19 May 2015, although the latter does not only refer to the field of criminal law.

66 *Díez Ripollés (fn. 37),* pp. 20-58; *J. Becerra Muñoz*, La toma de decisiones en política criminal. Bases para un análisis multidisciplinar, 2013, pp. 68 et seq.

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Decision 2004/757/JHA of 25 October 2004, laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking. The EU legislator avoided the discussion on the political approach to drug problem and took the UN view, which is far from being widely accepted[67].

Anyhow, not all EU criminal provisions have this high technical profile. It is possible to find politically-motivated norms[68], though they are considerably few in comparison with those in the domestic sphere. As Sotis argues, this is due to the fact that the process of European integration in criminal matters has been developed in a context of lack of democratic legitimacy. Therefore, criminal norms must be justified by enhancing a purely technical profile[69]. This can also be attributed to the lack of a proper European *demos* and a strong European civil society[70]. Regardless of the cause, this phenomenon of 'technocratisation' affects criminal law norms, which are supposedly objective[71], and leads to a series of problems. Indeed, one of the most important could be the small room left for critical analysis of *lege ferenda*, contributing to the petrification of European criminal law[72], to which we shall refer below. The aura of objectivity and scientific nature that sometimes envelops the legislative draft from the European Commission leads the European legislator to approve them at first reading. Accordingly, the national legislator rarely questions criminal norms coming from Brussels[73], and implements them without much discussion, even exceeding the commitment when those rules concede broad discretion, or when its application is not mandatory[74].

6. The *Third Generation's* Harmonisation and the *Petrification* of Law

As noted earlier, initially framework decisions aimed at the harmonisation of penalties, establishing the obligation for Member States to provide for "effective, proportionate and dissuasive" criminal sanctions that make extradition possible. However, progressively a new generation of norms emerged –the last provisions under the third pillar,

67 *Kert/ Lehner* (fn. 28), pp. 187-188.
68 See above, sections III and IV. 2.
69 *Sotis*, (fn. 25), pp. 164-165.
70 *K. Nuotio*, On the significance of criminal justice for a 'Europe United in diversity', in K. Nuotio, (Ed). *Europa in search of 'meaning and purpose'*, 2004, p. 200.
71 Thus the EU Criminal Law is set as the new *Natural Law*, generating consensus among politicians and citizens. See, *Nieto Martín* (fn. 25), p. 230.
72 *Sotis*, (fn. 25), pp. 168-169.
73 That use to happen in Spain. A paradigmatic case was the adoption of the Spanish Criminal Code reform by LO 11/2003, to tackle illegal immigration. The European origin of the reform allowed the Spanish Government to elude the parliamentary discussion about criminalisation details. See *M. Cancio Meliá,* Derecho penal europeo: ¿ahora, nunca o mañana?, en M. Bajo Fernández/S. Bacigalupo Saggese/C. Gómez-Jara Díez, (Coords.), Constitución Europea y derecho penal económico: mesas redondas de Derecho y Economía, 2006, pp. 271-272.
74 *Muñoz de Morales Romero* (fn. 36) pp. 256-261.

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and the most under Lisbon Treaty-[75] requiring higher criminal sanctions and defining the punitive threshold, even pointing out the minimum-maximum penalty –a maximum of at least a certain number of years- or even foreseeing aggravating circumstances[76]. This is the case in many criminal norms as, inter alia, the Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011, on preventing and combating trafficking in human beings and protecting its victims[77], the Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011, on combating sexual abuse and sexual exploitation of children and child pornography[78]; and the Council Framework Decision 2002/475/JHA of 13 June 2002, on combating terrorism[79]. Naturally, this left little room for Member States to manoeuvre in developing their internal criminal policies, and paradoxically has not succeed at ap-

75 See *V. Mitsilegas*, The third wave of third pillar law: which direction for EU criminal justice? European Law Review, Vol. 34, No. 4, 2009. pp. 523-524.

