Post-Lisbon Criminal Legislation in the EU

Results and Tendencies

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Abstract

The Treaty of Lisbon which fundamentally reformed the judicial cooperation within the EU vested the EU legislator with reinforced legislative powers. On the basis of the legal harmonization competences of Articles 83(1) and 83(2) TFEU, several directives were adopted which determine minimum rules relating to criminal offences of sanctions in different fields. At the same time, legal experts and the EU institution recognized the need for an effective and coherent criminal policy at the level of the EU, as a result of which, several guidelines were issued which contain requirements for the admissibility and content of the future criminal legislation and specify the criminal law principles which the EU directives has to comply with. Based on these documents, the coherence of EU criminal law has significantly been increased, the structure and the content of the criminal law directives have become more and more unified which is beneficial both for the legislation and the application and interpretation of the legal acts. The objective of the paper is to present and analyze the criminal law directives adopted after the Treaty of Lisbon, through which the tendencies of the developing EU criminal policy and the observance of criminal law principles during EU legislation can also be shown.

Keywords: EU criminal law, Treaty of Lisbon, legal harmonization, European criminal policy, Manifesto on European Criminal Policy

1. Introductory remarks

With the Treaty of Lisbon, the judicial cooperation in criminal matters became the integral part of the area of freedom, security and justice[1] which belongs to the shared competences between the EU and the Member

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1 Title V TFEU.

States.[2] With the abolishment of the pillar system introduced by the Treaty of Maastricht, the former third pillar was transformed into the Community legal order and became a supranational policy.[3] Therefore it is not an exaggeration to state that the Lisbon Treaty placed the EU criminal law on a new contractual basis.

The Treaty of Lisbon vested the EU with broad legislative competences in the field of substantive and procedural criminal law, as a result of which extensive criminal legislation began in the EU. At the same time, another tendency could be observed which aims to harmonize and increase the coherence of the EU criminal legislation, to lay down the basic principles of EU criminal law, and to establish a more uniform and coherent criminal policy at the level of the EU. The first step of this process was the publication of the so-called Manifesto on European Criminal Policy[4] by an expert group called 'European Criminal Policy Initiative' in 2009, which tried to draw up a balanced and coherent concept of criminal policy.[5] The document listed the fundamental principles of the European criminal law (the requirement of a legitimate purpose, the *ultima ratio* principle, the principle of guilt, the principle of legality, the principle of subsidiarity and the principle of coherence), which should be recognized as a basis for every single European legal instrument dealing with criminal law. After the adoption of the Manifesto, the EU institutions also acknowledged the risk of the lack of a coherent European criminal policy and adopted several – non-binding – communications and conclusions, in which the European Commission,[6] the Council[7] and the European Parliament[8] also refer to the

2 Article 4(2)(j) TFEU.

3 Ester Herlin-Karnell, *The Constitutional Dimension of European Criminal Law*, Hart Publishing, Oxford – Portland, 2012, p. 34; Steve Peers, *EU Justice and Home Affairs Law*, Oxford University Press, Oxford – New York, 2016, p. 22.

4 Petter Asp *et al*., 'Manifesto on European Criminal Policy', *Zeitschrift für Internationale Strafrechtsdogmatik*, Vol. 4, Issue 12, 2009, pp. 707–716.

5 Helmut Satzger, 'Der Mangel an Europäischer Kriminalpolitik. Anlass für das Manifest der internationalen Wissenschaftlergruppe European Criminal Policy Initiative', *Zeitschrift für Internationale Strafrechtsdogmatik*, Vol. 4, Issue 12, 2009, pp. 692–693.

6 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, COM(2011) 573 final.

7 Draft Council conclusions on model provisions, guiding the Council's criminal law deliberations, 16542/2/09 REV 2, 27 November 2009.

8 European Parliament resolution of 22 May 2012 on an EU approach to criminal law [2010/2310(INI) – P7_TA(2012) 208].

guiding principles of the European criminal law and intend to delineate guidelines for the admissibility and content of the future criminal legislation. After the adoption of the Treaty of Lisbon, the slow development of the European criminal policy can be observed, which is indispensable for a coherent criminal legislation at the EU's level.

This paper aims to present and analyze the results of the legal harmonization of the EU in the field of substantive criminal law. The study examines the criminal law directives adopted after the entry into force of the Treaty of Lisbon in detail, through which it also aims to highlight the tendencies of the consideration of the fundamental criminal law principles in the EU legislation and the current situation of the developing EU criminal policy. In this context, it is important to emphasize that the article only deals with the substantive criminal law directives of the EU, therefore the criminal procedure instruments will not be included in the paper.

2. EU Criminal Law after the Treaty of Lisbon

The general legal harmonization competence in the field of substantive criminal law can be found in Article 83(1) TFEU.

> "The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis."

For the use of the EU's legal harmonization competence under Article 83(1) TFEU two cumulative criteria are required to be met, whose exact meaning, however, is not precisely defined by the Treaty. *(i)* The first requirement is the 'particular seriousness' of the crime, which means that a certain level of graveness needs to be reached in order to justify EU's legislative competence. *(ii)* The second requirement is the 'cross-border dimension' of the offence, which is defined by three alternative criteria: nature, impact, or special need to combat the areas of crime on a common basis.[9] A crime can

9 Martin Böse, 'Justizielle Zusammenarbeit in Strafsachen' *in* Jürgen Schwarze (ed.), *EU-Kommentar*, Nomos, Baden-Baden, 2012, p. 1073; Perrine Simon, 'The Criminalisation Power of the European Union after Lisbon and the Principle of Democratic

be considered to have a cross-border dimension by nature when the offence involves the crossing of borders, *e.g.* in case of trafficking in human beings. The cross-border dimension results from the impact of the offence when the crime does not involve the crossing of borders, but typically affects more than one state, *e.g.* in case of environmental offences, where pollution does not stop at the borders.[10] The last requirement (the special need to combat the offence on a common basis) means that criminal law on the level of the EU has to have an added value function in the fight against serious transnational criminal offences.[11] The Treaty lists ten criminal offences (so-called 'eurocrimes'), which meet the aforementioned criteria, therefore can be subject to harmonization: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime. However, the Treaty does not provide an exhaustive enumeration, because on the basis of developments in crime further criminal offences could be added to this list by the Council acting unanimously, with the consent of the European Parliament. In 2022, based on this authorization, the Council established that the violation of Union restrictive measures also meets the requirements of the Treaty and therefore can be subject of legal harmonization.[12]

Article 83(2) TFEU regulates the ancillary harmonization competence of the EU.

> "If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonization measures,

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Legitimacy', *New Journal of European Criminal Law*, Vol. 3, Issue 3–4, 2012, pp. 247–248.

10 Fabian Dorra, *Strafrechtliche Legislativkompetenzen der Europäischen Union. Eine Gegenüberstellung der Kompetenzlage vor und nach dem Vertrag von Lissabon*, Nomos, Baden-Baden, 2013, pp. 195–200; Petter Asp, *The Substantive Criminal Law Competence of the EU*, Jure Bokhandel, Stockholm, 2012, pp. 86–87.

