Category Model for the Harmonisation of Criminal Sanctions in Europe

European Criminal Policy Initiative

Helmut Satzger, Frank Zimmermann, Laura Neumann, with the collaboration of Benedikt Linder and Sarah Pohlmann (project management team Munich, Germany); Thomas Elholm (Denmark); Dan Frände, Dan Helenius (Finland); Jocelyne Leblois-Happe (France); Maria Kaiâfa-Gbandi, Nikolaos Bitzilekis, Elisavet Symeonidou-Kastanidou (Greece); Luigi Foffani, Francesco Viganò (Italy); Ingeborg Zerbes, Helmut Fuchs (Austria); Slavomir Steinborn (Poland); Pedro Caeiro (Portugal); Sergiu Bogdan (Romania); Petter Asp, Annika Suominen (Sweden); Adán Nieto-Martín (Spain)

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Preamble

The present concept for the harmonisation of criminal sanctions in the European Union was developed following the tradition of a liberal, rule of law-based criminal law and in the consciousness of the challenges of the globalisation and specifically Europeanisation of this specific field of law. It is therefore a continuation of the Manifests developed previously by the European Criminal Policy Initiative.
European Criminal Policy Initiative (ECPI) concerning European criminal policy.¹

Criminal sanctions are traditionally referred to as the “sharpest blade” of a state wishing to react to misconduct. They are tightly connected to national cultural and social roots. Penalties shall only be imposed in case of socially unacceptable attacks on the most important protected interests. Not only the threat of penalisation as such, but above all custodial sentences as the classic reaction to criminal offences are therefore always subsidiary to other solutions. The presumption is as follows: *in dubio pro libertate*. Punishment can’t solve social and societal issues; political and global social efforts are required for this.

It is imperative to preserve the liberal and auto-coherent sanctioning systems of the Member States within the supranational structure of the EU. During the previous harmonisation of criminal law based on Art. 83 TFEU, special “minimum maximum penalties” were determined, which, generally speaking, led to an increase in punitivity in the Member States and affected the proportionality of national penal concepts. The reason for this is the absolute, arithmetic concept the EU has of the term “minimum rules concerning the definition of […] sanctions”.

The following concept should be thought of as an alternative, which on the one hand guarantees the protection of proportionality and coherence, without on the other hand neglecting the necessity of legal harmonisation. This is in particular what forms the basis for judicial cooperation in Europe in accordance with the principle of mutual recognition. The point of departure, familiar to all EU Member States, is the gradation of criminal sanctions pursuant to their severity. If these national grades of severity were made use of in the future, the advantage would be of a double nature: The EU legislator would be put in a position to develop a coherent sanctioning system tiered only by the degree of severity with regard to the offences being harmonised. Secondly, the Member States could retain their own, auto-coherent sanctioning systems.

1. Objective and Function of the Guidelines

The objective of the present project is to present guidelines for a harmonisation of the European system of sanctions which shall equip the European legislator with alternative possibilities of harmonisation and therefore contribute to a stronger systematisation of the European requirements concerning criminal law.

Given the little convincing and ultimately mostly ineffective previous alignment concerning consequences of criminal misconduct (cf. pp. 711 et seq.), a comprehensive legal comparison of the sanctioning system of twelve European Member States (Austria, Denmark, Finland, France, Germany, Greece, Italy, Poland, Portugal, Romania, Spain, Sweden)\(^2\) was conducted, which serves as the basis for the development of the present model for harmonisation of criminal punishments (so-called category model). In comparison to previous requirements, this model is characterised by its improved ability to counterbalance the often conflicting interests of the EU and the Member States in the field of sanctions and legal consequences of criminal misconduct.

Ultimately, the aim is to present the EU legislator with a path he must follow in order to establish a consistent and sustainable sanctioning system in accordance with the extent permissible in criminal harmonisation. The indispensable, but at the same time sufficient requirements the model entails concerning acts of harmonisation are implementable into national systems without intervening disproportionately and without violating the national particularities the sanctioning systems possess. Hence, the model follows the spirit of the general barriers to exercise EU competences, namely the principles of subsidiarity and proportionality. It is therefore able to counterbalance in the best possible way the interest the EU has in harmonisation on the one hand and the interest the Member States have in maintaining the coherence of their national systems on the other hand.

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\(^2\) In the following, the two-digit country codes of ISO 3166 ALPHA-2 are used for purpose of simplicity: AT (Austria), DE (Germany), DK (Denmark), ES (Spain), FI (Finland), FR (France), GR (Greece), IT (Italy), PL (Poland), PT (Portugal), RO (Romania), SE (Sweden).
2. **Point of Departure: Insufficient Previous Attempts at Harmonisation**

As the previous “instruments” of harmonisation of criminal misconduct – the minimum triad consisting of “effective, proportionate and deterrent” sanctioning and punishment and the minimum maximum penalties – have proven to have little effect, and additional, relatively more interventionary efforts of harmonisation such as the introduction of minimum penalties or precise ranges of penalties seem politically unattainable, a new attempt at harmonisation of the EU sanctioning system is in great need.

2.1. **Stipulation of the Minimum Triad is Insufficient**

It may indeed, regarding some fields of crime, be sufficient that the EU restricts itself to commit the Member States to provide “effective, proportionate and deterrent” sanctions (“minimum triad”). In these cases, also the model to be presented in these guidelines wishes to retain this manner of approach. But as far as most offences, and above all the most severe of them, are concerned, the EU will want to deploy additional requirements, as observable in the previous attempts at harmonisation.

2.2. **Other, More Extensive Measures of Harmonisation Insufficient Until Now**

The comparative analysis conducted as part of the present project evidenced that previous measures of harmonisation (imposition of minimum maximum penalties and minimum penalties) are either not effective (minimum maximum penalties) or not feasible (minimum penalties and precise EU ranges of penalties).

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4 Cf. i.e. the attempt at introducing minimum minimum penalties in Art. 8 of the Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the fight against fraud to the Union's financial interests by means of criminal law, COM(2012) 363 final, which was largely resisted in the Council (see p. 2 of Council document 9836/13 of 28.5.2013 as well as Council document 10729/13 of 10.6.2013) as well as in the Parliament (see amendment 27 of the legislative resolution of 29.4.2014, P7_TA-PROV(2014)0427), which was therefore eliminated.
2.2.1. Minimum Maximum Penalties Fail to Reach Their Target

So far, the most detailed provisions of the EU, which concern consequences of criminal misconduct, stipulate so-called minimum maximum penalties which obligate the Member States not to fall below a certain maximum penalty. A less precise stipulation concerns the so-called “minimum maximum penalty ranges”, which do not prescribe a specific value in relation to the maximum penalty, but instead grant them a scope within which the maximum penalty may be imposed. Both of these instruments only impose a minimum; they do not exclude more severe provisions. Thus, in the end, a “minimum maximum penalty range” essentially is nothing but a minimum maximum penalty, as it only obligates the Member States to impose not less than the bottom limit of the given range as a maximum penalty.

a) Poor Efficiency Concerning the Harmonisation of the Maximum Limit

Minimum harmonisation concerning only the maximum penalty has proven to be of poor efficiency. In most countries, the maximum penalty is much less relevant for the individual punishment than the minimum threshold. Particularly in legal systems with a very large range of penalties, of which the top half is practically never applied, a harmonisation of the maximum limit has nearly no impact on the specific penalty imposed in an individual case. This is increasingly the case when the EU does not even specify a certain maximum limit but instead limits its requirements to a minimum or even a minimum penalty range.

b) Problems Resulting from Discrepancies in the Different Member States’ Punishment Standards

Furthermore, the legal comparison upon which this research is based revealed a large discrepancy between Member States as far as the statutory

5 In Council document 9141/02 of 27.5.2002, four levels of minimum maximum penalties ranging from 1 to 10 years were stipulated in order to guarantee “horizontal coherence”.