76 See *Nieto Martín* (fn. 25), p. 232; *Muñoz de Morales Romero* (fn. 36) pp. 149-150; *Miettinen,* (fn. 12), p. 138 et seq. See the criticism about the utility of establishing criminal sanctions in *J. Öberg*,, Do we really need criminal sanctions for the enforcement of EU law?, *New Journal of European Criminal Law* (NJECL), 2014, pp. 381-382.

77 Article 4: "1. Member States shall take the necessary measures to ensure that an offence referred to in Article 2 is punishable by a maximum penalty of at least five years of imprisonment. 2. Member States shall take the necessary measures to ensure that an offence referred to in Article 2 is punishable by a maximum penalty of at least 10 years of imprisonment where that offence (…); 3. Member States shall take the necessary measures to ensure that the fact that an offence referred to in Article 2 was committed by public officials in the performance of their duties is regarded as an aggravating circumstance.".

78 Article 4: "1. Member States shall take the necessary measures to ensure that the intentional conduct referred to in paragraphs 2 to 7 is punishable. 2. Causing or recruiting a child to participate in pornographic performances, or profiting from or otherwise exploiting a child for such purposes shall be punishable by a maximum term of imprisonment of at least 5 years if the child has not reached the age of sexual consent and of at least 2 years of imprisonment if the child is over that age. 3. Coercing or forcing a child to participate in pornographic performances, or threatening a child for such purposes shall be punishable by a maximum term of imprisonment of at least 8 years if the child has not reached the age of sexual consent, and of at least 5 years of imprisonment if the child is over that age. 4. Knowingly attending pornographic performances involving the participation of a child shall be punishable by a maximum term of imprisonment of at least 2 years if the child has not reached the age of sexual consent, and of at least 1 year of imprisonment if the child is over that age. 5. Causing or recruiting a child to participate in child prostitution, or profiting from or otherwise exploiting a child for such purposes shall be punishable by a maximum term of imprisonment of at least 8 years if the child has not reached the age of sexual consent, and of at least 5 years of imprisonment if the child is over that age. 6. Coercing or forcing a child into child prostitution, or threatening a child for such purposes shall be punishable by a maximum term of imprisonment of at least 10 years if the child has not reached the age of sexual consent, and of at least 5 years of imprisonment if the child is over that age. 7. Engaging in sexual activities with a child, where recourse is made to child prostitution shall be punishable by a maximum term of imprisonment of at least 5 years if the child has not reached the age of sexual consent, and of at least 2 years of imprisonment if the child is over that age.".

79 Article 5.3: "Each Member State shall take the necessary measures to ensure that offences listed in Article 2 are punishable by custodial sentences, with a maximum sentence of not less than fifteen years for the offence referred to in Article 2 (2)(a), and for the offences listed in Article 2 (2)(b) a maximum sentence of not less than eight years. In so far as the offence re-

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proximating national criminal penalties since it has not been able to remove the differences between domestic criminal systems[80].

In addition, this has another effect: the petrification of the part of the criminal law that has been subject to harmonisation. Because of the EU law's primacy principle, Member States have the obligation to establish specific incriminations –minimum rules as established in art. 83 TFEU[81]- in their internal criminal system that may not be revoked until another EU provision allows for it[82]. Thus, harmonisation creates a one-way criminal law, preventing the national legislature from reconsidering their criminalisation options, at least, in regard to the decriminalisation or lowering of penalties.

7. Overcriminalisation and harsher Imprisonment Terms

European legislation on substantive criminal law is continuously directed towards an increase of repression, expanding the criminalisation of new behaviours and, especially, increasing penalties[83]. This criminalisation trend is not usually directed to cover legislative gaps, but to deal with behaviours that are already criminalised at the national level. This causes what Sotis calls "secondary over-criminalisation", which has a special relevance in the case of imprisonment sentences[84]. In addition, the current trend in many Member States, such as Spain, tends to go beyond the real EU harmonisation obligations, widening the frame of criminalisation and increasing penalties above what is required by the EU norm.

