The Principle of Proportionality and the Protection of Legal Interests (*Verhältnismäßigkeit und Rechtsgüterschutz*)

Martin Böse*

Abstract

According to the manifesto on European Criminal Policy, the European legislator has to abide by the principle of proportionality and its sub-principles, the protection of legal interests (Rechtsgutslehre) and the ultima ratio principle. A critical appraisal of these principles will reveal that a "materialised" concept of legal ("fundamental") interests cannot be considered a suitable basis for a coherent criminal policy whereas the ultima ratio principle does not go beyond the general requirements of the principle of proportionality. Since absolute limitations cannot be derived from these principles the legitimacy of criminal law should not only depend upon respect for substantial limitations, but derived from procedural requirements in the legislative process as well.

1. Introduction

Whereas the principle of *nullum crimen, nulla poena sine lege* addresses the formal legitimacy of criminal sanctions, this article examines the substantial limitations of criminal law set out in the manifesto on European Criminal Policy: The principle of proportionality – including, in particular, the *ultima ratio* principle and the protection of legal interests ("*Rechtsgüter*") as the sole legitimate purpose of criminal law.[1]

The principle of proportionality is one of the fundamental principles of the European Union legal system.[2] Even though its scope extends far beyond criminal law, it carries significant importance in the area of criminal law in particular, as Art. 49(3) of the Charter of Fundamental Rights reveals. Thus, the principle of proportionality is more than just a "policy principle", that is, a sort of guideline for the relevant political actors. It embodies a binding rule of primary law the European legislative process has to comply with.

However, it cannot be denied that the European institutions still have room for discretion in the law-making process. In this regard, the constitutional principle may have a kind of "spill-over effect" in guiding the legislator even beyond the ambit of hard constitutional rules and judicial review by the European Court of Justice.

A corresponding political commitment has been expressed in the Stockholm Programme, adopted in December 2009, stating: "Criminal law provisions should

* Professor Dr. jur. Martin Böse, Universität Bonn

[1] A Manifesto on European Criminal Policy, Zeitschrift für Internationale Strafrechtsdogmatik 2009, p. 707.

[2] ECJ, 94/71 – *Schlüter & Maack*, ECR 1972, 307, para. 11; C-44/79 – *Hauer*, ECR 1979, 3727, para. 23; C-181/84 – *Man*, ECR 1985, 2889, para. 20; *Pastor Munoz*, Europäisierung des Strafrechts und mitgliedstaatliche nationale Besonderheiten in der Europäischen Union, Goltdammers Archiv für Strafrecht 2010, pp. 84, 94 et seq.; *Groussot*, General Principles of Community Law, pp. 18 et seq., 145 et seq.

https://doi.org/10.5235/219174411798862695 - Generiert durch IP 216.73.216.40, am 03.01.2026, 00:40:54. © Urheberrechtlich geschützter Inhalt. Ohne gesonderte Erlaubnis ist jede urheberrechtliche Nutzung untersagt, insbesondere die Nutzung des Inhalts im Zusammenhang mit, für oder in KI-Systemen, KI-Modellen oder Generativen Sprachmodellen.

be introduced when they are considered essential in order for interests to be protected and, as a rule, be used only as a last resort."[3] Given the rather vague notion of proportionality, the efforts of the manifesto put into place in order to develop precise and workable standards for a European criminal policy must be welcomed. Before discussing the single elements of this concept, two preliminary remarks may be permitted:

Firstly, the notion of proportionality implies that a criminal law provision is adopted in order to reach an objective, i. e. criminal law serves as an instrument to prevent significant social harm; one might even say that it is used as a tool for social engineering. Thus, this concept is based on the maxim *punitur ne peccetur* focussing on the (dissuasive and affirmative) effects of criminal law and criminal punishment (*positive / negative Generalprävention*). In contrast, the theory of retribution following the maxim *punitur quia peccatum est* objects to any concept of criminal law founded on a purpose of criminal punishment because the reason for punishment lies in the commission of the crime itself.[4] Consequently, this theory is outside the ambit of the principle of proportionality. In other words, reference to this principle is linked to a particular theoretical foundation of criminal law that has to be accepted if the principle should be applied. Nevertheless, the theory of retribution can be – or must be – considered in the framework of other principles, in particular the principle of culpability (*nulla poena sine culpa*).

