

Articles

Approximation of criminal penalties in the EU: Comparative review of the methods used and the provisions adopted – Future perspectives and proposals

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The objective of the following study is to present and evaluate the methodology of approximating criminal penalties in the EU as it has evolved from 1999 until today, and to examine the provisions adopted so far in terms of their significance for the principle of proportionality and for consistency both at an EU level and at a national level. In this context, special attention is paid to demonstrating the advantages of pursuing approximation by means of a system and also to formulating proposals regarding the reasons that justify approximation.

I. Introduction

The approximation of criminal penalties, and more specifically of penalties that involve a deprivation of liberty, is a *unique* feature of EU law, owing its existence to the advanced level of judicial cooperation pursued within the area of freedom, security and justice; at the same time, it is considered to be a very *challenging* task, which has a great *impact* on national legislations.¹ Nearly 16 years after the Amsterdam Treaty introduced the EU's competence to establish minimum rules regarding criminal penalties, such rules have become a standard part of the content of almost all framework decisions and directives adopted in the field of substantive criminal law. Nevertheless, the methodology used and the exact reasons justifying the approximation of criminal penalties in the EU are still inadequately determined; this shortcoming is quite significant, especially since the requirements regarding the legality of the EU's criminal legislation are much stricter under the Lisbon Treaty than what they used to be in the third pillar.

In total, the main rules and guidelines governing particularly the approximation of criminal penalties have been: the reference of former article 31(e) TEU and article 83 TFEU to establishing “minimum rules” relating to penalties²; the

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¹ See *B. Asp*, Harmonisation of Penalties and Sentencing within the EU, *Bergen Journal of Criminal Law and Criminal Justice* (BJCLCJ) 2013, pp. 58–62, *T. Elholm*, Does EU Criminal Cooperation Necessarily Mean Increased Repression in the Nordic countries? *European Journal of Crime, Criminal Law and Criminal Justice* (EJCLCJ) 2009, pp. 191 et seq.

² Article 83 TFEU uses the term “sanctions”, however the directives adopted based on this article refer to “penalties”, with the exception of directive 2014/62/EU on counterfeiting.

Declaration on article 31(e) TEU under the Amsterdam Treaty, citing that approximation “shall not have the consequence of obliging a Member State whose legal system does not provide for minimum sentences to adopt them”;³ the 2002 “Council conclusions on the approach to apply regarding approximation of penalties”. While the primary law provisions mentioned above have long been interpreted as only stating that the EU may lay down the *minimum* requirements with respect to the *maximum* penalties provided for in the national legal orders, the 2002 Council conclusions gave more detailed instructions on how to approximate criminal penalties; furthermore, they were uninterruptedly applied for a period of about six years, offering an example of how the approximation of criminal penalties is carried out by means of a *system*. And since the use of a system is rightfully presumed to favour *consistency*, it is essential to examine the effect of the 2002 Council conclusions and find out whether they can serve as a starting point to answering fundamental questions concerning the approximation of criminal penalties.

Thus, the present contribution consists of three parts: the comparative review of the methods employed to form the minimum rules relating to criminal penalties; the evaluation of these minimum rules in terms of their compatibility primarily with the principle of proportionality; and proposals on how to approximate criminal penalties in a way that is rational, adequately efficient and more respectful towards the rights of the citizens.

II. Methodology

Prior to the enactment of the Amsterdam Treaty, the third pillar conventions on fraud and corruption required Member States to ensure that the offences prescribed in those instruments would be punishable by effective, proportionate and dissuasive criminal penalties, including, at least in serious cases, penalties involving deprivation of liberty which can give rise to extradition.⁴ Therefore, both conventions set two basic objectives: the criminalisation of the types of conduct described and the facilitation of judicial cooperation regarding only serious cases.

When the Amsterdam Treaty entered into force, the EU’s tactic changed. In particular, only two out of the first seven framework decisions contain provisions similar to the ones of the conventions. Almost all the rest ask for effective, proportionate and dissuasive criminal penalties that may entail extradition as to *all* of the offences defined therein; in addition, they lay down rules concerning the minimum-maximum penalties for the most serious of the offences defined in each instrument (one framework decision only provides for the latter). Hence, the provisions aiming at facilitating judicial cooperation were expanded and the EU

³ The content of Declaration 8 was not repeated in reference to the Lisbon Treaty. However, the reasons that had led to the introduction of the Declaration (most notably, the fact that certain Member States do not provide for special minimum penalties for each crime on the one hand, and the increased complexity of approximating minimum penalties as well on the other hand) are still valid.