Due to all of this, the criminal systems within the Member States are becoming more authoritarian and conservative. Considering the Spanish case, the legislator often tends to rely on the EU provisions and increases penalties much more than required. We can see this, for instance, on the offence of human trafficking. Article 3.2 of the Council Framework Decision 2002/629/JHA of 9 July, on combating trafficking in human beings, established a maximum penalty of imprisonment of not less than eight years in aggravated cases. However, the Spanish legislature, when transposing this norm by LO

ferred to in Article 2 (2)(a) refers only to the act in Article 1 (1)(i), the maximum sentence shall not be less than eight years".

80 See, *P. Caeiro./M. A. Lemos,* Content and impact of approximation: the case of terrorist offences (Council Framework Decisions 2002 and 2008), in F. Galli/A. Weyemberg, (eds). Approximation of substantive Criminal Law in the EU. A way forward, 2013, pp. 165-166. Galli also point out that this gives rise to a "geométrie variable". *Galli*, (fn. 28), p. 202; *Kert/Lehner* (fn. 28), pp. 175-177, 181; *F. Höpfel,* Función y límites de la armonización en el Derecho penal de los Estados miembros de la CE, in L. Arroyo Zapatero/A. Nieto Martín (dirs.), El Derecho penal de la Unión Europea: situación actual y perspectivas de futuro, 2007, pp. 138-141. *Demetrio Crespo*, (fn. 12), p. 51.

81 There is an academic discussion about the meaning and effect of the "minimum rules of criminalisation". See *Asp*, (fn. 9) p. 110 et seq.; *Klip*, (fn. 5), pp. 162-163.

82 *Sotis*, (fn. 25), pp. 168-169; *Muñoz de Morales Romero* (fn. 36) pp. 137-138; *Nilsson*, (fn. 9), pp. 174-175; *Miettinen,* (fn. 12), p. 124.

83 See, MECP, ZIS 2009, p. 715; *Miettinen,* (fn. 12), p. 146; *Galli*, (fn. 28), pp. 202 et seq., 214-215; *Satzger*, (fn. 2), p. 144.

84 *Sotis*, (fn. 25), p. 164.

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5/2010 of 22 June, created a new article 177bis establishing an imprisonment penalty of at least five to eight years, reaching much higher imprisonment sanctions in aggravated cases. Another example could be the recent Spanish Criminal Law on combating terrorism (LO 2/2015 of March 30th). There was no doubt about the compliance of the Spanish counter-terrorism legislation -which already was very rigorous due to the tragic past national experiences- with the EU *acquis*. Nevertheless, the Spanish legislator, invoking international obligations and the need to comply with the Framework Decisions 2002/475/JHA and 2008/919/JHA, increased the penalties, even establishing a new life-imprisonment sentence with parole (article 273 bis 1) for the most serious terrorist crimes. This was of course not triggered by the EU framework decisions[85]. However, it can be said that the EU criminal norms tend to act as some sort of invitation to increase criminalisation and penalties at national level[86].

V. A Few Remarks: the Irrationality of EU Criminal Policy

Firstly, the European Union's criminal policy presents, like it does in many Member States, serious problems or defects. Some of them, as we have already noted, are phenomena that are also reflected at the national level. For instance, the extension of the *Law and Order* approach, expansion of criminal law, legislative improvisation, or the continuous raising of penalties. Others, however, are due to the special characteristics of European law, or due to the institutional organisation of the EU, such as the subordination of substantive criminal law to police and judicial cooperation, and the 'technocratisation' and the 'petrification' of criminal standards. The latter phenomena are not unique to criminal matters, but its observance is of particular concern, given the special importance of this branch of the law and its strong ties with the traditions and social values prevailing in each society.