Secondly, the principle of proportionality is ambiguous in the law of the European Union. As a general principle, it has been developed as a limitation to acts of the Union interfering with fundamental rights of the individual.[5] On the other hand, the principle of proportionality obliges the European legislator to respect the competences of the Member States (Art. 5(4) TEU and the protocol on the application of the principles of subsidiarity and proportionality).[6] It is obvious that these two notions of proportionality are different from one another. For matters of competence, the need for a common (uniform) standard must be established. Even if action on the European level is "necessary" and proportionate, this does not coincide with the proportionality test with regard to fundamental rights. For example, a directive for the retention of telecommunication data may be based on the former Art. 95 TEC, because of a possible distortion of competition within the internal market, however, it seems doubtful whether these obligations are in conformity with the fundamental right to privacy. Turning to substantive criminal law, one can say that the "special need" to combat crime on a common basis mentioned in Art. 83 sect. 1 TFEU refers to the principle of proportionality in matters of competence. In the following, the article will nevertheless limit and focus

[3] European Council, The Stockholm Programme, OJ C 115 of 4 May 2010, p. 1, 15.

[4] In this respect, see *Noltenius,* „Verhältnismäßige Gerechtigkeit im Strafmaß?, Höchstrichterliche Rechtsprechung im Strafrecht 2009, pp. 499, 504 et seq., in particular p. 505.

[5] *Hatje*, Wirtschaftsverfassung im Binnenmarkt, in: v. Bogdandy/Bast (eds.), Europäisches Verfassungsrecht, 2nd ed. 2009, pp. 801, 841, 849 et seq.

[6] *Streinz*, Europarecht, 8th ed. 2008, para. 167.

https://doi.org/10.5235/219174411798862695 - Generiert durch IP 216.73.216.40, am 03.01.2026, 00:40:54. © Urheberrechtlich geschützter Inhalt. Ohne gesonderte Erlaubnis ist jede urheberrechtliche Nutzung untersagt, insbesondere die Nutzung des Inhalts im Zusammenhang mit, für oder in KI-Systemen, KI-Modellen oder Generativen Sprachmodellen.

its attention on the discussion of the principle of proportionality with regard to fundamental rights.

2. Legitimate Purpose: Protection of legal interests (*Rechtsgüterschutz*)

The starting point for the proportionality test is to identify a legitimate purpose. The manifesto defines the requirement of a legitimate purpose as follows:[7]

"The legislative powers of the EU in relation to criminal law issues should only be exercised in order to protect fundamental interests if:

(1) These interests can be derived from the primary legislation of the EU;

(2) The Constitutions of the Member States and the fundamental principles of the EU Charter of Fundamental Rights are not violated, and

(3) The activities in question could cause significant damage to society or individuals."

As the discussion of the legislative acts reveals, this definition adheres to the theory of legally protected interests ("*Rechtsgutslehre*"). According to this theory, the sole purpose of criminal law is the protection of a legal interest ("*Rechtsgut*").[8] The legislature is compelled to state the purpose of each criminal law provision it wants to adopt. A legitimate legal interest must differ from the norm prohibiting the conduct in question; on the other hand, the prohibited conduct must be capable of violating the protected interest. So, the concept of legal interest rationalizes the legislative process by a precise definition of the protected interest and the requirement of its violability ("*Verletzbarkeit*").

But the approach of the manifesto goes one step further, requiring a "fundamental interest" of society and its citizens. In other words, it is not up to the legislature to define a legal interest to be protected by criminal law, but it is bound by a "quasi-constitutional", substantive concept of "*Rechtsgut*". In the author's view, this approach ignores the objections raised in the discussion at national (German) level.[9] A legal interest is always constituted by an appraisal of that interest (as a "good").[10] Since there is no consensus on the ultimate value and pecking order of interests in a modern pluralistic society, legal ("fundamental") interests have to be assessed and balanced in an open democratic process.[11] Restricting the legitimate purpose of criminal law to the protection of fundamental interests of citizens would not only

[7] A Manifesto on European Criminal Policy, Zeitschrift für Internationale Strafrechtsdogmatik 2009, p. 707.