6 Cf. also Caeiro, in: FS-Höpfel, 645, 662.
maximum penalty is concerned.\textsuperscript{7} It is, for example, limited to 12 years in Finland, whereas for example in France and Italy, maximum penalties of up to 30 years are possible. Evidently, for this reason alone, the impact of a minimum maximum penalty can vary greatly from one Member State to another. For example, the implementation of a minimum maximum penalty of 15 years (as in the Framework Decision and in the Directive concerning the combat of terrorism)\textsuperscript{8} leads to significant problems in Finland,\textsuperscript{9} whereas the same stipulation only corresponds to half of the statutorily permitted maximum penalty in France and Italy.

c) The System of Previous Requirements and Tendency for Future Guidelines

By stipulating minimum maximum penalties, the EU intends to reflect the different degrees of severity inherent to the criminal behaviours the Member States have to penalise. These efforts for a greater systematisation of the sanctioning requirements peaked in the Council document of 27.5.2002\textsuperscript{10}, which stated that one of four minimum maximum penalty ranges needed to be chosen in every act of harmonisation to come, depending on the severity of the crime. Setting aside the logical and constructive weaknesses of such minimum maximum penalty ranges, this approach demonstrates the large interest the EU legislator has in determining on Union law level the severity of the offences to be harmonised, and this in a coherent manner.

The 26 acts enacted so far (Agreements, Framework Decisions and Directives)\textsuperscript{11} concerning requirements of criminal sanctions include eight different minimum maximum penalties (MMPs) – 1, 2, 3, 4, 5, 8, 10 and 15 years – and three minimum maximum penalty ranges, 1-3, 2-5 and 5-10 years. But the use of these penalties and penalty ranges varies greatly. Whereas the highest and lowest MMP were only used once each (1 year stipulated in the Directive “child abuse”\textsuperscript{12} and 15 years in the Framework

\begin{itemize}
\item \textsuperscript{7} Cf. also pp. 520 et seqq. as well as pp. 649 et seqq.
\item \textsuperscript{8} Cf. Art. 5.3 Framework Decision 2002/475/JI and Art. 15.3 Directive 2017/541/EU.
\item \textsuperscript{9} Cf. pp. 215 et seq.; for similar issues regarding the implementation in Sweden of the original minimum maximum penalty of 12 years stipulated by Art. 1.3 Framework Decision 2002/946/JI, cf. pp. 483 et seqq.; see also ZIS 2009, 707, 715.
\item \textsuperscript{10} Council document 9141/02 of 27.5.2002.
\item \textsuperscript{11} Cf. pp. 577 et seqq.
\item \textsuperscript{12} Cf. Art. 3.2 Directive 2011/93/EU.
\end{itemize}
Decision and Directive “terrorism”\(^{13}\), the MMP of 8 years\(^{14}\) and the range of 1-3 years were each already used five times and the MMP of 5 years was used four times in total. Notably, the threshold ranges were not used in the last years;\(^{15}\) the most recent acts dominantly apply the MMPs of 2, 3, 5 and 8 years.

In the case of legal acts being substituted, it is interesting to observe to what extent the sanctioning requirements vary in replacing acts. For example, the MMP of 8 years was maintained in the Directive “counterfeiting” for the fraudulent falsification and counterfeit of money (Art. 3.1 a of the Framework Decision and the Directive\(^{16}\)) and complemented merely by a MMP of 5 years concerning the fraudulent issuing (Art. 3.1 b), import, export, transport, receiving, or obtaining of counterfeit currency (Art. 3.1 c); Art. 6 of the Framework Decision merely stipulated the “minimum triad”. The MMPs of 8 and 15 years were also imported from the Framework Decision “terrorism” to the Directive “terrorism”. However, the originally intended minimum maximum penalty ranges in the Framework Decisions “sexual exploitation of children”\(^{17}\) and “cybercrime”\(^{18}\) were all replaced by specific MMPs. The ranges of 1-3 and 2-5 years in the Cybercrime Framework Decision changed to become MMPs of 2, 3 and 5 years in the following Directive on the same topic\(^{19}\); the ranges of 1-3 and 5-10 years in the Framework Decision “sexual exploitation of children” became MMPs of 5 and 10 years in the Directive “child abuse”. The MMP of 8 years stipulated in the Framework Decision “human trafficking”\(^{20}\) for qualified forms of human trafficking (Art. 3.2) was raised to 10 years in the Directive (Art. 4.2)\(^{21}\); additionally, the “minimum triad” stipulated for offences in Art. 3.1 of the Framework Decision and the possibility of extradition were replaced by a MMP of 5 years. This evolution demonstrates the double tendency of the EU legislator: the requirements become more specific and the penalties become more severe.

\(^{13}\) Cf. fn. 8.

\(^{14}\) The duplicate usage in the acts concerning counterfeiting and terrorism was only counted once.

\(^{15}\) The latest application of the 1-3-year range is to be found in the Framework Directive “racism” of the Council of 28.11.2008 (2008/913/JI).


\(^{17}\) Framework Decision 2004/68/JI.

\(^{18}\) Framework Decision 2005/222/JI.

\(^{19}\) Directive 2013/40/EU.

\(^{20}\) Framework Decision 2002/629/JI.

\(^{21}\) Directive 2011/36/EU.
Lack of Regard to National Particularities

The legal comparison also made apparent that not only do the maximum sanctions partly differ greatly among the Member States, but also the MMPs stipulated by the EU do not find an equivalent numerical implementation in the national legal systems. Most Member States basically apply a system of gradation of maximum punishments, but the grades used differ greatly at times. As a result, not all of the “maximum penalty” values referred to by European MMPs are familiar to all European Member States, thus resulting in implementational problems.

In its previous legal instruments, the EU has obliged Member States to impose penalty scales with a maximum of at least 1, 2, 3, 4, 5, 8, 10 and 15 years. All of the twelve compared countries (Austria, Denmark, Finland, France, Germany, Greece, Italy, Poland, Portugal, Romania, Spain and Sweden) are familiar with a maximum sanction of 1 and 2 years, the maxima of 3 and 10 years exist in nearly all of the countries. The maximum sanction of 5 years exist in eleven of the examined Member States. The maximum of 15 years exists in nine Member States except for Denmark, Finland and Sweden. A maximum sanction of 8 years is meanwhile only applied in eight of the compared countries (unknown to Austria, France, Germany and Romania); a maximum penalty limit of 12 years exists in seven countries (unknown to Austria, Finland, France, Germany and Greece). The maximum sanction of 4 years is unknown to more than half of the compared countries (familiar only to Denmark, Italy, Portugal, Spain and Sweden).

This lack of consideration of the national legal systems up to this point leads to a situation in which a Member State which does not provide a maximum penalty equivalent in value to the specific European maximum

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23 Cf. the table on p. 613.
24 In ES no penalty limit ends at 10 years; eleven states (with the exception of PT) also have lifetime imprisonment as a maximum penalty, cf. pp. 528 et seq.
25 The maximum penalty of 5 years is known to all Member States except for Denmark; the same applies to the six-month limit, which is unknown only in Poland and Romania.
26 The four-year limit exists only in DK, ES, IT, FI, PT and SE; equally frequent is a maximum of 20 years which is common in AT, ES, FR, GR, PT and RO.
penalty, has to either introduce this maximum penalty$^{27}$ or “evade” this step by applying the next higher maximum penalty known to the national system, just in order to adhere to the minimum European requirements.$^{28}$ While the creation of new sanctioning ranges is not unproblematic in view of the coherence of the national system in question, the implementation of European requirements by the means of such an “evasion strategy” bears many consequences:

- Firstly, the level of sanction might exceed the level intended by the EU, thus resulting in the MMP leading – unintendedly – to more severe penalties and to a greater punitivity in general.
- Secondly, the levels of severity intended by the EU are unwantedly levelled by the implementation if, for example, a Member State is unfamiliar with a maximum sanction of 8 years and therefore MMPs of 8 and 10 years are implemented by means of the same national penalty range.
- Thirdly, this will reduce the signal effect and weight of EU criminal reinforcements which do not lead to any change in the legal situation in the Member States.$^{29}$
- Fourthly, the use of MMPs, stipulated in view of the harmonisation of national systems, might lead to discrepancies between the different Member States if, for example, a MMP of 4 years is implemented in more than half of the countries by a maximum penalty of 5 years, but by a maximum penalty of 4 years in all the other countries.