The particular form of construction of EU criminal law, explained above, is particularly relevant to understanding the current configuration and European criminal policy problems. Indeed, its development has been marked by a struggle of powers between the Council and the Commission, whose judicial outcome ended with the 2005 and 2007 ECJ judgments. The Commission and the European Parliament have always defended the need of 'communitisation' of criminal law, while Member States, through the Council, have been reluctant to it and have sought a more intergovernmental approach. The fact that the focus has always been around competence issues has resulted in other equally important issues, such as criminal law guarantees and principles, not being addressed sufficiently. On the other hand, EU effectiveness criteria when legislating in criminal matters, to strengthen the principle of mutual trust and improve judicial and police cooperation in criminal matters, has not contributed greatly to the formation of a more rational criminal law.

85 About the Spanish last reform (LO 2/2015), see *N. Corral Maraver*, Las penas largas de prisión en España. Evolución histórica y político-criminal, 2015, pp. 252-258.

86 *De la Mata Barranco* (fn. 62), p. 231.

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All of this has led to the criminal policy scene that we have today. We must not, however, succumb to discouragement but set up mechanisms that can help to reduce or eliminate the current EU criminal policy rationality defects. It would certainly be a good start to pay more attention to legislative procedures within the European Union.

VI. A Step Forward: Focusing on the EU Criminal Law-making Process

The study of the so-called 'science of law-making' is a field that, despite its importance, has not traditionally received enough interest from academics, focused mainly on the field of judicial law application[87]. Due to its significant institutional, jurisdictional and procedural complexity, EU law still lacks in-depth research in this area[88]. However, studies on harmonisation or unification of criminal law have proliferated lately. There is undoubtedly a great interest in these studies but from my point of view, we must rather focus more on the criminal law-making process within European Institutions. Thus, law-making processes are determinants regarding the quality of legislation derived from them.

In the last few years, the interest in the study of criminal law-making processes as a way of improving law quality has increased. This is the result of the realisation of the diffusion of the *Law and Order* approach throughout the Western world, resulting in increasingly rigorous criminal systems. The fact that nowadays any kind of social conflict tends to be addressed to a significant extent by criminal law can be taken into account as well[89]. Some studies on the Spanish legislative procedure in criminal matters show that the decision-making process is unsatisfactory in terms of rationality and efficiency[90]. Expertise or mandatory technical reports are not usually taken into consideration in the drafting of criminal bills[91]; lobbyists have a significant influence[92]; and budgetary reports and subsequent evaluation of the norms are practically non-existent or very limited. Therefore, criminal policy is becoming short-term oriented and of low

87 Inter alia, *Becerra Muñoz*, (fn. 66), pp. 32, 58 et seq.; J. *L. Díez Ripollés*, La racionalidad de las leyes penales, 2013, pp. 67-74; *G. Marcilla Córdoba*, Racionalidad legislativa: crisis de la ley y nueva ciencia de la legislación, 2005, pp. 178 et seq.

88 Despite the fact that this concern for the quality of legislation seems to exist within the EU Institutions, as manifested in some communications and reports, e.g. Communication from the European Commission "*European Governance: Better lawmaking*" (COM(2002) 275 final). See also, *Becerra Muñoz*, (fn. 66), pp. 54-55. There are of course, a few exceptions. See, especially, *Muñoz de Morales Romero* (fn. 36).

89 J. *L. Díez Ripollés*, A Diagnosis and Some Remedies for Spanish Criminal Justice Policy, EuCLR, 2012, p. 130; *Díez Ripollés* (fn. 87), p. 14; *Díez Ripollés (fn. 37),* pp. 79-82, 93-96; *Becerra Muñoz*, (fn. 66), pp. 68-69.

90 The same or similar shortcomings and inconsistences can be found in other Member States. See, e.g., *C. Grandi,* The 'Qualities' of Criminal Law – Connected to National and European Law-making Procedures, EuCLR, 2011, p. 287 et seq.