[8] *Hassemer/Neumann*, in: Nomos Kommentar zum StGB, Vol. 1, 3rd ed. 2010, vor § 1 n. 108 et seq. 146 et seq.; *Roxin*, Strafrecht Allgemeiner Teil – Band I: Grundlagen – Aufbau der Verbrechenslehre, 4th edition, 2006, § 2 n. 1 et seq.; *Rudolphi*, in: Systematischer Kommentar zum StGB, 13th Supplement 1990, vor § 1 n. 2.

[9] *Amelung*, Rechtsgüterschutz und Schutz der Gesellschaft: Untersuchungen zum Inhalt und zum Anwendungsbereich eines Strafrechtsprinzips auf dogmengeschichtlicher Grundlage, 1972,p. 302 et seq*; Appel*, Verfassung und Strafe. Zu den verfassungsrechtlichen Grenzen staatlichen Strafens, 1998, pp. 344 et seq., 381 et seq.

[10] *Amelung*, Der Begriff des Rechtsgutes in der Lehre des strafrechtlichen Rechtsgüterschutzes, in: Hefendehl/von Hirsch/Wohlers (ed.), Die Rechtsgutstheorie – Legitimationsbasis des Strafrechts oder dogmatisches Glasperlenspiel?, 2003, pp.155, 157 et seq.

[11] Bundesverfassungsgericht, BVerfG Reports Vol. 120, pp. 224, 240; Vol. 92, pp. 1, 13; *Gärditz*, Strafbegründung und Demokratieprinzip, Der Staat 49 (2010), p. 331, 342 et seq.; *Kindhäuser*, Rechtstreue als Schuldkategorie, Zeitschrift für die gesamte Strafrechtswissenschaft 107 (1995), pp. 701, 723.

https://doi.org/10.5235/219174411798862695 - Generiert durch IP 216.73.216.40, am 03.01.2026, 00:40:54. © Urheberrechtlich geschützter Inhalt. Ohne gesonderte Erlaubnis ist jede urheberrechtliche Nutzung untersagt, insbesondere die Nutzung des Inhalts im Zusammenhang mit, für oder in KI-Systemen, KI-Modellen oder Generativen Sprachmodellen.

override the legislative competences and main tasks of the Parliament, but also delegitimise certain criminal offences that are widely accepted such as cruelty to animals. Correspondingly, even proponents of the theory of legal interest admit that the requirement of a legal interest cannot be applied without exception.[12]

These critical objections also apply to the definition of fundamental interests in the manifesto. The required link to the primary law of the European Union (first criterion) seems to be equivalent to a constitutionally protected interest on national level. Again, it must be doubted whether reference or silence of the constitution with regard to a specific interest can be interpreted as a main criterion for the appraisal of this interest to be "fundamental" and thereby a legitimate object of protection by criminal law.

Furthermore, primary law of the Union cannot be directly compared to a national constitution, since it is fragmentary, which is due to the Union's limited competences (principle of conferral, Art. 5(2) TEU). Consequently, the treaties cannot provide an exhaustive list of fundamental interests.

Besides, the (possible) differences between the purpose of harmonisation (uniform standards) and the purpose of the harmonised provision (protection of a legal interest) must be taken into account. The criminalisation of money laundering provides an illustrative example in this respect: A directive explicitly stipulating criminal sanctions might be based upon Art. 83(2) TFEU in connection with the competence on the internal market, based on the concern for the stability and the integrity of the financial sector. However, the legitimate purpose of this criminal offence cannot be found in these concerns, but in the aim to deprive the perpetrator of its illegal profits and to protect the interests violated by the previous offence. It seems doubtful at best whether these purposes can be derived from the treaties.

To sum up, a "materialised" concept of legal ("fundamental") interests does not seem a suitable basis for a coherent criminal policy, since it cannot be applied without exceptions and these exceptions cannot be integrated into the theory of legal interest. By restricting the legitimate purpose of criminal law to the protection of fundamental interests in the above mentioned sense, the manifesto anticipates the assessment of the other criteria of the proportionality test (suitable, necessary, adequate). This effect becomes obvious in the criticism of the framework decision on combating the sexual exploitation of children and child pornography.[13] According to the manifesto there is no legitimate purpose to criminalise virtual child pornography. However, the purpose to protect the rights of children can be derived from primary Union law (Art. 24 Charter of Fundamental Rights) and is certainly legitimate; what can be doubted is whether a ban on virtual child pornography is suitable and necessary to achieve this aim.