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$^{27}$ Cf. the coherence problems in GR caused by the introduction of a maximum penalty of 8 years for certain harmonised offences, which is usually not common for crimes (pp. 289 et seqq.).

$^{28}$ Cf. also pp. 649 et seqq.

$^{29}$ For example, the minimum maximum penalty of 8 years in Art. 3.2 of the Framework Decision Human Trafficking was implemented by § 232.3 StGB (German Criminal Code), which threatened a prison sentence of 1 year to 10 years (cf. BT-Drs. 15/4048, p. 12); the increase in the minimum maximum penalty for certain forms of qualified human trafficking from 8 to 10 years by Art. 4.2 of the Directive on Trafficking in Human Beings did not, however, lead to a tightening of the maximum penalty in German criminal law; rather, the minimum penalty was even reduced from 1 year to 6 months (see § 232.2 and 3 StGB since 2016).
2.2.2. Specific EU Penalty Ranges are Not Implementable into National Systems or Jeopardise National Coherence

The large discrepancies between the Member States concerning penalisation demonstrate that more specific European stipulations, let alone an obligation imposed by the EU to introduce specific penalty ranges, are utopian, in any case at present.\footnote{Study on Minimum Sanctions in the EU Member States, p. 187 (fn. 22).} It is possible to differentiate between obstacles of technical, legal and legal policy nature.

a) Technical Impossibility of More Far-Reaching Stipulations

To begin with, more far-reaching stipulations (especially minimum penalties and specific penalty ranges) are problematic from a technical point of view.

The limitation of judicial discretion, as resulting from an introduction of minimum penalties, is either completely unknown or at least totally contrary to the legal system of many countries (Denmark and France). In the same manner, the occasional European attempts to introduce “minimum minimum penalties” have failed on the whole.\footnote{Cf. Art. 5.4 a of the Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA, COM/2013/042 final; but no longer included in Art. 5 of the Directive, ABl. 2014 L 151, 1.} The legal comparison undertaken as part of the present project led to the result that the stipulation of specific thresholds by the EU would lead to coherence problems in some Member States, which could even result in these states’ necessity to trigger the emergency provision of Art. 83.3 TFEU.

For the same reason, the stipulation of specific EU penalty ranges does currently not seem feasible:

If a minimum penalty, strictly speaking, is unknown to a Member State, a statutory bottom-line limitation of the penalty range by means of an increased minimum level is inconceivable. Granting judges in these countries the discretion to reduce the penalty to a proportionate level, depending on the specific case in question, is precisely the reason why they possess this power.

However, even in those countries which are generally familiar with the penalty ranges, there are similar differences regarding minimum penalties
as there are with regard to maximum penalties (see also pp. 715 et seq.). This means that only in very rare cases a specific penalty range (pre-defined lower and upper limit) exists; only three of the eleven countries examined have comparable penalty ranges. The specification of binding EU penal ranges thus inevitably entails the danger of disrupting the national system.

b) Unsuitability of More Specific Requirements for a Stronger Harmonisation

More specific stipulations are not suitable for providing a stronger harmonisation, and this for the sole reason that they do not take into account important particularities of national legal systems.

- Minimum penalties impair the judicial discretion and are therefore considered problematic with regard to the principle of separation of powers.\(^\text{32}\)
- Severe minimum penalties without possibility of mitigation are considered problematic with regard to the principle of proportionality.\(^\text{33}\)

Furthermore, severe differences exist between the national systems concerning the possibility to adapt a penalty affected by European stipulations referring to minimum penalties or specific penalty ranges, or to influence the means of its enforcement.

First of all, there are large differences concerning the possibility of a reduction of the statutorily prescribed penalty by application of mitigating factors.

- Greece: By application of mitigating factors, the statutory penalty can be reduced by up to its moiety.
- Italy: A sweeping discount of one third is granted in case of choice of an accelerated criminal procedure.\(^\text{34}\)

Additionally, the legal comparison revealed some big differences between the Member States concerning the possibility to suspend prison sentences and to transform them into monetary fines, thus resulting in the possibility that nominally identically imposed sentences can be of different severity \textit{de facto}. In PL, for example, only prison sentences of up to a maximum of

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\(^{32}\) Cf. Study on Minimum Sanctions in the EU Member States, p. 188 (fn. 22).

\(^{33}\) Cf. Study on Minimum Sanctions in the EU Member States, p. 188 (fn. 22).

\(^{34}\) Cf. pp. 318 et seq.
1 year may be suspended on probation, whereas this limit is 2 years in Austria, Finland, Germany and Italy, and 3 years in Romania. In France, Portugal and Spain, on the other hand, sentences of up to 5 years of imprisonment can still be suspended, and in Greece even the conversion of a prison sentence into a fine can be considered up to this level.

Big discrepancies also exist in the field of provisions concerning early release, resulting in a potentially strong divergence of the effective time of incarceration depending on the Member State. These major discrepancies also impact the specific penitentiary system. This field, which cannot be dealt with at length in this project, deserves to be made subject of an additional paper for the reason alone that it complements the present paper and has great practical importance (see the Aranyosi case).

As custodial sentencing is the classic reaction to criminal offences, the different conditions in the Member States should be analysed in view of a complete presentation of the sanctioning systems in the EU.

c) Problems Resulting from the Principle of Subsidiarity

Furthermore, stricter stipulations by the EU are not necessary, given the principle of subsidiarity, if the desired objective – primarily in consideration of the aforementioned problems – can be achieved just as well by milder, less intensively intervening means. One of these means is the model proposed in the present paper.

d) Problems in View of Criminal Policy

Stricter stipulations are problematic also from a point of view of legal policy as their effect on the different national systems would vary, as has al-
already been demonstrated. They are therefore inherently linked to the same flaws the commonly used minimum maximum penalties present.

Notably in the Nordic countries, the commonly (at least mostly) “liberal” legal policy would probably be thwarted by specific EU penalty ranges, thus undermining basic decisions of the (democratically legitimated) national criminal legislator.41

This is particularly problematic when such European requirements lead to problems of coherence even outside the harmonised area and the approval of the requirements is therefore affected on the whole.

From the legal comparison emerged notably the consisting fear of many Member States that the European stipulations could lead to a greater punitivity in the national legal systems.42

2.3. The New Approach: Reinforced Respect of National Basic Decisions Concerning Sanctioning Systems as Manifestation of “National Identity”

The point of departure for the new approach is the assertion, based upon the results of the legal comparison, that all Member States generally have a coherent overall sanctioning system, based on the basic decisions on criminal policy of the national legislator. The principle that the EU is not allowed to ride roughshod over this coherence when stipulating its requirements, but, on the contrary, needs to respect and comply with these national discrepancies, originates from the obligation to respect the national identities of Member States, as stated in Art. 4.2 TEU43, and is additionally implicitly postulated in the emergency provision of Art. 83.3 TFEU.

The novelty which the presently proposed model envisages is that the EU can benefit from the coherence the individual systems present, and this also in the field of harmonisation of sanctions. As just demonstrated, even the most specific EU stipulations concerning penalties do not find real expression of the effect of harmonisation, as the Member States present too many differences in sentencing law.