11 Valsamis Mitsilegas, 'EU Criminal Law Competence after Lisbon: From Securitised to Functional Criminalisation' *in* Diego Acosta Arcarazo & Cian C. Murphy (eds.), *EU Security and Justice Law. After Lisbon and Stockholm*, Hart Publishing, Oxford – Portland, 2014, pp. 115–116; Valsamis Mitsilegas, *EU Criminal Law After Lisbon. Rights, Trust and the Transformation of Justice in Europe*, Hart Publishing, Oxford – Portland, 2016, p. 59.

12 Council Decision (EU) 2022/2332 of 28 November 2022 on identifying the violation of Union restrictive measures as an area of crime that meets the criteria specified in Article 83(1) of the Treaty on the Functioning of the European Union.

directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned."

While Article 83(1) TFEU limits the criminal competence of the EU to certain areas of criminal offences where there is a special need to combat them on a common basis, Article 83(2) TFEU generally enables the use of criminal law if it is essential to the effective implementation of a Union policy.[13] For the application of this harmonization competence two requirements have to be fulfilled: on the one hand there has to be a need for previous harmonization measures in the policy area which the EU legislator intends to criminalize, and on the other hand, the criminal sanctions have to be essential for the effective implementation[14] of the aforementioned harmonized Union policy.

With the legal basis of the harmonization competence of Article 83(1) TFEU, the EU legislator has adopted seven directives: on trafficking in human beings,[15] sexual abuse and sexual exploitation of children and child pornography,[16] attacks against information systems,[17] counterfeiting of the

13 André Klip, *European Criminal Law. An Integrative Approach*, Intersentia Publishing, Cambridge – Antwerp – Portland, 2012, p. 166.

14 *See* in details, Jacob Öberg, 'Union Regulatory Criminal Law Competence after Lisbon Treaty', *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 19, Issue 4, 2011, pp. 290–293.

15 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (Human Trafficking Directive).

16 Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA (Sexual Exploitation Directive).

17 Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA (Cybercrime Directive).

euro and other currencies,[18] terrorism,[19] money laundering[20] and fraud and counterfeiting of non-cash means of payment.[21] Based on the ancillary harmonization competence of Article 83(2) TFEU, two further directives were issued on the criminal sanctions for market abuse[22] and on the fight against fraud to the Union's financial interests by means of criminal law.[23] Furthermore, there are other ongoing criminal legislations based on Article 83(1)[24] and Article 83(2)[25] TFEU which will or are planned to be finished in 2024. However, since they were not published in the Official Journal of the EU at the time of the closure of the manuscript, this paper will not analyze these legislative proposals.

According to Article 83 TFEU, which is also confirmed by the adopted secondary legal acts,[26] the EU legislator can use its legal harmonization competence by adopting minimum rules concerning the definition of crim-

18 Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA (Counterfeiting Directive).

19 Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA (Terrorism Directive).

20 Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law (Money Laundering Directive).

21 Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA (Non-Cash Payment Directive).

22 Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (Market Abuse Directive).

23 Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law (PIF Directive).

24 Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence [COM(2022) 105 final]; and Proposal for a Directive of the European Parliament and of the Council on the definition of criminal offences and penalties for the violation of Union restrictive measures [COM(2022) 684 final].

25 Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC [COM(2021) 851 final].

26 Article 1 of the Human Trafficking Directive, Article 1 of the Sexual Exploitation Directive, Article 1 of the Cybercrime Directive, Article 1 of the Counterfeiting Directive, Article 1 of the Terrorism Directive, Article 1 of the Money Laundering Directive, Article 1 of the Non-Cash Payment Directive, Article 1(1) of the Market Abuse Directive, Article 1 of the PIF Directive.

inal offences and sanctions.[27] This so-called 'minimum harmonization' imposes the obligation on the Member States to fulfil the minimum requirements prescribed in the EU standards.[28] It means that the Member States have to criminalize and punish the behaviors specified in the EU legal acts, but they can neither supplement the criminal definitions with additional elements that narrow the punishability, nor they can prescribe less severe sanctions than those defined by the directives of the EU.[29] However, the Member States are entitled to introduce or maintain stricter rules than the regulation of the EU directives, *e.g.* by criminalizing other conducts or introducing more serious penalties.[30]

Under the provisions of the Treaty, minimum rules can be adopted in connection with the definition of criminal offences and sanctions. However, the legislative practice of the EU interprets its competence broadly compared to the narrow grammatical meaning of the Treaty, and in addition to definition of criminal offences and sanctions, the directives often include other elements as well. Regarding the definition of offences, directives can define the elements of the crimes, *i.e.* the description of the prohibited conducts. Directives can also cover ancillary conducts (instigating, aiding and abetting) as well as the attempt to commit the offence. Apart from offences committed by natural persons EU legislation can also regulates the liability of legal persons for the committed crimes. As regards to sanctions,[31]

27 Asp 2012, pp. 110–127; Klip 2012, pp. 162–163, 166–167.

28 Böse 2012, pp. 1077–1078.

29 Krisztina Karsai, 'Büntetőjogi jogközelítés az Európai Unióban' *in* Ferenc Kondorosi & Katalin Ligeti (eds.), *Az európai büntetőjog kézikönyve*, Magyar Közlöny Lap- és Könyvkiadó, Budapest, 2008, p. 443; *See also* Dorra 2013, pp. 219–222; Martin Böse, 'Kompetenzen der Union auf dem Gebiet des Straf- und Strafverfahrensrechts', *in* Martin Böse (ed.), *Europäisches Strafrecht mit polizeilicher Zusammenarbeit*, Nomos, Baden-Baden, 2013, pp. 157–158.

30 Christoph Safferling, *Internationales Strafrecht. Strafanwendungsrecht – Völkerstrafrecht – Europäisches Strafrecht*, Springer Verlag, Heidelberg – Dordrecht – London – New York, 2011, p. 417; Helmut Satzger, *Internationales und Europäisches Strafrecht. Strafanwendungsrecht – Europäisches Straf- und Strafverfahrensrecht – Völkerstrafrecht*, Nomos, Baden-Baden, 2016, p. 144; Katharina Schermuly, *Grenzen funktionaler Integration: Anforderungen an die Kontrolle europäischer Strafgesetzgebung durch den EuGH*, Peter Lang Verlag, Frankfurt am Main, 2013, p. 56; Krisztina Karsai, 'The legality of criminal law and the new competences of the TFEU', *Zeitschrift für Internationale Strafrechtdogmatik*, Vol. 11, Issue 1, 2016, pp. 30–31. *See also* Klip 2012, pp. 166–167.