[12] *Roxin*, Zur neueren Entwicklung der Rechtsgutsdebatte, Festschrift für Winfried Hassemer, 2010, pp. 573, 597; *Rudolphi*, in: Systematischer Kommentar (note 8), vor § 1 n. 8.

[13] A Manifesto on European Criminal Policy, Zeitschrift für Internationale Strafrechtsdogmatik 2009, pp. 707, 710.

https://doi.org/10.5235/219174411798862695 - Generiert durch IP 216.73.216.40, am 03.01.2026, 00:40:54. © Urheberrechtlich geschützter Inhalt. Ohne gesonderte Erlaubnis ist jede urheberrechtliche Nutzung untersagt, insbesondere die Nutzung des Inhalts im Zusammenhang mit, für oder in KI-Systemen, KI-Modellen oder Generativen Sprachmodellen.

3. Criminal law as a "last resort" (*ultima ratio* principle)

Having established a legitimate purpose, the legislature must assess whether a criminal law provision is capable of protecting a legal interest and that no other measures exist that would be more suitable to safeguard the protected interest.[14] The authors of the manifesto correctly act on the assumption that the *ultima ratio* principle is a restriction that can be derived from the principle of proportionality. But the relevance of the *ultima ratio* principle is rather limited with regard to offences based on non-criminal prohibitions in civil or public law, because the introduction of a criminal offence is based on the experience that civil and administrative sanctions have proven to be insufficient so that criminal sanctions are used as a "last resort".[15] As a consequence, criminal law is not used as an alternative, but an additional means that is applied on the basis of pre-existing provisions of administrative or civil law.[16] For instance, environmental law states that certain activities require a permission issued by the competent authority or are subject to a notification procedure. The latter applies to the shipment of waste. According to the manifesto, the criminalisation of the failure to comply with this procedure is not compatible with the principle of *ultima ratio* because of its merely formal character.[17] However, it should be borne in mind that the proper functioning of the public law regime cannot be guaranteed if it is not supplemented by criminal law provisions. Otherwise producers, collectors and dealers would probably not bother about their obligation to make notification of a shipment of waste. This would render the whole system useless or at least inefficient.

Given the fact that the relevant provision of the directive on the protection of the environment through criminal law requires a shipment undertaken in a non-negligible quantity, it seems quite difficult to see any difference between the illegal shipment of waste and the corresponding offences in the directive on providing measures and sanctions against employers of third country nationals that have been considered compatible with the principle of *ultima ratio*.[18]

Since the *ultima ratio* principle focuses on measures to be applied as an alternative means to criminal law, it is evident that this principle comes into play if a conduct not prohibited by other norms is to be criminalised; for activities that occur before the actual commission of a crime, in particular.

Nevertheless, the principle of *ultima ratio* has been subject to severe criticism in this regard. Some scholars held that criminal law might be a less severe means if the alternative instrument were to consist of an overall supervision and inspection of the relevant economic activity. Since criminalisation would only affect a small number

[14] A Manifesto on European Criminal Policy, Zeitschrift für Internationale Strafrechtsdogmatik 2009, pp. 707, 711.

[15] See *ECJ*, C-176/03 – Commission v. Council, ECR 2005, I-7879, para. 48;C-440/05 – Commission v. Council, ECR 2007, I-9097, paras 60 et seq.

[16] *Lagodny*, Strafrecht vor den Schranken der Grundrechte, 1996, p. 348; *Wohlers*, Deliktstypen des Präventionsstrafrechts, 2000, p. 77.

[17] Manifesto on European Criminal Policy, Zeitschrift für Internationale Strafrechtsdogmatik 2009, pp. 707, 711.

[18] Manifesto on European Criminal Policy, Zeitschrift für Internationale Strafrechtsdogmatik 2009, pp. 707, 710.

https://doi.org/10.5235/219174411798862695 - Generiert durch IP 216.73.216.40, am 03.01.2026, 00:40:54. © Urheberrechtlich geschützter Inhalt. Ohne gesonderte Erlaubnis ist jede urheberrechtliche Nutzung untersagt, insbesondere die Nutzung des Inhalts im Zusammenhang mit, für oder in KI-Systemen, KI-Modellen oder Generativen Sprachmodellen.