91 *Díez Ripollés,* EuCLR, 2012, pp. 127-128.

92 *Díez Ripollés,* EuCLR, 2012, pp. 125-126.

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quality, deeply influenced by partisan interests, and without proper technical studies and planning[93].

Such studies should be required in the field of EU criminal law-making. The EU criminal law-making process, which after the Lisbon Treaty is the co-decision procedure, shows some advantages over the processes existing at the national level. Thus, for example, it allows for the broader participation of experts and civil society through various methods and consultations, such as Green and White Papers, Impact Assessment -required from the Interinstitutional Agreement on better law-making (2003/C 321/01)- or on-line consultations. There are also various statistics to measure crime within the EU[94] but as Pérez Cepeda points out, they do not have impact on the EU criminal law-maker[95]. Nevertheless, social participation in the development of European criminal law is very scarce and the way of carrying out consultations or the selection of experts can be questioned.

Some of these problems have been addressed by the European Commission in its recent Communication, "Better regulation for better results. An EU agenda", of 19 May 2015[96]. In this instrument, the Commission aims to improve the law-making quality and promote the extensive use of impact assessments, both in the pre- and post-legislative phases. As a consequence, an interinstitutional agreement on better Law-Making between European Commission, European Parliament and Council was set on 13 April 2016[97]. In this document, the three institutions are committed to the enforcement of the programme included in the previous communication. It remains to be seen whether these good intentions are effectively implemented in the forthcoming legis-

93 See, inter alia, *Díez Ripollés* (fn. 87), pp. 20-58; *Becerra Muñoz*, (fn. 66), pp. 68 et seq.; *J. Vogel*, Evaluación de los sistemas penales. Contribución a una política criminal racional", in J. L. Díez Ripollés /A. M, Prieto del Pino/ S. Soto Navarro, La política legislativa penal en occidente. Una perspectiva comparada, 2005, pp. 265 et seq. On the subject of post-legislative evaluation, see *S. Soto Navarro*, La protección penal de los bienes colectivos en la sociedad moderna, 2003, pp. 163-165; *S. Rodríguez Fernández*, La ¿evaluación? de las normas penales en España", Revista Electrónica de Ciencia Penal y Criminología *(RECPC*), 2013, pp. 17-20.

94 E.g. Eurostat, European Sourcebook of Crime and Criminal Justice Statistics and International Crime Victims Survey. See *A. Pérez Cepeda*, Estadísticas sobre criminalidad en la Unión Europea, in A. Nieto Martín/ M. Muñoz De Morales Romero/ J. Becerra Muñoz, Hacia una evaluación de las leyes penales, 2016, pp. 52 et seq.

95 *Pérez Cepeda* (fn. 94), pp. 63-64.

96 There are already been former deficits recognitions in EU law-making and attempts to improve its quality. See, for instance, the Communication from the Commission of 25 July 2001 "European governance – A white paper" (COM(2001) 428 final), the European Parliament, Council and Commission Interinstitutional Agreement on better law-making (2003/C 321/01) and the Stockholm Programme 2010-2014. Specifically in the field of criminal law, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law of 2011.

97 See, Interinstitutional Agreement on Better Law-Making, of 13 April 2016. http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2016:123:FULL&from=EN.

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lative initiatives[98]. In my view, there is little room for optimism since the draft Directive on combating terrorism of December, 2015[99], recently approved as Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism, , didnot include the required impact assessment, invoking urgency reasons.

There are also shortcomings in the EU law-making process, which are usually seen as repetitions of their equivalents happening at the national level[100]. Indeed, EU law-making procedures have also been shown to be highly conditioned by lobbies with different interests, such as victims' associations or economic groups and corporations. Nor can the political pressures on the EU or the international obligations coming from different bodies (e.g., UN, Council of Europe) be overlooked. We should also consider other deficits in the EU's own law-making process, such as the widespread tendency to end the legislative process at the first reading, reaching agreements in informal meetings, and subtracting the discussion of official channels or lack of political profile when developing criminal policy[101]. In the area of legislative assessment, the EU does not appear to have provided true and appropriate mechanisms for evaluation of criminal legislation[102], beyond the infringement proceedings against Member States whose effectiveness as an instrument of legislative evaluation is very limited. The Commission infringement report[103] is focused on the implementation of EU norms by Member States, but pays no attention to their compatibility with criminal law principles, fundamental rights and rationality criteria.