31 On the critical analysis of the harmonization affecting sanctions, *see further* Helmut Satzger, 'The Harmonisation of Criminal Sanctions in the European Union. A New Approach', *Eucrim – The European Criminal Law Associations' Forum*, 2/2019, pp.

the directives usually use the requirement of effective, proportionate and dissuasive penalties which was elaborated by the CJEU.[32] Furthermore, the EU legislator often determines of the type (*e.g.* imprisonment, fines, community service) and/or the level of the penalty (minimum penalties) which could be imposed to natural or legal persons having committed the criminal offences defined in the directives, as well as the aggravating and the mitigating circumstances. Furthermore, the EU directives often contains provisions in connection with jurisdiction and other issues closely related to definition of criminal offences and sanctions (*e.g.* the statutory limitation period or criminal law cooperation and exchange of information with Member States and EU bodies).[33]

3. Harmonization of the Criminal Offences

One of the main element of the criminal law directives of the EU is the definition of the criminal offences which fall under their material scope. For this purpose, the EU directives determine the objective and subjective factual elements of the criminal offences, which the Member States have to implement into their national criminal law system.

116–119; Robert Kert, 'Die Angleichung von Strafen in der Europäischen Union', *Miskolci Jogi Szemle*, Vol. 14, Special Issue 2, 2019, pp. 7–20.

32 Judgment of 21 September 1989, *Case C-68/88, Commission v Greece*, ECLI:EU:C:1989:339, para. 24.

33 *See* in details: Asp 2012, pp. 95–102; Bernd-Roland Killmann, 'Systematisierung' *in* Ulrich Sieber *et al.* (eds.), *Europäisches Strafrecht*, Nomos, Baden-Baden, 2014, pp. 296–301; Dorra 2013, pp. 79–91, and 222–229; Klip 2012, pp. 179–211, and 316–330; Peers 2016, pp. 197–209; Péter Csonka & Oliver Landwehr, '10 Years after Lisbon – How "Lisbonised" is the Substantive Criminal Law in the EU?', *Eucrim – The European Criminal Law Associations' Forum*, 4/2019, pp. 264–265; Samuli Miettinen, *Criminal Law and Policy in the European Union*, Routledge, London – New York, 2013, pp. 134–142; Valsamis Mitsilegas, *EU Criminal Law*, Hart, Oxford – Portland, 2009, pp. 87–90.

3.1. Actus Reus Elements of the Criminal Offences

The criminal law directives require the criminalization of the following offences.

Human Trafficking Directive	Offences concerning trafficking in human beings (Article 2)
Sexual Exploitation Directive	Offences concerning sexual abuse (Article 3)
	Offences concerning sexual exploitation (Article 4)
	Offences concerning child pornography (Article 5)
	Solicitation of children for sexual purposes (Article 6)
Cybercrime Directive	Illegal access to information systems (Article 3)
	Illegal system interference (Article 4)
	Illegal data interference (Article 5)
	Illegal interception (Article 6)
	Misuse of tools used for committing offences (Article 7)
Counterfeiting Directive	Offences concerning counterfeiting of the euro and other currencies (Article 3)
Terrorism Directive	Terrorist offences (Article 3)
	Offences relating to a terrorist group (Article 4)
	Public provocation to commit a terrorist offence (Article 5)
	Recruitment for terrorism (Article 6)
	Providing training for terrorism (Article 7)
	Receiving training for terrorism (Article 8)
	Travelling for the purpose of terrorism (Article 9)
	Organizing or otherwise facilitating travelling for the purpose of terrorism (Article 10)
	Terrorist financing (Article 11)
	Other offences related to terrorist activities (Article 12)
Money Laundering Directive	Money laundering offences (Article 3)
Non-Cash Payment Directive	Fraudulent use of non-cash payment instruments (Article 3)
	Offences related to the fraudulent use of corporeal non-cash payment instruments (Article 4)
	Offences related to the fraudulent use of non-corporeal non-cash payment instruments (Article 5)
	Fraud related to information systems (Article 6)

	Misuse of tools used for committing offences (Article 7)
Market Abuse Directive	Insider dealing, recommending or inducing another person to engage in insider dealing (Article 3)
	Unlawful disclosure of inside information (Article 4)
	Market manipulation (Article 5)
PIF Directive	Fraud affecting the Union's financial interests (Article 3)
	Money laundering (Article 4(1))
	Active and passive corruption (Article 4(2))
	Misappropriation (Article 4(3))

As can be seen, some of the directives (*e.g.* the Counterfeiting Directive and the Money Laundering Directive) only limits its scope to one criminal offence, while other directives (*e.g.* Terrorism Directive) cover a wide range of punishable acts and prescribe extensive criminalization. In addition to specifying the definition of criminal offences, several directives also address other issues arising from the nature of the crime. For this purpose, for example, the Sexual Exploitation Directive contains provisions in connection with the age of sexual consent and the criminalization of consensual sexual acts by the Member States,[34] the Money Laundering Directive defines the catalogue of the predicate offences of money laundering and the determines special rules for proving them,[35] and the PIF Directive specifies the concept and categories of public officials (Union and national officials) as perpetrators of passive corruption and misappropriation.[36]

During the definition of the punishable conducts, the EU legislator must pay close attention to the requirement of the legitimate purpose and the principles of *ultima ratio* and subsidiarity, which have very close relation to each other. The first requirement, which guarantees the legitimacy of criminal law,[37] means that the EU legislator can only exercise its criminal competences in order to protect fundamental interests, if these interests can be derived from the primary legislation of the EU; the constitutions of the Member States and the fundamental principles of the EU Charter of Fundamentals Rights are not violated; and the activities in question could cause

34 Articles 2(b) and 8 of the Sexual Exploitation Directive.
35 Articles 2(1), and 3(3)–(4) of the Money Laundering Directive.
36 Article 4(4) of the PIF Directive.
37 Maria Kaiafa-Gbandi, 'The Importance of Core Principles of Substantive Criminal Law for a European Criminal Policy Respecting Fundamental Rights and the Rule of Law', *European Criminal Law Review*, Vol. 1, Issue 1, 2011, p. 14.

significant damage to society or individuals.[38] According to the *ultima ratio* principle, criminal law can only be used as a last resort.[39] It means that criminal law should be reserved for the most serious invasion of interests if all other measures have proved insufficient to safeguard that interest. Less serious misconducts are more appropriately treated with other, *e.g.* civil law or by administrative sanctions.[40] Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.[41] Accordingly, it has to be ensured that the decisions will be taken as closely to the citizens as possible.[42] It can therefore be seen that these principles determine when and under which conditions the EU is entitled to use criminal law measures and require the EU legislator to prove the necessity of the application of criminal measures at EU law. As a consequence of these principles, criminal law has to signify an added value compared to other less restrictive measures, which is also an essential requirement of Article 83(1)–(2), as we have already seen.[43]

For the compliance with the principles of *ultima ratio* and subsidiarity, several positive examples can be found in the directive. Some legal acts only require the criminalization of the more serious forms of the criminal offences concerned, and leaves the opportunity to the Member States use non-criminal means for the less severe conducts. The PIF Directive, for example, gives the Member States the right to prescribe sanctions other than criminal sanctions (*e.g.* civil or administrative sanctions) in case of bagatelle offences, *i.e.* if the criminal offence involves damage or advantage of less than EUR 10,000. It means that the criminalization and the application of criminal sanctions is only mandatory if the perpetration is over the afore-