of individuals (i.e. potential offenders), criminalisation of an illegal conduct would not be *ultima ratio*, but rather – with regard to the overwhelming majority of enterprises – the less severe measure instead.[19] It is questionable whether the offender who faces criminal punishment will follow this argument. The assessment whether criminal law is a less severe means cannot be based on a comparison of the quantity of individual suffering of the persons concerned. This is a problem of balancing the conflicting interests of different groups that has to be discussed on the level of adequacy (proportionality in the strict sense).[20] Whether the use of criminal law is necessary must be assessed by the quality of the interference with fundamental rights of the individual person. With regard to the offender, it is obvious that his/her fundamental rights are seriously affected by criminal punishment. But even if the effects of criminalisation on all the addressees of a statutory prohibition are taken into consideration, the gravity of this instrument cannot be contested. By introducing a criminal offence, the legislature does not only create a new prohibition, but also a serious restriction of the freedom of the individual through an absolute binding rule. Whereas the consequences of illegal conduct in civil and public law are limited and can be regarded as the price that has to be paid by the offender the message of criminalisation is quite clear: There shall be no choice between legal and illegal behaviour. On the one hand, the price (imprisonment) would be too high. Furthermore, criminalising a certain conduct produces social pressure because the individual is expected to obey these fundamental norms and runs the risk of being stigmatised in case of non-conformity.[21]

Thus, criminalisation of a conduct seriously affects individual freedom. These effects become even greater if the scope of the criminal offence leaves a margin of interpretation; as a consequence legal uncertainty may arise, which could result in an excessive "over-prevention" of harmless conduct.[22]

To sum up, in most cases the use of criminal law should be considered as a means of last resort. Nevertheless, the criticism of the principle of *ultima ratio* has revealed that this problem has – at least partially – to be discussed on the level of adequacy or proportionality in the strict sense.

Going back to the criminalisation of preparatory acts, it can be stated as a general standard of criminal policy that the ambit of criminal law – due to the gravity of its impact on fundamental rights – is limited to violations of protected interests or activities that put these interests at risk.

This restriction is based on reasoning similar to that underlying the principle of *ultima ratio*: With regard to preparatory acts, priority should not only be given to preventive measures taken by the competent police or administrative authorities,

[19] *Tiedemann*, Der Entwurf des Ersten Gesetzes zur Bekämpfung der Wirtschaftskriminalität, Zeitschrift für die gesamte Strafrechtwissenschaft 87 (1975), pp. 253, 266-267.

[20] See in this regard *Böse*, Der Preis: Zu breite, intensive und schlecht überprüfbare Kontrolle? Das Strafrecht die liberalere Lösung, in: Lüderssen/Volk (ed.), Die Handlungsfreiheit des Unternehmers – wirtschaftliche Perspektiven, strafrechtliche und ethische Schranken, 2009, pp. 180 et seq.

[21] See in this regard *Böse*, Grundrechte und Strafrecht als „Zwangsrecht", in: Hefendehl/von Hirsch/Wohlers (note 10), pp. 89, 91 et seq.

[22] See in this regard *Böse* (note 19), pp. 183 et seq.

https://doi.org/10.5235/219174411798862695 - Generiert durch IP 216.73.216.40, am 03.01.2026, 00:40:54. © Urheberrechtlich geschützter Inhalt. Ohne gesonderte Erlaubnis ist jede urheberrechtliche Nutzung untersagt, insbesondere die Nutzung des Inhalts im Zusammenhang mit, für oder in KI-Systemen, KI-Modellen oder Generativen Sprachmodellen.

but also to the autonomous decision of the individual to avoid any violation of the protected interest. As a consequence, preparatory acts – and even the actual attempt, if voluntarily abandoned – are not subject to criminal prosecution.[23] Therefore, the criticism of the framework decision on combating terrorism raised in the manifesto is justified.[24]

However, criminalisation of conduct in the preparatory stage is not *per se* incompatible with the principle of proportionality and *ultima ratio*. In this context, an analogy to the principles of imputation might be helpful:[25] If a certain act by its nature and purpose is solely directed at facilitating the commission of a crime by others, it may be legitimate to criminalise this particular conduct. With such preparatory acts, the offender has created a risk he/she no longer has any control over. Under certain circumstances, the protection of the legal interests can prevail over the interest in the use of personal freedom. A high rank of the protected interest and a qualified risk should be considered as indispensable elements to justify the use of criminal law.[26]