Occasionally the European Commission has proceeded to the evaluation of some criminal norms, such as, the Council Framework Decision 2002/629/JHA of July 19th, on combating trafficking in human beings, and the Council Framework Decision 2003/568/JHA of July 22nd 2003, on combating corruption in the private sector, although these assessments are weak or incomplete[104]. Assessments have also been made

98 There is still scant practical application due to the transitional period until the end of 2015 for the initiatives which would be well advanced.

99 See Directive proposal on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism (COM (2015) 625 final), p. 12. Text available in https://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-625-EN-F1-1.PDF.

100 *Nieto Martín* (fn. 25), pp. 229-230; *Grandi,* EuCLR 2011, pp. 287-291.

101 Between 2009 and 2014 almost 85% of proposal for secondary legislation under codecision procedure were adopted at this stage. See *A. Hardacre / E. Akse,* How the EU Institutions work and… How to work with the EU Institutions, 2015, pp. 149-152; *Costa/ Brack*, (fn. 8), pp. 250-251.

102 *Nieto Martín* (fn. 25), pp. 234-235. One of the best academic studies in the Evaluation of EU criminal Law, in *A. Weyembergh/V. Santamaria*, The evaluation of European criminal law. The example of the Framework Decision on combating trafficking in human beings, 2009.

103 2015 and former reports are available in http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/annual-reports/index_en.htm.

104 See, *F. G. Sánchez Lázaro*, Evaluación y Derecho Penal Europeo: sobre el modelo de evaluación de la Comisión Europea, in A. Nieto Martín/ M. Muñoz De Morales Romero/ J. Becerra Muñoz, Hacia una evaluación de las leyes penales, 2016, pp. 247-254; *Miettinen,* (fn. 12), pp. 229 et seq.

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at the European level by other Member States, the so-called "peer review", as well as some evaluations by expert groups, normally requested by the Institutions themselves[105]. However, such assessments are scarce and uneven. The afore-mentioned Commission 2015 Communication "Better regulations for better results", aims to promote the post-legislative evaluation of all EU standards. Thus, the Commission takes into consideration the several academic criticisms. It also aims to create a Regulatory Scrutiny Board, composed of independent experts selected on the basis of their expertise. As said above, it is to be seen whether all this materializes into a real and continuous evaluation of European criminal law, overcoming the current limitations.

Many of the above-mentioned shortcomings of EU criminal policy could result from a lack of rationality in the EU criminal decision-making process. The consequences are serious, given all the foreseen defects, (many of them are imports of national practices), affecting Member States when they must adapt their criminal laws in accordance with European guidelines. Therefore, if European criminal policy is flawed it will cause a contagion effect in the 28 Member States, potentially affecting a population of over 500 million people.

All these rationality shortcomings often end up causing an over-criminalisation and homogenisation of the diverse national criminal legal systems in terms of greater punitive rigor, increasingly moving away from fundamental principles. It will be necessary to act pre-emptively in the criminal law-making process to minimise such effects, applying rationality criteria to guide the European criminal legislator to develop a more rational criminal policy and flawless criminal norms[106].