38 Asp *et al.* 2009, p. 707.
39 *See further* Tamás Lukácsi, 'Az *ultima ratio* elve az Európai Unió jogában', *Állam- és Jogtudomány*, Vol. 56, Issue 2, 2015, pp. 20–46.
40 Asp *et al.* 2009, p. 707; Ester Herlin-Karnell, 'Subsidiarity in the Area of EU Justice and Home Affairs Law – A Lost Cause?', *European Law Journal*, Vol. 15, Issue 3, 2009, p. 356.
41 Article 5(3) TEU.
42 Asp 2012, p. 184.
43 Bernd Hecker, *Europäisches Strafrecht*, Springer, Berlin – Heidelberg, 2012, p. 281; Perrine 2012, p. 252.

mentioned threshold.[44] Similarly, the Sexual Exploitation Directive refers to the discretionary right of the Member States whether to criminalize certain consensual conducts (*e.g.* consensual sexual activities between peers, who are close in age and degree of psychological and physical development or maturity, in so far as the acts did not involve any abuse; or production and possession of pornographic material by the producer solely for his/her private use provided that the act involves no risk of dissemination of the material).[45] Furthermore, the Cybercrime Directive and the Market Abuse Directive do not require the Member States to punish with criminal punishments each conducts, they can use criminal means only 'at least for cases which are not minor' or 'at least in serious cases'.[46] However, the concept of minor or serious cases is not defined directly by these directive, but is referred to the discretion of the Member States.

However, alarming tendencies can also be observed in connection with the observance of the aforementioned principles. Some of the criminal law directives punish several preparatory criminal conducts which sometimes can only abstractly jeopardize the protected legitimate legal interest. The Cybercrime Directive and Counterfeiting Directive prescribe the Member States to punish as a criminal offence several preparatory criminal conducts (*e.g.* production, sale, procurement for use, import, receipt, acquisition, possession, distribution or otherwise making available) regarding different tools (*e.g.* instruments, computer programmes, passwords, access codes, security features) used for committing the offences.[47] The Terrorism Directive criminalize a number of preparatory conducts (*e.g.* providing or receiving training for terrorism, travelling for the purpose of terrorism, organizing or otherwise facilitating travelling for the purpose of terrorism) which are only very distantly related to the perpetration of concrete terrorist offence, and which has to be punishable even if the perpetrator did not intend to commit a specific terrorist crime, or his/her act was not related to an actually committed terrorist act.[48] In case of this expanding criminalization

44 Article 7(4) of the PIF Directive.

45 Articles 5(8) and 8 of the Sexual Exploitation Directive.

46 Articles 3–7 of the Cybercrime Directive, Articles 3–5 of the Market Abuse Directive.

47 Article 7 of the Cybercrime Directive, Article 3(1)(d) of the Counterfeiting Directive.

48 Articles 7–10 of the Terrorism Directive. *See* in details, Ferenc Sántha, 'A terrorcselekmény és a terrorizmus kapcsolódó egyéb bűncselekmények' *in* Ákos Farkas (ed.), *Fejezetek az európai büntetőjogból*, Bíbor, Miskolc, 2017, pp. 69–73; Róbert Bartkó & Ferenc Sántha, 'Az Európai Unió jogalkotása és hatása a terrorcselekmény hazai büntetőjogi szabályozására' *in* Krisztina Karsai *et al.* (eds.), *Ünnepi kötet Dr. Nagy*

tendency, the compliance with the *ultima ratio* principle is highly questionable, because the criminal sanctioning of these behaviors cannot in every case be justified with a legitimate purpose.

During the definition of the criminal offences, the European legislator also has to observe the *lex certa requirement* which derives from the principle of legality and legal certainty. This criterion requires that criminal law regulations should be clear and precise, so that individuals may ascertain unequivocally what their rights and obligations are and are able to predict actions that will make him criminally liable. This means that criminal law provisions must define offences in a strict and unambiguous way: the objective and the subjective prerequisites for criminal liability as well as sanctions which could be imposed if an offence is committed have to be foreseeable.[49] The description of conduct which is identified as punishable under criminal law must be worded precisely in order to ensure predictability as regards its application, scope and meaning.[50]

The criminal law directives of the EU usually tries to respect the *lex certa* principle as far as possible, therefore, the secondary legal acts often lists the possible punishable conducts in a very exhaustive way. However, in some cases it can be inappropriate and redundant, for the criminal conducts regulated in the EU legal acts often overlap and it is difficult to distinguish them from each other.[51] In the Counterfeiting Directive, for example, it could be very hard to differentiate between the receiving and the obtaining of the counterfeit currency in the practice.[52] Another problem is that the legal acts sometimes contain indefinite legal definitions. In the PIF Directive, the notion of total damage refers to the estimated damage that results from the entire fraud scheme, both to the financial interests of the Member States concerned and to the Union, excluding interest and penalties.[53] In this context, it is questionable how the term 'estimated damage' can be interpreted, since this kind of definition is difficult to reconcile with the legality requirement.[54] Therefore, in order to comply as closely as possible

Ferenc egyetemi tanár 70. születésnapjára, Szegedi Tudományegyetem, Állam- és Jogtudományi Kar, Szeged, 2018, pp. 94–100.

49 Asp *et al.* 2009, p. 708.

50 Draft Council conclusions, p. 5.

51 *See also* Asp *et al.* 2009, pp. 712–713.

52 Article 3(1)(c) of the Counterfeiting Directive.

53 Recital (4) of the PIF Directive.

54 Judit Jacsó & Bence Udvarhelyi, 'Új irányelv az uniós csalások elleni büntetőjogi védelemről', *Magyar Jog*, Vol. 65, Issue 6, 2018, p. 332.

with the *lex certa* principle, the EU legislator should avoid the use of such indefinite legal concepts.

It is also worth pointing out that due to the differences in the criminal law systems of the Member States, the EU legislator always specially requires the criminalization of the attempt as well as the incite, aid and abet of the commission of the criminal offence.[55] Some of the EU directives punishes incitement, aiding, abetting and attempt in connection with all punishable conduct, while another part of the legal acts – especially in case of attempt – imposes the obligation to criminalize these cases only in relation to some of the prohibited behaviors. This latter situation often occurs in case of punishable conducts where attempt, incitement, aiding and abetting are conceptually excluded. As a result of the minimum harmonization, however, the Member States still have the opportunity to adopt stricter provisions, and to criminalize the attempt or the accessory conducts in connection with all the crimes regulated in the directives. In this context, however, it could be problematic, that the directives fail to give exact definitions for these notions and does not specify further which kind of criminal offences should be created to punish the inciting, aiding, abetting and attempt. In the absence of unified, autonomous EU definitions, the national criminal law regulations of the Member States has to applied, which sometimes show significant differences. Consequently, it can easily occur that same act will be punishable in one Member State, while it will remain unpunished in another Member State.[56]

3.2. Mens Rea Elements of the Criminal Offences

Regarding the *mens rea elements*, the criminal law directives of the EU basically require the punishment of intentional acts and omissions. There is

55 Article 3 of the Human Trafficking Directive, Article 7 of the Sexual Exploitation Directive, Article 8 of the Cybercrime Directive, Article 4 of the Counterfeiting Directive, Article 14 of the Terrorism Directive, Article 4 of the Money Laundering Directive, Article 8 of the Non-Cash Payment Directive, Article 6 of the Market Abuse Directive, Article 5 of the PIF Directive.