Hence, European stipulations which concentrate only on a section of the entirety of sentencing law – i.e. the field of the harmonised elements of the offence – cannot lead to a harmonisation of the penalties as a whole,

41 Cf. pp. 483 et seqq.
42 Cf. p. 534.
43 On the basis of this principle the EU must in any case respect structural state decisions of the Member States (Puttler, in: Callies/Ruffert, 5th edition 2016, Art. 4 TEU para. 15).
but will on the contrary nearly inevitably lead to greater differences. Bearing these circumstances in mind, harmonisation of sanctioning law can only thrive if the EU accepts that the national systems of sentencing are each a basically coherent and conclusive system. Provided that the EU manages to create an appropriately coherent European system of consequences of criminal misconduct by means of appropriate prioritisation and systematisation of the harmonised elements of the offence, a system combining both levels can be made fruitful in order to then create effective European stipulations on harmonisation.

The background of any harmonisation of the sanctions for criminal misconduct is the desire of the EU legislator to demonstrate the gravity of the harmonised offences specifically in relation to other offences that have already been harmonised. By means of the provisions which the legislator stipulates in regard to the legal consequences of these offences, he has the possibility to establish an EU systemacity concerning the legal consequences, englobing the – constantly growing – harmonised fields of criminality and comparable to national systems. This can be achieved by rating the harmonised offences by severity and putting them into relation.

But for this purpose, it is not necessary to define exactly the types of sanctions and the levels of penalty. Apart from this, the EU even could not take this step due to the limitation of its competences to “minimum rules”, and the stipulations would furthermore lead to the already demonstrated problems of coherence. Quite on the contrary, the legal comparison made apparent that in every Member State’s legal system, the sanction linked to a specific offence reflects the severity of the offence. Inversely, it must also be true that a certain assessment of severity can be linked to a specific sanction. In other words, if the EU manages to mould its assessment of severity of a specific offence into a stipulation which every Member State can implement into national law by means of its own system, the respective EU offence is consequently penalised comparably in every Member State, in relation to the specific national legal system. Therefore, a system of relative comparability replaces the hitherto used stipulation of absolute figures which – as has been demonstrated – was neither expedient nor unproblematic. Essentially, it is the direct respect of national particularities which gives effect to this new system of harmonisation.

This new approach differs from previous measures of harmonisation as it is characterised by a remarkably higher emphasis on the basic structure of the European Union, as stipulated in primary law. According to the concept of the treaties, this emphasis is marked by a mesh of the European stipulations and the Member States’ legal systems, the relationship between EU and Member States being based on loyalty and mutual consider-
ation as required by the principle of loyal cooperation (cf. Art. 4.3 TEU). In the field of criminal law, this meshing of different levels is expressed extremely clearly as the jurisdiction to enforce is still a Member State competence – due to the lack of a European prosecution system\textsuperscript{44} –, irrespective of the fact that the jurisdiction to prescribe (Art. 83.1 and 2 TFEU) is an EU competence. Not least due to this circumstance the practical efficacy of European stipulations is subject to implementability by Member States. These circumstances in mind, the new harmonisation model as presented in this paper meets the needs far better than the alternatively conceivable creation of EU-autonomous stipulations in the sense of a supranational criminal law structure (cf. below p. 742).

The approach of relative comparability also leads to a clear distribution of responsibilities between the EU and the Member States. While the European legislator autonomously defines the severity of criminal behaviour and therefore guarantees that the offences harmonised by the EU are coordinated appropriately, the specific systemisation of sanctions remains a Member State competence. Hereby not only the practical applicability of the sanctioning rules is ensured, but also the mesh of penalisation, prosecution and execution of sanctions, as present in all legal systems, is guaranteed.\textsuperscript{45}

In order to avoid coherence problems, national particularities in these fields must be taken into account; this does not pose a problem if the Member States are entrusted the choice of the specific sanction. Simultaneously, the new approach can also be the catalyst of a future supranational criminal law.\textsuperscript{46}

3. \textit{Explanation of the New “Category Model”}

The following paragraphs deal with the specific realisation of the new approach.

\textsuperscript{44} The EPPO will use a system of “shared competence”, cf. Art. 24 Council Regulation “EPPO”.

\textsuperscript{45} The legal comparison revealed that most Member States are familiar with an overlap of these three fields, particularly as procedural settlement measures and mitigational circumstances often mesh; examples are the sweeping discount of 30\% which is granted in case of choice of an accelerated criminal procedure in Italy (cf. p. 324) and the Greek stipulation granting early release after 2/5 of the time of incarceration (cf. p. 270).

\textsuperscript{46} Cf. p. 741.
The principle innovation of the new model is the EU legislator’s task to stipulate requirements concerning the severity of the criminal misconduct to be sanctioned instead of the previously used minimum maximum penalties, which proved insufficient and not very effective (cf. supra). The Member States implement these EU stipulations by choosing a national sanction amongst the comparable severity category, as found in the national legal system. The EU legislator, by means of an abstract, EU-level sanctioning system, therefore only obligates the Member States to penalise a specific misconduct, esteemed worthy of penalisation, with a sanction of specific severity, but leaves the specific implementation to the Member States alone.

The leading idea is that every European legal system is familiar with a prioritisation and graduation of criminal sanctions due to their severity. The Member States are therefore basically also able to categorise the sanctions which already exist in their national systems in such a manner that they can be assigned to a specific, EU-stipulated number of severity categories (referred to as categories from here on).\textsuperscript{47} In future, this categorisation shall be the link between the EU requirements and the national sanctioning system, of which the European legislator can make use for future acts of harmonisation, by abstractly communicating a category to the Member States and therefore the severity of the sanction required. This system achieves that the specific sanctions chosen by the Member States are equally severe in relation to the sanctions available globally, thus constituting an important milestone in view of the objective of a comparably severe sanctioning system in all Member States.

The category model, following the principle of harmonisation, is of a two-level nature, the core concept being that, firstly, the EU legislator stipulates categories which – according to the EU – express the (also – in relation to other harmonised offences – relative) severity of the criminal misconduct (1). The Member States then implement this abstract stipulation of severity by choosing a specific sanction amongst their respective legal system which corresponds in severity to the European requirement (2). “Category 1” shall group the mildest (criminal) sanctions in the sense of

\textsuperscript{47} A Danish proposal of 2001 lead in a similar direction; it was not successful, see Council Document 12531/01, 5.10. 2001, p. 40; see also Caeiro/Lemos in: Galli/Weyemberg (ed.), Approximation of substantive criminal law, 2013, pp. 164 et seq.
Art. 83 TFEU and “Category 5” the most severe sanctions of the national legal system. This setup guarantees to a particular degree that on the one hand the coherence of the national systems is ensured and that on the other hand an actual effect of harmonisation occurs, because the EU requirement – unlike the minimum maximum sanctions used so far – takes the same effect in all Member States.

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<th>Harmonised Crime A</th>
<th>Classification by EU depending on severity (EU perspective)</th>
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<tr>
<td>(e.g. type of child pornography)</td>
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<tr>
<th>Harmonised Crime B</th>
<th>Category 3</th>
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<td>(e.g. type of EU fraud)</td>
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<tr>
<th>Harmonised Crime C</th>
<th>Category 4</th>
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<td>(e.g. human trafficking causing death)</td>
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**Classification by EU depending on severity (EU perspective)**

**Accessory Penalties / Consequences**

**Implementation**

| Implementation of the stipulations of the directive into a criminal offence |
| Selection of the national sanction corresponding to the EU category |

| “Filling” of categories by MS in accordance with their national sanction system |

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**3.2. Imposition of Categories of Severity by the EU**

In general, the European legislator has the task to evaluate the offences which are in his responsibility according to their severity. Within the new model, he fulfills this task by obligating the Member States to provide a sanction of a specific severity (“category”) for the harmonised offences. The decision about the concrete category must be based primarily on the guilt content of the incriminated conduct and must not be made with a view to enabling effective and promising procedural coercive measures. Altogether, the EU legislator is called upon to exercise caution (“in dubio pro libertate”) with respect to the principle of subsidiarity when weighting the offence severity (classification into one of the categories).