On the other hand, criminalisation of an activity which by itself does not cause any harm to society or its citizens seems doubtful if this conduct does not automatically (or probably) give rise to the commission of a crime, as can be shown by reference to the framework decision on child pornography and the recent proposal of the Commission for a directive.[27] In the manifesto, it has been criticised that the framework decision criminalises even virtual child pornography despite the fact that no child has been abused.[28] However, as far as the mere possession, distribution and purchasing of the incriminated pictures are concerned, there is only little difference between real and virtual child pornography because the sexual abuse of the victim has already been committed when the offender comes into play. The criminalisation of virtual child pornography is based on the argument that there is one single and common market for child pornography that does not differentiate between virtual

[23] For critical reviews of the German approach and its recent legislative implementation *Gazeas/Große-Wilde/Kießling*, Die neuen Tatbestände im. Staatschutzstrafrecht – Versuch einer ersten Auslegung der §§ 89 a, 89 b und 91 StGB, Neue Zeitschrift für Strafrecht 2009, p. 593; *Gierhake*, Zur geplanten Einführung neuer Straftatbestände wegen der Vorbereitung terroristischer Straftaten, Zeitschrift für Internationale Strafrechtsdogmatik 2008, pp. 397 et seq.; *Radtke/Steinsiek*, Bekämpfung des internationalen Terrorismus durch Kriminalisierung von Vorbereitungshandlungen? – Zum Entwurf eines Gesetzes zur Verfolgung der Vorbereitung von schweren Gewalttaten (Referentenentwurf des BMJ vom 21. 4. 2008), Zeitschrift für Internationale Strafrechtsdogmatik 2008, pp. 383 et seq.; *Sieber*, Legitimation und Grenzen von Gefährdungsdelikten im Vorfeld von terroristischer Gewalt – Eine Analyse der Vorfeldtatbestände im „Entwurf eines Gesetzes zur Verfolgung der Vorbereitung von schweren staatsgefährdenden Gewalttaten", Neue Zeitschrift für Strafrecht 2009, p. 353; *Weißer*, Der „Kampf gegen den Terrorismus": Prävention durch Strafrecht, Juristenzeitung 2008, p. 388.

[24] Manifesto on European Criminal Policy, Zeitschrift für Internationale Strafrechtsdogmatik 2009, pp. 707, 712.

[25] See in this regard *Frisch*, Rechtsgut, Recht, Deliktsstruktur und Zurechnung im Rahmen der Legitimation staatlichen Strafens, in: Hefendehl/von Hirsch/Wohlers (note 10), pp. 215, 228 et seq.

[26] See in this regard the dissenting opinion of Judge *Sommer*, in: Bundesverfassungsgericht, BVerfG Reports Vol. 90, pp. 145, 213- 214; *Lagodny* (Note 16), pp 438 et seq.; *Radtke/Steinsiek* (note 23), p. 390; *Rudolphi*, in: Systematischer Kommentar (note 8), § 1 n. 11 a; *Sieber* (note 23), pp. 358 et seq.

[27] Council Framework decision 2004/68/JHA on combating the sexual exploitation of children and child pornography, OJ 2004 L 13/44; Proposal for a Directive of the European Parliament and of the Council on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA, COM(2010) 94.

[28] Manifesto on European Criminal Policy, Zeitschrift für Internationale Strafrechtsdogmatik 2009, pp. 707, 710.

https://doi.org/10.5235/219174411798862695 - Generiert durch IP 216.73.216.40, am 03.01.2026, 00:40:54. © Urheberrechtlich geschützter Inhalt. Ohne gesonderte Erlaubnis ist jede urheberrechtliche Nutzung untersagt, insbesondere die Nutzung des Inhalts im Zusammenhang mit, für oder in KI-Systemen, KI-Modellen oder Generativen Sprachmodellen.

and real child pornography. Consequently, the selling and purchasing of virtual pornography creates a demand for more of the same and an indirect danger for the abuse of children to escalate in order to meet the demand.

This concept of the European legislature seems plausible. However, the possibility to meet the demand by "virtual" pornography – i. e. without causing harm to a victim – raises some doubts on the correlation between selling and purchasing of child pornography and the sexual abuse of children. In particular, the broad notion of "child" includes juveniles below the age of 18 years, so that "child pornography" can be produced by adult actors playing the role a person of 16 or 17 years of age. Furthermore, the mere possession of virtual child pornography cannot be considered market activity and can thus not be regarded by itself as sufficient risk for a child being abused. This objection has been taken into account in the framework decision by providing for an exception from criminal responsibility, but this provision has been removed from the Commission's proposal.