56 Costanza Di Francesco Maesa, 'Directive (EU) 2017/1371 on the Fight Against Fraud to the Union's Financial Interests by Means of Criminal Law: A Missed Goal?', *European Papers*, 3/2018, p. 1463; Krisztina Karsai, 'External Effects of the European Public Prosecutor's Office Regime', *Miskolci Jogi Szemle*, Vol. 14, Special Issue 2, 2019, p. 465; Sándor Madai, 'Nem csalás, de ámítás? Dogmatikai megjegyzések a PIF Irányelvhez', *Miskolci Jogi Szemle*, Vol. 14, Special Issue 2, 2019, p. 139.

one directive, the Cybercrime Directive which not only determines the requirement of intent but also the commission without right.[57] Two legal acts, the Human Trafficking Directive and the Sexual Exploitation Directive refers to the negligent conducts as well, because they consider as an aggravating circumstance if the criminal offence deliberately or by gross negligence/recklessly endangered the life of the victim.[58] The preamble of the Money Laundering Directive and the Market Abuse Directive also provides the possibility for the Member States that conducts committed recklessly or by serious negligence constitute criminal offences.[59] Furthermore, the Money Laundering Directive also stipulates that the Member States have the right (but are not obliged) to take the necessary measures to ensure that the described conducts are punishable as a criminal offence where the offender suspected or ought to have known that the property was derived from criminal activity.[60] However, due to the minimum harmonization, the Member States can order the criminalization of the conducts committed by negligence in connection with the other EU directives as well, since they are free to adopt stricter provisions than that of the directives.

It can be observed that the EU legislator fully respects to principle of guilt in connection with the subjective elements of the criminal offences. This principle requires that the criminalization of certain acts must be based on the principle of individual guilt, which should be regarded as a guarantee that human dignity is respected by criminal law. The EU legislator therefore has to justify that the requirements in European legislation as to the sanctions permits the imposition of penalties which correspond to the guilt of the individual.[61] As a consequence of this principle, the EU directives cannot oblige the Member States to criminalize and punish certain behavior with strict liability, regardless of the guilt of the perpetrator.[62] Strict liability, which is therefore excluded in the EU criminal legislation,

57 Article 2 of the Human Trafficking Directive, Articles 3–6 of the Sexual Exploitation Directive, Articles 3–7 of the Cybercrime Directive, Article 3 of the Counterfeiting Directive, Articles 3–12 of the Terrorism Directive, Article 3(1) of the Money Laundering Directive, Articles 3–7 of the Non-Cash Payment Directive, Articles 3–5 of the Market Abuse Directive, Articles 3–4 of the PIF Directive.

58 Article 4(2)(c) of the Human Trafficking Directive, Article 9(f) of the Sexual Exploitation Directive.

59 Recital (13) of the Money Laundering Directive, Recital (21) of the Market Abuse Directive.

60 Article 3(2) of the Money Laundering Directive.

61 Asp *et al.* 2009, pp. 707–708.

62 Kaiafa-Gbandi 2011, p. 31.

can be defined as a criminal liability which requires only the prohibited conduct, irrespectively of the *mens rea* of the perpetrator.[63]

4. Sanctions to Be Imposed on Natural Persons

With regard to the minimum rules relating to criminal sanctions, all directives stipulate as a general rule that Member States are required to punish the criminal offences with effective, proportionate and dissuasive criminal sanctions or penalties.[64] The requirement of effectiveness means that the sanction must be suitable for accomplishing the desired objective, *i.e.* the adequate protection of interests of the EU and the general and special prevention. The condition of proportionality requires that the selected sanction must be proportionate to the seriousness of the crime, and its effects must not exceed the extent necessary to reach the pursued goal. If there are several tools that seem suitable for achieving the given objective, the least severe one should be chosen. Finally, the dissuasive nature demands that the sanction must have an adequate deterrent force for future offenders.[65]

For the less severe punishable conducts, Some of the EU directives only stipulate the requirement of the effective, proportionate and dissuasive sanctions. In these cases the Member States are free to decide on the type and extent of the sanction. For the more serious cases, however, the EU legislator also determines the type and the level of punishment to be applied. As an effective, proportionate and dissuasive sanction, the directive primarily prescribe imprisonment. In some cases, the directives leave to the Member States to determine the minimum and/or maximum limit of the imprisonment,[66] while in other cases the directives set out the minimum level of the upper limit of the imprisonment.[67] In these cases, however, the national legislator can of course also prescribe higher maximum penalties.

63 Klip 2012, p. 203.

64 Article 4(4) of the Human Trafficking Directive, Recital (12) of the Sexual Exploitation Directive, Article 9(1) of the Cybercrime Directive, Articles 5(1) and 5(5) of the Counterfeiting Directive, Article 15(1) of the Terrorism Directive, Article 5(1) of the Money Laundering Directive, Article 9(1) of the Non-Cash Payment Directive, Article 7(1) of the Market Abuse Directive, Article 7(1) of the PIF Directive.

65 Hecker 2012, pp. 239–240.

66 Article 5(2) of the Counterfeiting Directive, Article 7(2) of the PIF Directive.

67 Ursula Nelles *et al.*, 'Strafrecht' *in* Reiner Schulze *et al.* (eds.), *Europarecht. Handbuch für die deutsche Rechtspraxis*, Nomos, Baden-Baden, 2010, pp. 2316–2318.

The legal acts often define the range of imprisonment in a differentiated manner based on the punishable conducts, the value of or the damage caused by the offense, or other aspects. The maximum penalty in the EU directives can be the following: *(i)* at least one year of imprisonment;[68] *(ii)* at least two years of imprisonment;[69] *(iii)* at least three years of imprisonment;[70] *(iv)* at least four years of imprisonment;[71] *(v)* at least five years of imprisonment;[72] *(vi)* at least eight years of imprisonment;[73] *(vii)* at least ten years of imprisonment;[74] and *(viii)* at least fifteen years of imprisonment.[75]

The level of imprisonment in the different EU directives are also summarized in the following table:

	Hum. Tr. Dir.	**Sex. Ex. Dir.**	**Cybr. Dir.**	**Count. Dir.**	**Terror. Dir.**	**M. L. Dir.**	**Non-Cash Dir.**	**Mark. Ab. Dir.**	**PIF Dir.**
1 year		GC					GC		
2 years		GC	GC				GC	GC	
3 years		GC	AC				GC		
4 years						GC		GC	GC
5 years	GC	GC	AC	GC			AC		
8 years		GC		GC	GC				

68 Articles 3(2), 4(4), 5(2)-(3) and 6(1) of the Sexual Exploitation Directive, Article 9(3) of the Non-Cash Payment Directive

69 Articles 3(3), 4(2), 4(4), 4(7) and 5(4)-(5) of the Sexual Exploitation Directive, Article 9(2) of the Cybercrime Directive, Articles 9(2) and 9(5) of the Non-Cash Payment Directive, Article 7(3) of the Market Abuse Directive

70 Articles 3(5) Point i-ii) and 5(6) of the Sexual Exploitation Directive, Article 9(3) of the Cybercrime Directive, Article 9(4) of the Non-Cash Payment Directive

71 Article 5(2) of the Money Laundering Directive, Article 7(2) of the Market Abuse Directive, Article 7(3) of the PIF Directive.