By requiring the European legislator to evaluate the gravity of future criminal acts, the category model also contributes to the establishment of a systematic and dogmatic approach to European sanctions law.
3.2.1. Category Requirements Functioning as Minimum Requirements

The category model, in its current version 1.0, has to necessarily respect the competence limitation as stipulated in Art. 83 TFEU, and therefore is to be limited, at the current stage, to the extent that the category requirements imposed by the EU are to be seen as minimum rules. The Member States can therefore basically also impose and uphold sanctions of a more severe category.

3.2.2. The Number of EU Categories

A prerequisite of the category model is that the EU legislator determines a specific number of possible categories, by means of which he can adequately grade his legislative acts depending on severity. Hereby, the legislator needs to find a compromise between on the one hand a limitation to few categories, which are in general easier to implement, but might be opposed to a necessary refined gradation and not flexible enough, and on the other hand the stipulation of many categories, a technique which can prove to be problematic, especially in legal systems with few ranges of sentences, and which might eliminate the differences between categories.

A pilot run (feasibility analysis) performed in different Member States substantiated that a division of the national criminal law systems into five categories seems feasible at least from the Member States’ point of view. But also from the EU’s point of view, a number of five severity categories should leave ample and sufficient flexibility and leeway to meet the Union’s sanctioning requirements.

We propose to use Roman numerals for the designation of the categories (numeration from I to V), as this has the advantage of creating striking, handy names, which are known to other legal systems in a similar form (although not quite in the same context). In accordance with general linguistic usage, category I shall designate the relatively mildest and category V shall designate the relatively most severe sanctions.

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48 This term expresses the ECPI’s view that the proposed model is at the current stage the best balance between the EU’s and Member States’ interests, but at the same time contains potential for a future development, cf. below pp. 740 et seqq.

49 See also pp. 41 et seq.

Suggested Wording:
Category I encompasses those sanctions which are imposed for mild crime, category II those for mild to intermediate crime, category III those for intermediate crime, category IV those for intermediate to severe crime and category V those for the most severe crime.

3.2.3. The Scope of Categorisation – the Term “Sanction”

The Category Model requires a content-related limitation, which is in the Member States’ own interest: The Member States need to be able to recognise which national sanctions they have to categorise. But a common basis is also required in view of the principle of relative comparability functioning as the underlay of the model, based upon which the severity of a sanction needs to be assessed in relation to the existing criminal sanctions in general. In order to define the scope of application, the sanctions to be categorised by the Member States need to be selected first. If this step were to be skipped, the danger of disruption of comparability would arise, as some Member States might for example include their administrative criminal law (thus resulting in a bottom-line fray), whereas others wouldn’t. Therefore, the scope of application of the category model needs to be determined.

Limitation is ultimately also necessary due to competence-related reasons. If the task of categorisation is understood by the EU legislator as “minimum rule concerning the definition of sanctions” (cf. 3.1.), his competence can therefore not reach further than granted by Art. 83 TFEU. The definition of the term “sanction” is fundamental for the definition of the scope of categorisation, as the model is based upon it and it is presupposed by Art. 83 TFEU. Thus, the category model is able to capture at least such national sanctions which are englobed by the competence granted in Art. 83 TFEU. However, this does not exclude a narrower definition of the term “sanction” for the purpose of this model.

The term needs to be defined autonomously (“sanction in the European sense”) and on the basis of the legal comparison and general considerations of criminal sanctioning law. As such, it is possible to describe the “classic core” of the term as the infliction of a relevant harm (“scourge”), i.e. a forfeit of money or liberty, in combination with a disapproving state reaction in the form of a judgment of social faultiness (“Unwerturteil”). Therefore, at least such national sanctions should be considered as sanction which express such a judgment of social faultiness and at least also aim at
restricting – be it factually or potentially – the freedom of movement (i.e. custodial sentencing). Likewise, those Member State sanctions which aim at restricting economical liberty of the affected people should be considered as sanction if they are of such severity that they express a judgment of social faultiness.

Suggested Wording:

(1) **Sanctions in the sense of the proposed model are all Member State sanctions which express a judgment of social faultiness and lead to a factual or potential restriction of individual freedom of movement.**

(2) **Likewise, such sanctions enter into the definition in the sense of the model that aim at restricting the economical liberty of the person affected in such a manner that they express a judgment of social faultiness comparable to that in (1).**

### 3.2.4. Regulatory Density of the Category Model

First of all, the category model requires the European legislator to stipulate requirements concerning the severity of the sanctions to be envisaged. He therefore circumscribes those requirements with a category of severity, as seen above. It is doubtful whether a more detailed content-related circumscription by the EU is possible, which could stipulate *how* the national system needs to be categorised. The comprehensive legal analysis did reveal criteria which exist in multiple and even all legal systems and from which an assertion concerning severity is deductible and which could therefore be used for circumscribing the categories to be brought about on the national level. But it is not necessary that the EU stipulates *how* the criteria are to be graded in the national legal system. On the contrary, the principle of subsidiarity requires the EU to ensure only *that* the criteria are taken into account throughout the national categorisation process. The EU only equips the Member States with a “manual”; the filling of the (principally “empty”) EU categories is a Member State competence.

The EU may especially impose the consideration of such criteria which exist in all systems and which are particularly relevant for the classification as a category of severity (i.e. type of penalty and level of penalty). However, the use of “soft” categories which are not inherent to all Member States’ systems alike could be left to the discretion of the Member States, such as the exclusion of statutory possibility of suspension of sentence (as in Member States which do not have minimum penalties).
a) Criteria Concerning Severity of a Punishment

At least such criteria are suitable for this purpose which characterise the severity of the sanction (or of the offence) in all Member States.\(^{51}\) These are notably:

- **Type of sanction** (monetary penalty or custodial sentence): At least for all severe crimes the sanction generally is custodial sentence.
- **Level of penalty** as stipulated by law (the maximum level in all Member States, also the minimum threshold in Member States with a range in the sense discussed above).
- **Statute of limitation**: In many countries, the periods of limitation increase with the severity of the penalty.\(^{52}\)
- **Conversion** into alternative sanctions: In many countries, these are excluded in the case of severe offences and sanctions.
- **Procedural particularities**:
  - Jurisdictional competences: Particularly severe offences and sanctions can only be judged by collegial courts in many countries.
  - Termination of proceedings: This is excluded for severe offences and sanctions in many countries.
  - Condemnation by punishment order: This is generally only possible in the case of less severe offences.
- **Measures of enforcement**:
  - Suspension of sentence: This is generally not possible concerning severe penalties.
  - Early release on parole: At least in Spain, this is only possible for severe sanctions.\(^{53}\)
  - Possibility of imposing **accessory penalties** and automatically imposed **incidental consequences**: At least some accessory penalties (such as an occupational ban) are linked to the severity of the sanction.

