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

Petter Asp*

Abstract

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

In this context it is emphasized:

- *that criminal law is a legal area which is closely connected to national culture and values and to national understandings of difficult and complex ethical questions; in fact the coherence of the criminal law systems should be considered as forming part of the national identities of the Member States, thus being protected under article 4(2) of the Treaty on European Union,*
- *that criminal law a legal area which is based on an idea of a coherent system of values – reflected inter alia in the levels of punishment for different offences – and which is therefore sensitive (more sensitive than most other areas of law) to external influence,*
- *that criminal law is a legal area which, by its very nature, is repressive, which (in turn) means that harmonization in this area will – at least in practice – focus on increased repression.*

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

1. Introduction

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

* Professor Petter Asp, Juridiska fakulteten (Faculty of Law), universitet Stockholm.

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

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

The article of professor *Kaiafa-Gbandis* in this issue of EuCLR[2] focuses on the first four of these principles, i. e. the ones which could be seen as well established and fundamental criminal law principles. As explained in professor *Kaiafa-Gbandis'* article these principles are, however, not only internal criminal law principles, but they are also principles which are firmly rooted in EU law and which therefore must be respected by the Union.[3]

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

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

2. The principles of subsidiarity and coherence

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

[1] See *European Criminal Policy Initiative*, A Manifesto on European Criminal Policy, Zeitschrift für Internationale Strafrechtsdogmatik (ZIS) 2009, pp. 707 et seq.

[2] See *M. Kaiafa Gbandi*, The Importance of Core Principles of Substantive Criminal Law for a European Criminal Policy Respecting Fundamental Rights and the Rule of Law, *supra* p. 7

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

[4] *Cf.* e. g. *N. Emiliou*, Taking Subsidiarity Seriously? The View from Britain, European Public Law (EPL) 1995, pp. 590 ff (se also p. 565 footnote 5) and *G. Davis*, Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time, Common Market Law Review, 2006, pp. 72 et seq.

boundary setting norm. If one – in line with mainstream legal theory make a distinction between rules and principles – one might say that the principle of subsidiarity is much of a principle and little of a rule.[5]

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

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

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

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

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

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

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

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

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

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

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

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[5] See e. g. *Hannu Tölonen*, Rules, Principles and Goals: The Interplay Between Law, Morals and Politics, Scandinavian Studies in Law (Sc.St. L.), 1991, pp. 269 et seq.

[6] See, e. g., *K. Lenaerts & P. van Nuffel*, *Constitutional Law of the European Union*, 2nd ed., London 2005, p. 112 (5-042).

[7] See, as regards the elements of the principle of proportionality, e. g. *P. Asp*, Two Notions of Proportionality, in: K. Nuotio (ed.), Festschrift in honour of Raimo Lahti, , 2007, pp. 207 et seq.

[8] See *Emiliou*, EPL 1995,p. 586.

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

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

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

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

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

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

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

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[9] See e. g. *E. Herlin-Karnell*, The Lisbon Treaty. A Critical Analysis of Its Impact on EU Criminal Law, Eucrim 2010, p. 63.

[10] See *European Criminal Policy Initiative*, ZIS 2009, p. 709.

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

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

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

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

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

3. The criminal law context

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

[11] See *European Criminal Policy Initiative*, ZIS 2009, p. 709.

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

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

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

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

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[12] See e. g. *European Criminal Policy Initiative,* ZIS 2009 pp. 708 et seq., *M. Kaiafa-Gbandi,* The Importance of Core Principles of Substantive Criminal Law for a European Criminal Policy Respecting Fundamental Rights and the Rule of Law, *supra* p. 7 and *B. Schünemann*, The Foundations of Transnational Criminal Proceedings, in: B. Schünemann (ed.), Ein Gesamtkonzept für die europäische Strafrechtspflege/A Programme for European Criminal Justice, Köln/Berlin/München, 2006, pp. 346 et seq.

[13] See e. g. *H. Satzger*, Trends und Perspektiven einer europäischen Strafrechtspolitik, in: 4. Europäischer Juristentag, Reden – Referate – Generalberichte – Schlussvortrag, Wien, 2008, pp. 237 et seq.