72 Article 4(1) of the Human Trafficking Directive, Articles 3(4)–(6), 4(2)–(3) and 4(5)–(7) of the Sexual Exploitation Directive, Article 9(4) of the Cybercrime Directive, Article 5(4) of the Counterfeiting Directive, Article 9(6) of the Non-Cash Payment Directive.

73 Articles 3(5)(i)–(ii), 4(3) and 4(5) of the Sexual Exploitation Directive, Article 5(3) of the Counterfeiting Directive, Article 15(3) of the Terrorism Directive.

74 Article 4(2) of the Human Trafficking Directive, Articles 3(5)(iii), 3(6) and 4(6) of the Sexual Exploitation Directive.

75 Article 15(3) of the Terrorism Directive.

	Hum. Tr. Dir.	Sex. Ex. Dir.	Cybr. Dir.	Count. Dir.	Terror. Dir.	M. L. Dir.	Non-Cash Dir.	Mark. Ab. Dir.	PIF Dir.
10 years	AC	GC							
15 years					GC				

Abbreviations: GC: general case(s), AC: aggravating case(s)

Regarding the determination of the upper limit of the imprisonment, it can be problematic that in some cases the EU legal acts define the criminal sanctions in a less differentiated way, as a result of which the same penalty frameworks apply to crimes with different social danger. Let us see some examples for this. In the Terrorism Directive, participating in the activities of a terrorist group is punishable with a maximum penalty of at least eight years of imprisonment regardless of whether the purpose of the terrorist group is merely to threaten with the perpetration of terrorist acts or to actually commit terrorist crimes, although the danger to the society of the two cases is clearly different.[76] In the PIF Directive, the same level of imprisonment applies to all criminal offences falling within the competence of the directive (EU-fraud, active and passive corruption, money laundering and misappropriation) if they involve considerable damage or advantage. The considerable amount of damage or advantage means more than EUR 100,000 in case of most of the criminal offences, however, in case of VAT-fraud, the threshold is EUR 10 million. The sanction framework therefore does not reflect the differences between the criminal offences.[77] In this regard, however, positive examples can also be observed. The Sexual Exploitation Directive determines the punishable conducts in details and associates each criminal act with a separate maximum penalty between one and ten years.[78]

In addition to imprisonment, EU norms exceptionally determine other sanctions as well. The Sexual Exploitation Directive, for example, stipulates that in order to avoid the risk of repetition of offences, natural person who has been convicted of any of the offences may be temporarily or permanently prevented from exercising at least professional activities involving di-

76 Articles 2(3)–(4), and 15(3) of the Terrorism Directive. *See also* Ferenc Nagy & Krisztina Karsai, 'A kerethatározat', *Büntetőjogi Kodifikáció*, Vol. 3, Issue 1–2, 2003, p. 22.

77 Articles 2(2) and 7(3) of the PIF Directive.

78 Articles 3–6 of the Sexual Exploitation Directive.

rect and regular contacts with children.[79] The Money Laundering Directive provides the Member States the possibility to prescribe additional sanctions or measures to natural persons, however, it does not define the types of these penalties, but leaves it up to the Member States.[80] Finally, most of the directive mandatory prescribes the freezing, seizure and/or confiscation of proceeds derived from and instrumentalities used or intended to be used in the commission or contribution to the commission of the crimes.[81]

EU criminal law directives also often define cases which can be considered as aggravating or mitigating circumstances when imposing sanctions.[82] In connection with the former, most of the directives list the more dangerous and serious forms of the criminal offences concerned. However, some directives also prescribe higher level of penalty in case of these conditions,[83] while other directives do not determine higher sanctions for these cases, but only oblige the Member States to regard these cases as aggravating circumstances.[84] This duality, however, could lead to unjustified differentiation and could be incompatible with the criminal law dogmatic of some Member States. The aggravating circumstances in the directives are the following: *(i)* the crime is committed within the framework of a criminal organization within the meaning of Council Framework Decision 2008/841/JHA[85] on the fight against organized crime;[86] *(ii)* the crime is committed against a victim/child in a particularly vulnerable situation, such as a child

79 Article 10 of the Sexual Exploitation Directive.

80 Article 5(3) of the Money Laundering Directive.

81 Article 7 of the Human Trafficking Directive, Article 11 of the Sexual Exploitation Directive, Article 20 of the Terrorism Directive, Article 9 of the Money Laundering Directive, Article 10 of the PIF Directive.

82 Klip 2012, pp. 321–329.

83 Article 4(2) of the Human Trafficking Directive, Article 9(4) of the Cybercrime Directive, Article 9(6) of the Non-Cash Payment Directive.

84 Article 4(3) of the Human Trafficking Directive, Article 9 of the Sexual Exploitation Directive, Article 9(5) of the Cybercrime Directive, Article 15(4) of the Terrorism Directive, Article 6 of the Money Laundering Directive, Article 8 of the PIF Directive.

85 According to Article 1(1) of Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organized crime, criminal organization means "a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit".

86 Article 4(2)(b) of the Human Trafficking Directive, Article 9(d) of the Sexual Exploitation Directive, Article 9(4)(a) of the Cybercrime Directive, Article 6(1)(a) of the Money Laundering Directive, Article 9(6) of the Non-Cash Payment Directive, Article 8 of the PIF Directive.

with a mental or physical disability, in a situation of dependence or in a state of physical or mental incapacity;[87] *(iii)* the commission of the crime deliberately or by gross negligence endangers the life of the victim/child;[88] *(iv)* the crime is committed by use of serious violence or causes particularly serious harm to the victim/child;[89] *(v)* the crime is committed by public officials in the performance of their duties,[90] by a member of the child's family, a person cohabiting with the child or a person who has abused a recognized position of trust or authority, or by several persons acting together;[91] *(vi)* the offender has previously been convicted of offences of the same nature;[92] *(vii)* the commission of the crime causes serious damage, or it was committed against a critical infrastructure information system;[93] *(viii)* the crime is committed by misusing the personal data of another person, with the aim of gaining the trust of a third party, thereby causing prejudice to the rightful identity owner;[94] *(ix)* the offender of the crime is an obliged entity within the meaning of Directive (EU) 2015/849[95] and commits the offence in the exercise of their professional activities;[96] *(x)* the laundered property is of considerable value, or derives from one of the defined predicate offences.[97]

Mitigating circumstances are only regulated in the Terrorism Directive. According to this provision, penalties can be reduced if the offender renounces terrorist activity and provides the administrative or judicial authorities with information which they would not otherwise have been able