This topic surely deserves closer examination, but the article must draw to a close on this matter here. The brief overview has shown that the principle of proportionality and its sub-principles (theory of legal interest, *ultima ratio*) do not entail absolute limitations, but rather provide a road map for the discussion on whether the use of criminal law is legitimate. The elements of this principle (legitimate purpose, suitability, necessity, proportionality) have to be discussed in the context of the concrete legislative proposal. The article shall therefore conclude with a few remarks on the legislative process and the principle of proportionality.

4. Proportionality and legislative procedure

First of all, it seems odd that in legislative proposals the principle of proportionality is mainly considered as a matter of competence. In the Commission's proposal on child pornography, the principle of proportionality is only mentioned in an enumeration of the fundamental rights and principles that have been considered with "in-depth scrutiny".[29] A detailed analysis of the different offences and their compatibility with the principle of proportionality is lacking. In the author's view, this must be a crucial element of legislative proposals to come. Otherwise, there is no solid basis for a profound discussion in the legislative process and the principle of proportionality will not perform its task.

Such a profound discussion will also entail a critical review of the existing criminal law provisions. One of the major shortcomings of the discussion at European level is that decriminalisation is left to the Member States. The borderline between criminal and non-criminal conduct is not defined by the European legislature, but by the Member States. Consequently, the latter can always go beyond the minimum standard established by the law of the Union. Even if the European legislator abstains from criminalising a certain conduct in order to respect

[29] COM(2010) 94, p. 4.

https://doi.org/10.5235/219174411798862695 - Generiert durch IP 216.73.216.40, am 03.01.2026, 00:40:54. © Urheberrechtlich geschützter Inhalt. Ohne gesonderte Erlaubnis ist jede urheberrechtliche Nutzung untersagt, insbesondere die Nutzung des Inhalts im Zusammenhang mit, für oder in KI-Systemen, KI-Modellen oder Generativen Sprachmodellen.

the principle of proportionality, the national legislature is still free to do so. By this, European legislation in criminal law has a repressive "spin": The national legislature can avoid inconsistencies in criminal law only by adopting criminal provisions which go beyond the minimum standard. This has happened with regard to the elements establishing criminal responsibility as well as to the gravity of the criminal sanctions. A possible solution might be to give the term "minimum rules" in Art. 83 para. 2 TFEU a twofold meaning: a minimum standard of protection by criminal law and a minimum standard of protection against criminal law.

5. Concluding remarks

As mentioned before, too heavy a reliance on the critical potential of the principle of proportionality and theory of legal interest provokes scepticism. Nevertheless, the approach of the manifesto that only a fundamental interest may be subject to protection by criminal law can serve as a common basis for a European Criminal Policy. In the absence of a substantial definition of that fundamental interest, one might think about a higher threshold for the adoption of criminal offences in the legislative process. Just a few months ago, adopting a criminal legislation required unanimity in the Council. As a consequence, a framework decision on criminal law could not be adopted if one Member State was not convinced that a certain conduct should be made subject to criminal punishment. The right to veto fulfilled the (latent) function of procedural safeguard of the principle of *ultima ratio*. Correspondingly, it has recently been suggested at national (German) level that the introduction of a new criminal offence should be subject to a qualified majority in Parliament.[30] But this should be left for further discussion.

[30] *Amelung* (note 10), pp. 155, 164; *Kindhäuser*, Die deutsche Strafrechtsdogmatik zwischen Anpassung und Selbstbehauptung – Grenzkontrolle der Kriminalpolitik durch die Dogmatik, Zeitschrift für die gesamte Strafrechtswissenschaft 121 (2009), pp. 954, 963.

https://doi.org/10.5235/219174411798862695 - Generiert durch IP 216.73.216.40, am 03.01.2026, 00:40:54. © Urheberrechtlich geschützter Inhalt. Ohne gesonderte Erlaubnis ist jede urheberrechtliche Nutzung untersagt, insbesondere die Nutzung des Inhalts im Zusammenhang mit, für oder in KI-Systemen, KI-Modellen oder Generativen Sprachmodellen.