\(^{51}\) Cf. pp. 653 et seqq.
\(^{52}\) I.e. in DE (p. 128), GR (p. 268), PL (p. 357), PT (p. 400), SE (pp. 470 et seq.).
\(^{53}\) Cf. p. 168.
b) Criteria Concerning Existing Thresholds in the Legal System

Criteria concerning thresholds in some legal systems primarily include:

- **Classification as offence or crime**: This is an important threshold in many legal systems.
- **Jurisdictional competence**: A change of jurisdictional competence is an indication for a threshold.
- **The impact of the existence of mitigating or aggravating circumstances**: A shift of range of sentences can be seen as an indication for existing thresholds in the national legal system.

c) Consideration of Statistical Data Resulting from Practical Experience

In general, the status quo of the national legal system should form the basis for the categorisation. But especially if new insights concerning the practical handling of sanctions exist, this *prima facie* classification can be adjusted by taking into account statistical data, when appropriate. If, for example, a given range of sentences does not include a monetary penalty but only a custodial sentence, there is a good argument for assigning this range to a higher category than those also permitting the imposition of a monetary penalty. Of course, if a glance at the statistics points out that, nevertheless, the offences in question are sanctioned primarily with monetary penalties (i.e. as a result of a general possibility of substitution), the assignment of this category to a lower category can be justified. But, indeed, every Member State should be able to assess independently the added value of the consideration of statistical data, for the reason alone that the data situation is most heterogeneous.

d) Suggested Wording

As long as the EU legislator stipulates specific criteria for the categorisation of the Member States’ national sanctioning systems, a facultative and an obligatory provision can be distinguished. A merely facultative consideration is suitable especially for criteria which do not have similar impact in all countries. At the same time, the fact that some Member States are unfamiliar with some criteria does not in general inhibit an obligatory provision. Rather, this imbalance can be ironed out by stipulating that the obligation in question only applies to the extent to which the criterion is fa-
familiar to the Member State (suggested wording: “When categorising, the Member States also take into account the following criteria, as far as suitable to their legal system”).

**Suggested Wording:**

1. The following criteria have to be considered when categorising the national sanctioning systems:
   - The type of sanction,
   - The level of sanction,
   - The possibilities to convert into alternative sanctions,
   - The means of enforcement (suspension of sentence, early release on parole).

2. The following criteria may be considered when categorising the national sanctioning systems:
   - Whether premature conclusion of proceedings, such as cessation, is permitted;
   - The statutorily stipulated period of limitation of prosecution;
   - The jurisdictional competences;
   - The frequency of a specific range of sentences.

...  

3.2.5. **Accessory Penalties and Incidental Consequences**

So far, legal acts of the EU are not limited to stipulations concerning penalties in the strict sense of the term, but often also target accessory penalties and incidental consequences as such. But as the proposed category model has the character of being a substitute system for the European legislation imposed so far, which only concerns penalties in the strict sense of the term (such as the minimum maximum penalties), accessory penalties and incidental consequences generally do not fall within the realm of application.

Thus, the EU legislator may pass such legislation independently of the respective category criteria, also in future.

Apart from that, accessory penalties and incidental consequences may also become important within the category model. First, it is possible that a Member State, when “filling” a category, chooses either a sanction that mandatorily entails such an incidental consequence due to national law, or that the national law allows the imposition of the incidental consequence separately. In this respect, the effect of the incidental consequence can be
used as justification for the specific severity of the sanction (legitimation of the “filling”). Secondly, it is not excluded that – when developing the model further in the future – the EU will impose additional requirements on the Member States which are not related to the severity of the sanction (cf. pp. 740 et seq.). Those requirements could e.g. concern the incidental consequences.

3.3. **Implementation of Category Requirements by Member States**

3.3.1. **Main Features of National Categorisation**

It is a characteristic of the category model that it intends to avoid losses in national identity and coherence on Member State level in the context of further EU criminal law development. Based on the principle of loyal cooperation, Art. 4.3 TEU, it is the responsibility of the thus “strengthened” Member States to categorise the sanctions (in the sense of Art. 83 TFEU) available under their national legal system into five categories considering the coherence of the national sanctioning system. This “filling” of the abstract EU law severity categories with concrete sanctions provided by national law is a basically autonomous decision of every Member State and therefore respects the basic and value-related decisions of every criminal law system.

**Suggested Wording:**

*The Member States autonomously categorise the pre-existing sanctions of their law systems into five categories which – in accordance with the basic decisions and values of the national law systems – express the gradation in severity of the sanctions.*

In realising the categorisation, it is conceivable to categorise all criminal sanctions of the legal system in question in its entirety. This would imply that the Member States have to assign all of the existing penalties of their legal system, in the sense of the above definition, to the categories stipulated by the EU. Such an abstract full-range categorisation, however, is not only very tedious, but also creates virtually unsolvable problems, in partic-

54 For example, it is conceivable that the incidental consequence levels up the sanction in such a manner that a sanction which abstractly and generally is of a category 2 status is equivalent to the category 3 severity due to the combination with an incidental consequence.
ular if a sanction does not abstractly fall into either the category “severe” or “mild sanction”.55

Alternatively, the solution of a mere minimum categorisation is sufficient for the goals of the presently proposed model. For the Member States fulfill their duty of implementation of the European category stipulations into the national system merely by choosing one or multiple specific sanctions, which present the severity intended by the EU. From the category model’s point of view, it is therefore also unproblematic if a Member State limits its implementation of the EU stipulations to a specific field of the sanctions available in its national system and leaves other sanctions out of consideration (particularly accessory penalties and incidental consequences). Meanwhile, even a minimum categorisation requires the Member State in question to first obtain an overview of its sanctioning system in such detail that it is able to justify the allocation of the specific penalty to an EU category. Therefore, minimum and full categorisation consequently only differ in respect to the scope of justification necessary.56

3.3.2. Inclusion of Aggravating and Mitigating Circumstances?

Already previously, the EU legislator stipulated requirements concerning the consideration of aggravating and mitigating circumstances in his acts of harmonisation. Therefore, this aspect should also be taken into account by the new harmonisation model. Following the logic of the proposed model, the Member States’ general mitigating and aggravating circumstances remain applicable. The category model serves primarily as a replacement for the previously stipulated minimum maximum penalties; European provisions concerning aggravation and mitigation of sanctions have always existed beside the stipulations concerning the level of penalty. Moreover, the legal comparison pointed out that aggravation and mitigation basically follow their own rules in every system and are therefore difficult to harmonise. Furthermore, from the EU’s point of view there is no obvious need for such harmonisation.

55 Cf. i.e. the relation between a monetary sentence and a custodial sentence which has been suspended.

56 While the allocation of every conceivable sanction needs to be justified in the case of full categorisation, the justification necessary in the case of minimum categorisation is limited to the level of severity of the specific sanction chosen for the implementation of the category criteria.
Combined Provisions Concerning Aggravating and Mitigating Circumstances

EU acts which, such as hitherto, enumerate aggravating and mitigating circumstances in the Directive of harmonisation would therefore be unproblematically compatible with the new category model, as long as the specific manner of modification of sanction is left to the discretion of the Member States. The “normal” stipulation of an EU category of severity would then only obligate the Member States to impose an according range of sentences; the additional obligation to consider mitigating and aggravating factors would be implemented by the state by means of national law, as was the case until now.

**Suggested Wording:**

The Member States stipulate category IV sanctions for [the specific offences]. They additionally take the necessary measures in order to ensure that the presence of [the specific factors] is /may be taken into account as aggravating or mitigating circumstances.

Thus, in the process of implementation, the national legislator would be granted some discretion, taking into account national custom and criminal tradition (and particularly the national separation of powers). All the same, the objective pursued by the EU legislator (i.e. the consideration of specific sentence-modifying circumstances) would be achieved. Possible solutions are conceivable: the creation of qualified and privileged offences, the stipulation of sentencing rules (abstract or concrete), but also the general consideration of the specific factor throughout the process of sentencing. In the end, from the EU’s point of view, it is irrelevant whether the legislator imposes aggravation or mitigation in an abstract-general way or whether they only occur by the means of practical application by the courts (see below pp. 741 et seq.).

Incorporated Provisions Concerning Aggravating and Mitigating Circumstances

A different technique which is equally compatible with the suggested model would consist in considering mitigating and aggravating factors

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when stipulating the category on EU level. If the EU legislator is of the opinion that a certain circumstance increases the degree of unlawfulness to such an extent (in comparison to other harmonised offences, cf. horizontal coherence supra) that this must be reflected by a higher classification in terms of category, he may do so by requiring the Member States to choose another category (change of category).