87 Article 4(2)(a) of the Human Trafficking Directive, Article 9(a) of the Sexual Exploitation Directive, Article 15(4) of the Terrorism Directive.
88 Article 4(2)(c) of the Human Trafficking Directive, Article 9(f) of the Sexual Exploitation Directive.
89 Article 4(2)(d) of the Human Trafficking Directive, Article 9(g) of the Sexual Exploitation Directive.
90 Article 4(3) of the Human Trafficking Directive.
91 Article 9(b)–(c) of the Sexual Exploitation Directive.
92 Article 9(e) of the Sexual Exploitation Directive.
93 Article 9(4)(b)–(c) of the Cybercrime Directive.
94 Article 9(5) of the Cybercrime Directive.
95 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (4th AML-Directive).
96 Article 6(1)(b) of the Money Laundering Directive.
97 Article 6(2)(a)–(b) of the Money Laundering Directive.

to obtain, helping them to prevent or mitigate the effects of the offence; identify or bring to justice the other offenders; find evidence; or prevent further offences.[98]

5. Liability of Legal Persons and Sanctions against Them

In addition to sanctioning natural persons, the EU directives also regulate the liability of legal persons and the types of sanctions applicable to them. In these matters, the EU directives contain almost identical rules.

The liability of legal persons can be established in two cases. On the one hand, legal persons can be held liable if the criminal offence concerned was committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, which is based on a power of representation of the legal person, an authority to take decisions on behalf of the legal person, or an authority to exercise control within the legal person. On the other hand, the liability of the legal persons can be established where the lack of supervision or control by a person in a leading position has made possible the commission of the criminal offences for the benefit of that legal person by a person under its authority. The directives also stipulate that the liability of a legal person shall not exclude criminal proceedings against natural persons who are perpetrators, inciters or accessories in the offences.[99]

In connection with the liability of legal persons, it has to be mentioned that there could be Member States who rejects the introduction of criminal responsibility of legal persons because it is inconsistent with the principle of guilt.[100] However, it can be stated that the EU norms completely respect the national sovereignty of the Member States in this respect, because they only oblige them to sanction the legal persons, but does not refer that the sanctions have to be criminal sanctions. Therefore, it is up to the Member States whether they fulfil their sanctioning obligation by means of criminal law or by other less restrictive measures (*e.g.* civil or administrative mea-

98 Article 16 of the Terrorism Directive.

99 Article 5 of the Human Trafficking Directive, Article 12 of the Sexual Exploitation Directive, Article 10 of the Cybercrime Directive, Article 6 of the Counterfeiting Directive, Article 17 of the Terrorism Directive, Article 7 of the Money Laundering Directive, Article 10 of the Non-Cash Payment Directive, Article 8 of the Market Abuse Directive, Article 6 of the PIF Directive.

100 Kaiafa-Gbandi 2011, p. 31.

sures). In connection with the liability of the legal persons, the Manifesto also states that rules concerning criminal liability of legal entities must be elaborated on the basis of criminal law provisions at the national level.[101]

Concerning the sanctions, the EU directives determines the general requirements that legal persons have to be subject to effective, proportionate and dissuasive sanctions. As applicable sanctions, the EU norms exemplary list the followings: *(i)* criminal or non-criminal fines; *(ii)* exclusion from entitlement to public benefits or aid; *(iii)* temporary or permanent disqualification from the practice of commercial activities; *(iv)* placing under judicial supervision; *(v)* judicial winding-up; *(vi)* temporary or permanent closure of establishments which have been used for committing the criminal offence; *(vii)* temporary or permanent exclusion from public funding, including tender procedures, grants and concessions.[102]

It also should be pointed that the regulation of the liability of the legal persons does not seem to be justified and necessary in connection with all regulated crimes. There are criminal offences, such as the sexual exploitation of children or certain offences related to terrorist activity (*e.g.* recruitment for terrorism or travelling for the purpose of terrorism), where the commission of the crime in the name and for the benefit of a legal person is conceptually excluded.

6. Rules Affecting Criminal Procedure Law and Judicial Cooperation

In addition to the definition of criminal offences and sanctions, the EU directives also contain several other regulations in connection with criminal procedure law or judicial cooperation. Among these provisions we can find, for example, the obligation of the Member States to provide effective investigative tools for investigating or prosecuting the offences

101 Asp *et al.* 2009, pp. 708, and 711.

102 Article 6 of the Human Trafficking Directive, Article 13 of the Sexual Exploitation Directive, Article 11 of the Cybercrime Directive, Article 7 of the Counterfeiting Directive, Article 18 of the Terrorism Directive, Article 8 of the Money Laundering Directive, Article 11 of the Non-Cash Payment Directive, Article 9 of the Market Abuse Directive, Article 9 of the PIF Directive. It is important to emphasis that the first six of the listed types of sanctions are included in all directives, while temporary or permanent exclusion from public funding can only be found in the Money Laundering Directive, Non-Cash Payment Directive and PIF Directive.

referred,[103] the exchange of information between the relevant authorities of the Member States as well as between the Member States and the EU institutions,[104] the protection and the rights of the victims of the crimes as well as the assistant and support to them,[105] the preventive measures against the criminal offences,[106] the measures to ensure the prompt removal of websites containing or disseminating criminal offences,[107] the recovery of sums unduly paid or VAT not paid in the context of the commission of the criminal offences,[108] or the statutory limitation period of the criminal offences concerned.[109]

Among the criminal procedural provisions of the EU directives, the regulation of jurisdiction deserves to be highlighted, as it appears in all legal acts. According to the directives, Member States are generally obliged to establish their jurisdiction if the crime was committed in whole or in part within their territory, or if the offender is one of their nationals. Furthermore, EU legal acts also define other grounds for which Member States may extend their jurisdiction, either on a mandatory or optional basis. These are the following: *(i)* the criminal offence was committed outside the territory of the Member State concerned, against one of its nationals or a person who is an habitual resident in its territory,[110] for the benefit of a legal person established in its territory,[111] or the offender is an

103 Article 9(4) of the Human Trafficking Directive, Article 15(3) of the Sexual Exploitation Directive, Article 9 of the Counterfeiting Directive, Article 20(1) of the Terrorism Directive, Article 11 of the Money Laundering Directive, Article 13(1) of the Non-Cash Payment Directive.

104 Article 13 of the Cybercrime Directive, Articles 14–15 of the Non-Cash Payment Directive, Article 15 of the PIF Directive.

105 Articles 11–17 of the Human Trafficking Directive, Articles 18–20 of the Sexual Exploitation Directive, Articles 24–26 of the Terrorism Directive, Article 16 of the Non-Cash Payment Directive.

106 Articles 18–19 of the Human Trafficking Directive, Articles 21–24 of the Sexual Exploitation Directive, Article 17 of the Non-Cash Payment Directive.