VII. A Proposal: The Necessary Inclusion of Rational Legislative Criteria in the Development of European Criminal Law-making

1. Rational Decision-making Theory and Criminal Law

Therefore, we must move to legislation theory. There have been efforts to contribute to a more rational approach to criminal law. Such attempts have been made from different perspectives, sometimes appealing to widely accepted concepts, such as legal interest, or theories of punishment[107]. On other occasions, some criminal principles have been used as an instrument to achieve a rational criminal policy; that is the case of the proportionality principle[108], or the meta-concept of legality, which englobes the

105 *M. Muñoz De Morales Romero*, Evaluación Legislativa y Racionalidad en el Ámbito Penal Europeo (y Nacional)», *Revista General de Derecho Penal (RGDP),* 2010, pp. 39-45; *Mitsilegas* (fn. 4), pp. 50-52; *Weyembergh/ Santamaria*, (fn. 102).

106 In a similar vein , see, *M. Kubiciel*, Einheitliches Europäisches Strafrecht und vergleichende Darstellung seiner Grundslagen, Juristische Zeitung, N° 2, 2015, p. 69.

107 *Díez Ripollés*, (fn. 87), pp. 116-120.

108 *J. A. Lascuraín Sánchez,* Cuándo penar, cuánto penar, in J. A. Lascuraín Sánchez/ M. A. Rusconi (dirs.) El principio de proporcionalidad penal, 2014, p. 327.

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main fundamental contents of substantive criminal law[109]. Also, in the EU sphere can be found many academic studies that intend to contribute to the rationality of criminal law only through some of those principles, namely, principle of proportionality, subsidiarity or legality. The intense focus on these principles might be due to the constitutional dimension of some of them, or their explicit recognition in the primary EU Legislation.

Despite the large importance of such works, none of them have the potential to support all the rationality contents needed for a European criminal law that provides all possible guarantees. The constitutional dimension of some of them is not enough, as we can find another equally important criminal law principles that do not have a clear constitutional basis, neither in the Member States nor in the EU. Such approach tends to force principles and focus only in the application of law, having a *de lege lata* view that is not accurate for the law-making process[110].

The EU Institutions tend to pay more attention to the quality of law-making that the national governments, but they also have a fragmentary approach[111].

For these reasons, we argue in favour of a new and more comprehensive approach, focusing on the creation of the laws. We need a complex rationality model, in accordance to the rational decision-making theory, to identify and articulate the practical application of fundamental requirements of a guarantee-based EU criminal law.

To this end, it would be interesting to study the adaptation of Díez Ripollés´ proposal for a criminal law rationality model to the specificities of the EU law-making process[112].

2. A Model of Law Rationality for Criminal Law

Law rationality can have several different meanings. Professor Díez Ripollés considers that a legislative decision can be said to be rational, as far as it takes into account all or most relevant facts of the social and juridical situation it intends to impact upon[113]. He proposes a multi-level law rationality model[114] that aims to be an ambitious instrument to provide law rationality in the creation of law. This model is composed of five levels[115]. Thus, a criminal provision can be said to be irrational when it does not comply with any of such levels of rationality. We will briefly explain them:

109 *Díez Ripollés*, (fn. 87), pp. 134-135.
110 *Díez Ripollés*, (fn. 87), pp. 100-106.
111 See "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Towards an EU Criminal Policy" of 2011, "European Parliament resolution of 22 May 2012 on an EU approach to criminal law" and Communication "Better regulation for better results. An EU agenda" of 19 May 2015.
112 See *Díez Ripollés* (fn. 87), p. 67 et seq.
113 *Díez Ripollés*, (fn. 87), pp. 86-87.
114 Based in the proposal of Law philosopher Manuel Atienza. See *M. Atienza*, Contribución a una teoría de la legislación, 1997, pp. 27-40.
115 *Díez Ripollés*, (fn. 87), pp. 109-162.