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

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

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

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

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

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

This focus on minimum rules will inevitably make the cooperation as regards substantive criminal law one-sided and repressive. This is due to the fact that minimum rules cannot logically provide any added value unless the minimum level is set above the existing minimum level within the Union. If the minimum level is set at the existing minimum level of the Union, then the instrument will not add anything. This means that one can take for granted that each and every decision on minimum rules will, in practice, lead to an increased level of repression in some of the Member States of the union.[14] In other words the cooperation focus only on the side of criminal law that concerns the exercise of state power (Criminal law as

Strafbegründungsrecht), not on the equally important side which is concerned with criminal law as a limit to state power (Criminal Law as *Strafbegrenzungsrecht*).[15]

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

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

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

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

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

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

[14] See *P. Asp*, Basic Models of a European Penal Law, Trends und Perspektiven einer europäischen Strafrechtspolitik, in: 4. Europäischer Juristentag, Reden – Referate – Generalberichte – Schlussvortrag, Wien, 2008, pp. 267 et seq.

[15] See *W. Hassemer*, Diskussionsbeitrag, in: U. Sieber (ed.), Europäische Einigung und Europäisches Strafrecht. Beiträge zum Gründungssymposium der Vereinigung für Europäisches Strafrecht e. V. Köln, 1993, pp. 126 et seq.

[16] Cf. *H. Fuchs*, Regulation of Jurisdiction and Substantive Criminal Law, in: B. Schünemann (ed.), Ein Gesamtkonzept für die europäische Strafrechtspflege/A Programme for European Criminal Justice, Köln/Berlin/München, 2006, p. 362.

underlined that the way you look at justifications, as negative elements of an offence or as independent rules providing for exceptions on their own merits, will normally determine the answer to a lot of different dogmatic questions, for example whether the principle of legality applies to justifications and whether mistakes as regards elements relevant for justification should be treated as lack of intent.[17] Thus, also when one deals with dogmatic technicalities of the general part one should be aware that there is an underlying strive for coherence. Since the criminal law cooperation within the EU does not focus on the general part we can, however, leave these complexities aside.

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

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

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

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

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

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

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

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

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

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[16] See *G. Fletcher*, The Nature of Justification, in: S. Shute, J. Gardner and J. Horder (eds.) Action and Value in Criminal Law, Oxford, 1993, pp. 175 et seq.

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

Until now the EU have coped with this problem by merely deciding on minimum maximum penalties,[19] i. e. by focusing on harmonising the upper limit of the penalty scale. This makes the problems less acute, since the upper limits of the penalty scales do not necessarily affect the actual sentencing that much, but the basic problem is still there: measures of harmonisation always runs the risk of disturbing the inner coherence of the criminal law systems of the Member States and they should therefore be taken with discrimination and only when it is really necessary.

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

(1) should be discriminatory and use the tool of harmonization only when this is necessary having regard to the tasks and purpose of the Union, and

(2) when doing so, we should leave some room for adaption of the EU rules to the national context.

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

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

[17] See also *K. Nuotio,* The Emerging European Dimension of Criminal Law, in: P. Asp, C. E. Herlitz and L. Holmqvist (eds.), Flores juris et legum. Festskrift till Nils Jareborg, Uppsala, 2002, pp. 557 et seq.

[18] See e. g. *H. Satzger*, *Internationales und Europäisches Strafrecht*, 4th ed., Baden-Baden, 2010, pp. 122 et seq.

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

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

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

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

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

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

[19] See *European Criminal Policy Initiative*, ZIS 2009, p. 709.

5. Concluding remarks

As indicated in the manifesto, there are of course examples of instruments where the principles of subsidiarity and coherence have not been observed.[21] But there are also, and perhaps more importantly, examples where the principles of subsidiarity and coherence has been respected by the EU-legislator and which shows that it is possible to combine a strive for harmonization with respect for subsidiarity and coherence.

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

In fact, there has also been cases where a special provision has been introduced which explicitly allows for the preservation of the inner coherence of the criminal law systems of the Member States. Thus, article 1 section 4 of the framework decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence,[22] explicitly provides for an exception for the purpose of preserving the inner coherence of the national criminal law systems. After having set a requirement of a minimum maximum penalty of eight years this section allows the Member States to make use of a lower maximum sentence if this is necessary to preserve the coherence of the national penalty system. The wording of this section is as follows:

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

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

[20] See *European Criminal Policy Initiative*, ZIS 2009, pp. 713 et seq.
[21] Council Framework Decision 2002/946/JHA, OJ 2002 L 328 of 5. 12. 2002, p. 1.