107 Article 25 of the Sexual Exploitation Directive, Article 21 of the Terrorism Directive.

108 Article 13 of the PIF Directive.

109 Article 12 of the PIF Directive.

110 Article 10(2)(a) of the Human Trafficking Directive, Article 17(2)(a) of the Sexual Exploitation Directive, Article 12(2)(c) of the Non-Cash Payment Directive.

111 Article 10(2)(b) of the Human Trafficking Directive, Article 17(2)(b) of the Sexual Exploitation Directive, Article 12(3)(b) of the Cybercrime Directive, Article 19(1)(d) of the Terrorism Directive, Article 10(2)(b) of the Money Laundering Directive, Article 12(2)(b) of the Non-Cash Payment Directive, Article 10(2)(b) of the Market Abuse Directive, Article 11(3)(b) of the PIF Directive.

habitual resident in its territory;[112] *(ii)* the criminal offence was committed by means of information and communication technology accessed from the territory of the Member State concerned, whether or not it is based on its territory;[113] *(iii)* the criminal offender committed the offence when physically present on the territory of the Member State concerned, whether or not the offence is against an information system on its territory or the offence is against an information system on its territory, whether or not the offender commits the offence when physically present on its territory;[114] *(iv)* the criminal offence in connection with euro was committed outside the territory of the Member State concerned, where the offender is in the territory of that Member State and is not extradited; or the counterfeit euro notes or coins related to the offence have been detected in the territory of that Member State;[115] *(v)* the criminal offence was committed on board a vessel flying the Member State's flag or an aircraft registered there, or against the institutions or people of the Member State concerned or against an institution, body, office or agency of the Union based in that Member State;[116] *(vi)* the criminal offender provided training for terrorism to its nationals or residents;[117] *(vii)* the criminal offender is subject to the Staff Regulations at the time of the criminal offence, or is one of the officials of the Member State concerned who acts in his or her official duty.[118]

In connection with the regulation of jurisdiction, the Terrorism Directive goes the furthest, which – based on the principle of universal criminal jurisdiction – generally allows the Member States to extend its jurisdiction if the offence was committed in the territory of another Member State, even if the offence is not connected to the Member State in question at all.[119]

112 Article 10(2)(c) of the Human Trafficking Directive, Article 17(2)(c) of the Sexual Exploitation Directive, Article 12(3)(a) of the Cybercrime Directive, Article 19(1)(c) of the Terrorism Directive, Article 10(2)(a) of the Money Laundering Directive, Article 12(2)(a) of the Non-Cash Payment Directive, Article 10(2)(a) of the Market Abuse Directive, Article 11(3)(a) of the PIF Directive.

113 Article 17(3) of the Sexual Exploitation Directive.

114 Article 12(2) of the Cybercrime Directive, Article 12(2) of the Non-Cash Payment Directive.

115 Article 8(2) of the Counterfeiting Directive.

116 Article 19(1)(b)–(e) of the Terrorism Directive.

117 Article 19(2) of the Terrorism Directive.

118 Articles 11(2) and 11(3)(c) of the PIF Directive.

119 Article 19(1) of the Terrorism Directive (last sentence).

7. Tendencies of the EU Criminal Legislation and Criminal Policy

The Treaty of Lisbon has resulted in an increasing criminal legislation at the level of the EU. Parallel with this, the European criminal policy has also emerged and begin to develop. The Manifesto and the guidelines of the EU institutions listed the most important criminal law principle which the EU have to take into consideration during the adoption of criminal law directives. As a result of this, the coherence of EU legal acts has significantly been increased, the criminal law directives have a similar structure and content, which clearly facilitates not only the EU legislation, but also the application and interpretation of the law. The directives of the EU generally try to comply with the criminal law principles as much as possible.

In addition to these positive tendencies, however, it cannot be ignored that certain problems have not been eliminated by the developing EU criminal policy. Already the Manifesto mentioned several alarming tendencies which must be observed and not be ignored:

> "criminal law must not be adopted without pursuing a legitimate purpose; the principle of ultima ratio must not be neglected; the Member States must not be obliged to pass imprecise national criminal laws; the legislation must not answer every social problem with passing increasingly repressive acts and consider this as a value in itself."[120]

If the current EU criminal law legislation is analyzed, some negative trends can still be observed. The greatest concern may be the increasing trend of criminal law repression. If we compare the directives adopted after the Treaty of Lisbon with the previous III pillar framework decisions which were replaced by these directives, it can be stated that the new legal acts usually contain more severe rules with regards to both the criminal offences and the sanctions. The post-Lisbon legislation often expanded the scope of the punishable conducts and in some cases, the directives prescribe the criminalization of certain criminal offences which could hardly be justified with the legitimizing factors of EU criminal law. The regulation of the sanctions also become stricter. While the previous framework decisions did not in all cases determine the maximum level of the penalties and often prescribed only the requirement of effective, proportionate and dissuasive sanctions, the directives stipulate almost in each case the minimum upper limit of the imprisonment, usually more strictly than the prior framework

120 Asp *et al.* 2009, p. 715.

decisions. Most of the directives also expanded the range of aggravating circumstances. In this context, however, it is important to point out that the growth of the legal harmonization activity of the EU cannot be considered a negative tendency in itself, since uniform EU norms are necessary to ensure effective fight against cross-border crimes and to protect supranational legal interests. The real problem is that the strengthening repression and the expansion of criminalization could lead to the erosion or jeopardy of other criminal law principles as well.

A further problem which also has to emphasize is that although the vertical and horizontal coherence of the EU criminal law norms has significantly increased after the Treaty of Lisbon, shortcomings can be observed in this regard as well. The horizontal coherence of EU directives could be violated in particular if a criminal offence is subject to more legal acts, *e.g.* in case of money laundering, which is regulated by the 4th AML-Directive (which was modified with the 5th AML-Directive[121]), the Money Laundering Directive and the PIF Directive. The multi-level regulation of money laundering, however, can cause incoherence in many cases, which can be observed both in relation to the regulation of criminal offences and criminal sanctions.[122] The implementation of the different EU norms therefore can put difficult challenges on the national legislator in order to create coherent national criminal law framework that fully complies with all EU standards. The fragmented and incoherent EU regulation can therefore result in unjustified discrimination and a different level of legal protection.

The criminal law and criminal policy of the EU are constantly developing, the EU legislator must increasingly respect the basic principles of criminal law. The aforementioned negative tendencies do not in themselves undermine the legitimacy of EU criminal law, however, ignoring these dangers and risks may ultimately lead to an unacceptable criminal law

121 Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU.

122 *See* in details, Robert Kert, 'The need for implementation in the areas of money laundering, corruption and misappropriate use of funds' *in* Ákos Farkas *et al.* (eds.), *Criminal Law Aspects of the Protection of the Financial Interests of the European Union – with particular emphasis on the national legislation on tax fraud, corruption, money laundering and criminal compliance with reference to cybercrime*, Wolters Kluwer Hungary, Budapest, 2019, pp. 223–228.

that contradicts fundamental principles and criminal law traditions.[123] In order to continuously improve EU criminal law legislation, the future EU criminal policy must find answers to these challenges.

123 Asp *et al.* 2009, p. 715.