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a) The ethic rationality. This level is composed of historic and cultural motivated principles that are part of a common system of beliefs in a society. Each field of Law has its own basic principles, including the criminal law. Every criminal law standard should respect these common beliefs. The ethic rationality contents three sublevels:
- Legal interests protection principles: Harm principle, principle of significant offence, principle of public interest, principle of accordance with reality.
- Principles for criminal responsibility: Principle of *lex certa*, principle of offence-based liability, principle of attribution of responsibility, principle of guilt, principle of *jurisdiction*.
- Sanctioning principles: Principle of humanity, teleological principle based on theories of punishment, principle of proportionality, public *ius puniendi*.

b. The teleological rationality. This level must identify the legal interest protected, its range of protection, the scope of criminal responsibility, and the choice of sanctions. In this level there are public and private interests that can have contradictions[116].

c. The pragmatic rationality. It tries to make compatible the goals of the teleological rationality and the real possibilities to make them possible through criminal law standards. Thus, this level deals with the effectiveness and efficacy of Law. A public open debate must be encouraged to conciliate all possible public and private interests.

d. The systematic rationality. Every legal order must be coherent. This level aims to assure that the new criminal law are consistent with the previous justice system as a whole.

e. The linguistic rationality. Being noted that every law must be understandable to recipients and jurists, this level aims to ensure the clarity and intelligibility of criminal provisions.

All the levels must be taken into account through all the law-making phases, namely the pre-legislative stage (detection of social dysfunction and drafting of law), the legislative and the evaluation stage. In the law-making process these rationalities can clash or disagree. Thus, the criterion of efficiency, which focuses on cost-benefit approach, must act as a transversal dimension to all rationalities, dealing with conflicts within and between rationalities[117]. Only this way to reach a balance between levels would be possible.

To solve potential discrepancies between rationalities, for instance, when the pragmatic goals can clash teleological rationality, the democratic criterion will act as guideline for solving discrepancies. As Díez Ripollés points out, the implementation of the

116 In the ethic rationality most of principles are widely accepted, but in this level diverse or even opposed interests can coexist and the majority criterion can be useful for solving the disagreements. *Díez Ripollés*, (fn. 87), p. 94.

117 *Díez Ripollés*, (fn. 87), p. 97.

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democratic criterion may entail some risks, due to the influence of populist trends in current Criminal policy. But despite this, it is the only legitimate criterion to follow in any democratic society[118].

3. A Model of Criminal Law Rationality in the European Union

As it has been noted, the above-mentioned model of law rationality was conceived for a domestic sphere. However, due to its characteristics it can easily be adapted into a transnational space.

If we focus on the ethical principles we can see that many of them are widely accepted all through Western countries, and can easily be used without major changes in the EU system. Some of them are even been recognised in EU Treaties or Rights Charts.

Nevertheless, other principles may require adaptation, and some others may not be suitable as guidelines for the EU law-making process. However, that does not invalidate the model as a whole.

The other rationality levels can also be used as instruments in the law-making process within the EU. Teleological rationality could also be implemented within el EU through some reform of law-making proceedings, such as more public and transparent debates, better impact assessment and evaluation report, among others. The effectiveness and efficacy criteria are well-known in the European area[119]. Some principles normally raised in the EU criminal law, such as the principle of subsidiarity, may have an important role within the pragmatic rationality. The linguistic and systematic levels are equally important, due to the problems derived from multilingual law versions and multilevel implementation of criminal provisions.

From my point of view, it would be of great relevance to incorporate such law rationality model into the EU law-making sphere. To this effect the work made by the European Criminal Policy Initiative in the Manifesto on European Criminal Policy is of a high value. This group defends a criminal policy based in legal principles, some of them similar to those proposed by Díez Ripollés in his model. They also contribute to the formulation of common principles, according to the specificities of national systems, while being respectful with their constitutional traditions.

This task unfortunately exceeds the frame and possibilities of the current study, but it may be developed in forthcoming academic contributions. This research framework can contribute to the creation of a more rational EU criminal policy and to the development of a theoretic rationality frame. In this way, overcoming the current fragmentary approach to substantive criminal law in the EU can become a reality.

118 *Díez Ripollés*, (fn. 87), pp. 165, 183 y ss.
119 See above, section IV.

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