⁴ See articles 2(1) of the PIF convention, 5(1) of the PIF protocol on corruption of public officials and 5(1) of the convention on same subject.

started making efforts to ensure that serious crimes would be considered as such by the Member States.

At the same time, negotiations were held within the Council in order to establish specific guidelines concerning the approximation of criminal penalties; these discussions began in 1998 and ended in 2002 with the adoption of conclusions, which were reaffirmed by the Council in 2009.⁵ Given that the methodology of the approximation is currently uncertain and thus open to debate again, the key points of those discussions are presented below, along with the final conclusions.

1. In search of a method – Council conclusions of 2002

In 1999⁶, two arguments were used to justify the need to approximate criminal penalties: (a) due to the fact that, in many Member States, a response to a request for extradition or mutual assistance is possible only if the level of the custodial penalty provided for a crime exceeds a certain limit, an exceptionally low penalty might hamper the response to such a request; (b) Member States that apply exceptionally low penalties to some offences, the commission of which involves premeditation and planning, may attract potential offenders from other Member States. A few years later⁷, the Member States replied to a questionnaire concerning aspects of their penalty systems and expressed their views regarding the approximation of criminal penalties; at that point, they agreed that approximation should focus on *the most serious offences*, it should take account of *national traditions* and it should only be effected where it proves necessary, as *it is not an end in itself* but means to developing an area of freedom, security and justice.⁸

As far as the main issue of the discussions is concerned, i. e. *the method to be used*, four different schemes were basically considered by the Council.

An important proposal was the one by Denmark, to create *a scale* of three penalty levels: (I) “maximum penalties which make extradition possible”, (II) “maximum penalties which make imprisonment of a long duration possible”, (III) “maximum penalties which are among the most severe under national law”.⁹ According to this proposal, *each Member State* would determine the content of levels II and III,¹⁰ and

⁵ See Council docs 8232/98, 9141/02 and 16542/2/09 respectively.

⁶ Council doc 9959/99, p. 3.

⁷ Council doc 12531/01.

⁸ See also Council doc 13789/01, p. 2.

⁹ Council doc 12531/01, p. 40. Later (13789/01, p. 4), the Danish proposal referred to (II) “long sentences” and (III) “sentences of the longest duration”, while the *Austrian* one to (II) “custodial sentences of average duration depending on the national law, which are in any case considerably longer than required for extradition purposes and which normally lead to the imposition of substantial custodial sentences”, and (III) “custodial sentences which form part of the group of longest sentences applied in terms of a specific number of years as provided for under national law”. *Luxembourg* referred to “a method that entails dividing penalties into categories and drawing up a correlation table of penalties for the 15 Member States. Thereafter it will be enough to refer to the relevant category so that each Member State knows how to interpret the obligation” (12531/01, p. 40).

¹⁰ The content of level (I) would also depend on national provisions, however, in the view of the EU, a maximum penalty which may entail extradition corresponds to a maximum penalty of *one* year, due to the 1957 European Convention on extradition (and also because of the framework decision 2002/584/JHA on the European arrest warrant); see explicit reference to the one year threshold in COM (2001) 771, p. 15, SEC (2007) 1424, p. 51, and SEC (2007) 160, “Specific option 2: Minimum levels of penalties only for natural persons”.

the EU would choose the level appropriate for every offence. Denmark argued¹¹ that this method, which in essence promoted the *substantive* approximation of national legislations, would facilitate judicial cooperation, provide sufficient approximation, and ensure flexibility. However, the proposal was turned down, as it was thought that in certain cases it might even work *against* approximation.¹²