**Suggested Wording:**

The Member States stipulate category IV sanctions for [the specific offences]. In presence of [a specific mitigating or aggravating circumstance] they stipulate a category III/V sanction.\(^{58}\)

This approach has the advantage of rendering the category model more “holistic”; it could therefore contribute to the systematisation of European sanction(ing) law. Besides, the national provisions concerning aggravation and mitigation could be made beneficial in the course of the categorisation of the specific national system (aggravation and mitigation resulting in a change of sentencing range and hence indicative for a change of category). But problems could occur if the impact of mitigating and aggravating circumstances withstood a categorisation in some Member States, and therefore effectively counteracted the chosen categories. Moreover, the latter technique would only be implementable if the circumstances modifying the sentence were of such weight that a change in category would seem appropriate. In the case of less severe modifications of unlawfulness, a change of category is not appropriate; then the stipulation of a modification of sentence within the prescribed category would be more expedient.

### 3.3.3. Control of Categorisation by the EU?

The propagated Member States’ “filling discretion” of course cannot be granted without limits. On the contrary, at all times the EU must have the power of control. Two different points of reference for control exist:

First, the national categorisation could be reviewed by the EU “in general”. This would imply the Member States’ obligation to harmonise their sanctioning system *in toto* and to disclose this classification to the EU *ex officio*.

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\(^{58}\) Presently the Member States are already partially required to impose a more or less severe sanction when specific aggravating or mitigating circumstances exist.
Secondly, the European scope of control could be limited to the implementation of a specific EU act (“Act X is sanctioned with category II”). In order to maintain the crucial autonomy of the Member States and to prevent a subversion by means of a control mechanism “through the back door”, plenty of indications suggest a limitation to the necessary degree of control. Hence, only the implementation of the specific EU act into a specific category should be controllable. Nevertheless, in exercising this control power, the global categorisation on the national level becomes significant in an indirect way: the location of a Member State sanction in a specific category can only be verified by the means of a global view of the whole sanctioning system.

Control of the implementation of the specific harmonising Directive is enforceable through the infringement proceedings, Art. 258 TFEU. The European Commission can trigger these proceedings if indications suggest that a Member State incorrectly implemented a stipulated EU category. The concrete implementation can be explained to the Commission as early as at the stage of preliminary proceedings (Art. 258 TFEU, opportunity to submission of observations) by disclosure of the national categorisation of sanctions; hence, the infringement proceedings can be terminated at an early stage. But if the Commission is continuously convinced that an implementational error occurred and if this error is not rectified by the Member State pursuant to the Commission’s solicitation, it can launch CJEU proceedings. It is the CJEU who, in fine, has the competence of verification; the Member State in question has to transparently demonstrate the reasonableness and coherence of its categorisation, the burden of justification is on his side. These proceedings strengthen the duty of justification throughout the national categorisation which the Member State has to fulfill, at the latest when the infringement proceedings are impending. But, of course, it makes sense to the Member States to make sure from the beginning that the categorisation is consistent, and therefore – in the end – transparent for the CJEU.

3.4. Questions of Competence

3.4.1. Competence of “Minimum” Harmonisation

The presently proposed model is based on a conservative interpretation of Art. 83 TFEU, according to which the article only permits minimum harmonisation in relation to sanctioning requirements. The term “minimum rules concerning (in paragraph 2: with regard to) the definition of [...]

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sanctions” therefore implies that the EU legislator is restricted to stipulating a minimum threshold for the penalty to be introduced by the Member States. Hence, it is always possible for Member States to introduce a penalty that is more severe in level or nature. The consequence for the category model is that Member States may nevertheless replace the category chosen by the EU with a sanction of a higher category (category X+Y); the EU’s category stipulation thus only obligates the Member States to choose “at least” category X.

An argument in favour of this interpretation is its accordance with the significant rule of interpretation of primary law, the principle of *effet utile*; it cannot stay unnoticed that Art. 5 TEU declares subsidiarity to be a significant objective of the treaties, as emphasized further by the involvement of the national parliaments, Art. 65 TFEU, and the subsidiarity protocol. A model that leaves a large margin of discretion to Member States – especially on the topic of more severe sanctions – simultaneously grants them more sovereignty concerning the choice of the specific sanction.

However, the category model as drafted so far is based entirely upon the principle of subsidiarity. The Member States’ possibility to fill the categories imposed by the EU with their own sanctions in itself entails the utmost consideration of national identity and of particularities concerning sanctioning. Seen from the view of the EU legislator, a systematisation would be advantageous if it allowed the chosen category to be accurately reflected in the Member States’ legal systems, leading to all Member States choosing exactly those sanctions that are prescribed for the given offence in the EU Directive. On this basis, the EU could create a sanctioning system which is auto-coherent and complete and which would then find an exact equivalent on national level, “filled” with the sanctions available in the national systems. Also from the point of view of legal policy, such an approach would entail multiple advantages, as for example the increasing and – rightly – criticised punitivity. Having said this, the classical interpretation of paragraphs 1 and 2 of Art. 83 TFEU as described above doesn’t manage to attain this aim.

An obvious way out and a route towards giving the EU the possibility to stipulate “more” concerning sanctions would be a modification of the treaties. Unquestionably, the circumscribed objective could be legally attained *de lege ferenda* by such a clarification.

But this route is not the only conceivable one. *De lege lata*, the competence provision of Art. 83 TFEU can be interpreted in a progressive manner, permitting more than just a minimum harmonisation of sanctioning law and therefore functioning as a basis of the category model – subsequently, the EU could already today obligate the Member States to pre-
scribe sanctions which comply exactly with the category imposed by the EU, and to not replace these by sanctions of a higher category.

With regard to the German wording of Art. 83 TFEU (“Mindestvorschriften zur Festlegung von […] Strafen”), the term “minimum rules” (“Mindestvorschriften”) does not necessarily refer to the “sanctions” (“Strafen”), but explicitly to the “definition” of sanctions (“Festlegung von Strafen”). This interpretation is less feasible when regarding the English wording, as the word “concerning” can refer equally to the word “sanctions” and the word “definition” of sanctions. But the unclarity of the English wording is somewhat exceptional, lots of the wordings in other languages follow the German syntax: In the French version, paragraph 1 and 2 are identical, “établir des règles minimales relatives à la définition des infractions pénales et des sanctions”. The reference solely to minimum rules concerning the definition of sanctions is unambiguous in this language. When referring to the Italian (“possono stabilire norme minime relative alla definizione dei reati e delle sanzioni”, Spanish (“podrán establecer normas mínimas relativas a la definición de las infracciones penales y de las sanciones”) or Portugese (“estabelecer regras mínimas relativas à definição das infrações penais e das sanções”) versions, the reference of the minimum rule not to the sanction as such, but (only) to its circumscription becomes unequivocally apparent.

Hence, no wording compels to linking the minimum rules to the sanctions themselves. But this would be proof of the argument to always permit more sanctioning in spite of harmonisation. On the contrary, the wording in many languages permits the conclusion that the definition or circumscription of the sanction in the Directive needs to limit itself to a minimum. This leads to a totally different interpretation of Art. 83 TFEU, especially with regard to the category model: The EU legislator has to limit himself to stipulating rudimentary sanctioning requirements in need of completion; with regard to the category model, he is not allowed to prescribe the details of the sanctions comprised in these categories, but has to let the Member States “fill” the categories according to their national particularities. This interpretation is exactly the fundamental idea behind the presently proposed model. Therefore, this model can de lege lata be seen as a minimum stipulation concerning the definition of sanctions according to Art. 83 TFEU, even without the Member States’ possibility to depart from the stipulations to a higher level.

