

## Editorial

The “Manifesto on European Criminal Policy” drafted and published by the European Criminal Policy Initiative in 2009 (cf. EuCLR 2011, p. 86) claims that “Europe needs a balanced and coherent concept of criminal policy based on a number of fundamental principles. These principles should be recognised as a basis for every single legal instrument which deals with or which could influence criminal law. The European legislator has to justify the relevance of its proposals in relation to the principles and standards of good governance.” Only recently – on 29<sup>th</sup> September, 2011, – the Commission published the **“Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (COM [2011] 573 final)”**. It is a document of utmost importance and may even mark a new area of criminal law in the EU. As the Communication’s title **“Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law”** clearly indicates, the Commission fundamentally acknowledges its task to develop and respect specific guidelines for the use of criminal law when determined by European legal instruments. As is expressed in the accompanying press release

*“[t]he EU has been taking measures in the area of criminal law for more than a decade, with the goal of better fighting crime which has become increasingly international and sophisticated. But previous legislation has been developed without a coherent policy basis and is not always effectively enforced. In March 2010 EU Justice Commissioner, Viviane Reding, outlined the need for a balanced and coherent approach to criminal law policy, and announced her intention to take action in this field .... With today's Communication "Towards an EU Criminal Policy", the Commission is delivering on its promise and is also heeding calls from legal practitioners and academics for a more coherent approach to criminal law at EU level, as expressed by the drafters of the 2009 Manifesto on EU Criminal Policy.”*

Indeed, many of the ideas and postulations laid down in the Manifesto have been incorporated. The Commission clearly stresses the special role of criminal law when stating that criminal law not only comprises intrusive rules which may amount to the deprivation of liberty; it is, moreover, a field of sensitive policy, where differences amongst national systems remain substantial and which reflects the basic values, customs and choices of any given society. As a consequence of the respect

for diversity expressed by the EU-Treaty, the Commission shares the Manifesto's fundamental requirement that EU legislation on criminal law must be coherent and consistent. Further principles of criminal policy to be respected in future – especially when it comes to making use of the competence laid down in art. 83 (2) TFEU – are, apart from the fundamental requirement of subsidiarity, the ultima-ratio-principle (as to *if* and *what kind* of criminal sanctions should be required from Member States), the respect of fundamental rights and the principle of legal certainty (though here the Commission points out that the standards must be lower than in national law as it is the national legislator who has to implement EU legislation).

While on the one hand the Commission acknowledges that the intrusive character of criminal law necessitates an effective protection of the individual which is guaranteed by the now legally binding Charter of Fundamental Rights, it cannot, on the other hand, be overlooked that the Communication does not evoke a purely or mainly liberal concept of criminal law. As can be easily established from the wording and terminology used in the document, the Commission – in the end – pursues a twofold strategy: Throughout the Communication we find clear indications that criminal law – as employed by the EU – has to *serve* other – economic or political – ends, something we can tell from the Communication's headline that already criminal law shall help to “effectively implement the EU policies”; further on, we can read that it is meant to “promote the quality of justice”, to “foster the confidence of citizens in using their right to free movement and to buy goods or services from providers of other Member States through a more effective fight against crime” and even to “contribute to the economic recovery”.

The idea to use criminal sanctions as a “means of enforcement” in order to achieve economic or political aims was not only one of the Manifesto's elementary points of criticism in relation to EU legislation in the past; it has also been heavily criticised as a fundamental flaw in European criminal law and in modern economic criminal law in general. Yet having read the Communication as a whole, the conviction prevails that the Commission is no longer prepared to accept that criminal law may be used “automatically” to achieve any aim under the TEU. This simply would not fit the detailed concept described in the Communication and the concern expressed by the Commission: “To establish the necessity for minimum rules on criminal law, the EU institutions” – according to the Commission – “need to be able to rely on clear factual evidence about the nature or effects of the crime in question and about a diverging legal situation in all Member States which could jeopardise the effective enforcement of an EU policy subject to harmonisation.”

If this is meant in all seriousness, an excessive use of criminal law cannot be reasonably expected in future. The Commission is obviously aware of the criticism of an aggravated punitivism in Europe due to the influence of the EU. Most comforting – and in the context of the rest of the Communication convincing, as well – we find the statement that “[i]t is not the primary goal of an EU-wide approximation to increase the respective sanction levels applicable in the Member States but rather to reduce the degree of variation between the national systems and

to ensure that the requirements of ‘effective, proportionate and dissuasive’ sanctions are indeed met in all Member States.”

The Communication is meant to be an “initial step” in establishing a coherent and consistent EU criminal policy. While today this may be considered a small step, there is hope that it may ultimately turn out to be a giant leap if we look back in the years to come.

*The Editors*