Moreover, the consideration of an interpretation of effet utile doesn’t contradict this proposal as the subsidiarity – as mentioned above – is not the sole objective of the treaties. The objective – especially in the field of judicial cooperation in criminal law – is rather the creation of a uniform
judicial space that aims at reducing the discrepancies between the Member States. Furthermore, as seen above, the principle of subsidiarity has been taken into account globally in the present category model. In addition, the EU has the objective of maintaining the fundamental freedoms and fundamental rights and is bound to the principle of proportionality – in particular concerning penalties (Art. 49.3 of the Charter of Fundamental Rights of the European Union: “The severity of penalties must not be disproportionate to the criminal offence.”). All this at least indicates that the introduction of a possibility for one or more Member States to introduce more severe sanctions or sanctions of higher level in comparison with the category stipulated by the EU (which would be classified in a different category) does not comply with the EU’s objectives.

3.4.2. Competence for a “Framework” Directive “General Part”

Another question of competence arises if a repetition of the questions concerning the configuration of the category model in every specific Directive of harmonisation is to be avoided; otherwise, the legal acts of the EU would become unnecessarily long and complex. It is rather advisable to regulate the prerequisites and details of the category model in a kind of “framework” Directive that is applicable to all subsequent specific acts of harmonisation and follows the character of a “General Part”, a concept familiar to national criminal law (in German: “Allgemeiner Teil”).

The first prerequisite is that the EU has the competence for such a “framework” Directive. This should be unproblematic as the extraction of the general provisions of the category model and their fusion into a Directive is not more than a consolidation of the common elements. If Art. 83 TFEU allows to include this type of provisions in every area-specific Directive, which it unproblematically does, a “framework” Directive with no other ambition than a technical simplification must be able to be based on the same legal basis.

Meanwhile, Art. 83 only permits “Directives”, but not Regulations. Doubts could therefore arise if at least parts of the framework which establish the category model do not grant a (substantial) leeway concerning the implementation into national law. But this does not obstruct the choice of Directive as act of choice (and therefore of Art. 83 TFEU as legal basis), because a general need of implementation exists – at any rate in combination with the future specific Directive – and therefore also the framework provisions are far from being “complete” and definitely need further ascertainament.
Furthermore, following virtually consensual opinion in doctrine, no harm is done if stipulations of a Directive present a regulatory density comparable to that of a Regulation (cf. i.e. the Directive concerning summer-time arrangements).

4. Perspectives

4.1. Further Development of the Category Model

The presently described category model outlines the main features of a new approach which is open to dynamic development and constant consolidation. The following perspectives aim at providing an outlook concerning feasible advancements of this “version 1.0”.

4.1.1. Elaboration of EU Categories by the Means of Supplementary Criteria

It seems conceivable and reasonable to start by increasing the category requirements given by the EU. In particular, an introduction of specific characteristics which sanctions of a specific category should fulfill seems feasible. The criteria described above (p. 729) concerning the severity of a penalty could be used. For example, the EU could stipulate that Member States are no longer allowed to suspend sanctions of a specific or multiple categories (such as sanctions of category IV and V).

In order to create compatibility between such a stipulation and legal systems which are unfamiliar with the criterion in question or in which it cannot be regulated by the legislator, the wording as a “presumptive paradigm” seems apt (see pp. 730 et seq.).

Suggested Wording:

Category IV includes sanctions which are imposed for intermediate and severe crime and which are regularly no longer subject to suspension.

Alternatively, a flexibility clause would be possible which grants the Member States the possibility to diverge from the European severity stipulation

60 Directive 2000/84/EG.
in exceptional cases if the stipulation led to serious problems concerning the coherence of the national sanctioning system. A similar clause already exists in the Framework Decision concerning people smuggling.\footnote{61}

4.1.2. Addressee and Perspective of the Categorisation

As in every Directive, the Member States are the addressees of the Category Model. Therefore, all state organs excercing state power are in charge of categorisation; the national separation of powers is irrelevant to the EU.

Naturally, primarily the legislator is the addressee of the mission of categorisation, as he is in charge of the creation of the specific national provision. If the European legislator imposes supplementary requirements, the obligation of implementation into national law concerns the Member State as a whole. This is specifically relevant in the field of sanctioning law as the delimitation is different for the abstract stipulation of the sentencing provision and the specific sentencing in every Member State and depends on the national arrangement of the separation of powers between legislative and judicial power. The EU does not want to and also does not have to intervene here.

As a result, a European sanctioning requirement is already sufficiently implemented if the desired outcome is achieved in cooperation of the different state powers; a statutory stipulation is not imperatively necessary. A good example is that of the exclusion of sentence suspension. It is irrelevant whether a Member State changes a statutory provision in order to exclude suspension in the specific case, or whether other mechanisms ensure that the judiciary power does not impose suspension of sentence. In fine, it is of course at the discretion of the EU whether it prescribes “effects” or limits itself to demand theoretical requirements (such as penalisation of a specific conduct as such).

Traditionally, the verification of implementation of an EU stipulation is limited to the statutory provisions. This results from the fact that the legislator, who is obligated to implement into national law, is deprived of the possibility to regulate the practical handling. But sentencing law is of a special nature as many Member States recognise a big margin of discretion

\footnote{61 Cf. Art. 1.4 of the Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (2002/946/JI); the minimum maximum penalty of 8 years is lowered to 6 years “if imperative to preserve the coherence of the national penalty system”.}
of the courts, thus resulting in some aspects being withdrawn from the legislator’s sphere of influence. As an example, in legal systems which are generally not familiar with increased minimum penalties, the possibility to suspend a sentence cannot be excluded by law; such a provision would run counter to these systems. Nevertheless, in view of the goal to be achieved, there would be no problem if the Member State saw to it by other means that no suspension of sentences is imposed in practice. An argument in favour of this is that the judiciary as state power is also bound to the European stipulations and can therefore be obligated to achieve the given goal. If the desired outcome can be achieved differently, the EU legislator’s aspiration will be fulfilled independently of a compelling stipulation.

In any case, this approach takes into account the different manners of separation of powers in the Member States. Also, the courts as “institutions” of the Member States are required to implement the Directives within their national reach of competence; therefore, no “loss of attachment” is to be expected.

4.2. The Category Model as a Contribution to the Approximation of the Different Member States’ Systems

Besides, the category model is able to encourage an approximation of the Member States’ systems. It seems feasible that the Member States exchange views concerning the categorisation of specific sanctions or that they are inspired by the implementation of the EU stipulations by other countries. This could lead to a bottom-up approximation of the legal systems, totally independently from European stipulations.

Another feasible approach would be that the EU uses those stipulations which are seen as particularly successful in some legal systems as model stipulations in the future. Seen from this angle, the categorisation by Member States can be a catalyst for extensive and detailed future European provisions.

4.3. The Category Model as a Catalyst for a Supranational Criminal Law System

Ultimately, the category model is an interesting and promising type of regime in terms of legal policy as it can serve as the point of departure for the development of a coherent supranational sanctioning system.
Presupposing that the EU primary law will include provisions for a supranational criminal law, including criminal sanctions, the category model can become the basis of a supranational sanctioning system: For the EU can also assign the violations concerning sanctions to the existing categories. However – in lack of a two-level legislation – the possibility and necessity of the Member States to “fill” the categories with national sanctions ceases to exist. It is rather the EU itself that develops a supranational catalogue of penalties and other consequences of criminal misconduct and then assigns it to the categories in its own responsibility. The EU can therefore utilise the sanctions used for the “filling” of the categories, and particularly such sanctions which overlap among the Member States. But the stipulation of supranational penalties is not implemented by means of a Directive, but rather by a Regulation which is directly applicable. As well as this, it seems conceivable that – on the basis of the experience with the category model – the interim step of category stipulation becomes superfluous and the EU migrates to stipulating specific, directly applicable sanctions for the supranational offences.

The advantage of such ongoing development is apparent: Future supranational penalties which will develop little by little and area by area fit in virtually automatically and seamlessly with the universal sanctioning system provided by the category model. Only the “filling” migrates from the Member States to the EU to the extent of the transfer of competences.