Another important proposal, presented by the UK, was to introduce a scale whose levels would consist of *numbers of years* regarding the maximum penalty. The idea was that the Council would form “ranges”¹³ by determining the lowest and the highest point of each level; then, when legislating, the EU would decide on the level appropriate for a specific offence and the Member States would have to set the maximum penalty provided in their national law for this offence within the range chosen by the EU. Although the proposal was not approved as such (because it included levels that were too narrow in range)¹⁴, the basic concept behind it appealed to many Member States, as it was considered that the ranges ensure a significant degree of flexibility without impeding approximation; accordingly, a proposal to turn the levels of ranges into levels of single numbers of years was rejected.¹⁵

Along with the proposals that referred to scales of levels, the Council assessed the tactic applied in the first framework decisions, which comprised a general obligation for effective, proportionate and dissuasive criminal penalties that may entail extradition and a special provision about the minimum–maximum penalty for the most serious of the offences described in a legislative act. This “method” was simple, precisely because it did not involve the prior formation of a scale or any other system; in addition, it was said to ensure some degree of approximation, apparently due to the fact that approximating criminal penalties only for the serious offences had led to setting rather high standards for the minimum–maximum penalties, thus restricting the discretion of the Member States. Nevertheless, it was also argued that in reality its effect on approximation had *proven* poor, while it was once again noted that using a single number as a minimum–maximum penalty lacks flexibility and makes it hard for the Member States to preserve the coherence of their penalty systems.¹⁶

Following the proposals mentioned above, the Council put forward a “combined option”¹⁷, stressing the need to provide for *common* penalties that would

¹¹ Council doc 12998/01, p. 2.

¹² Council doc 13789/01, p. 5: “The risk of this approach is that rather than achieving any substantial approximation it will exacerbate existing differences between sanctions, since “long” and “longest duration” have very different meanings across the Member States”.

¹³ This term used by the Council (see for example Council doc 12998/01).

¹⁴ The proposal of the UK (Council doc 12998/01, p. 3) included five levels of ranges: 1–4 years (1st), 4–6 years (2nd), 6–8 years (3rd), 8–10 years (4th), 10–12 years (5th level).

¹⁵ The proposal for a scale of four levels of fixed numbers of years (first level: 1 year; second: 2 years; third: 5 years; fourth: 10 years), presented in Council doc 7266/02 (p. 4), was briefly contemplated (7266/1/02, 7266/2/02) and rejected (7266/3/02).

¹⁶ Council doc 13789/01, pp. 2–3, 5.

¹⁷ This option “would enable a balance to be struck between simply referring to national law and determining a minimum threshold for a single Europe-wide maximum penalty” (13789/01, pp. 5–6).

reflect the seriousness of an offence in all the Member States, as well as the need to take into account “the concern voiced in the Danish and Austrian proposals to avoid a system that is too complex and involves too many levels”. The method examined under this option took its final shape in the “Council’s conclusions on the approach to apply regarding approximation of penalties”.¹⁸ Apart from the method of approximation, the Council’s conclusions¹⁹ contain statements that amount to general guidelines and the rules to apply when using this method, as demonstrated below.

- *General guidelines*: when approximating criminal penalties, (a) *differences* in the penalty levels between Member States should not be regarded as mere obstacles to cooperation because they are an expression of how the Member States deal with crucial questions concerning crime and punishment; (b) for the coherence of the national systems to be preserved, *flexibility* is needed; (c) the necessity to approximate criminal penalties is examined *in view of a proposal to approximate the definition* of an offence.
- *Method*: in some cases, it may be *sufficient* to provide that the offences concerned must be punishable by *effective, proportionate and dissuasive criminal penalties*, whose type and level will be determined by the Member States. In other cases, *there may be a need* to pursue further the objectives of enhancing judicial cooperation and fighting crime;²⁰ in such cases, *a system* should be used. This system consists of four levels:
 - 2nd) penalties of a maximum of at least between 2 and 5 years of imprisonment;
 - 3rd) penalties of a maximum of at least between 5 and 10 years of imprisonment;
 - 4th) penalties of a maximum of at least 10 years of imprisonment (in cases where very serious penalties are required).
- *Rules on how to use the system of penalty levels*: (a) Member States are not allowed to set the maximum penalty below the lowest point of a range, but they can exceed its highest one; (b) in special circumstances, it is possible for the EU to ask for a higher penalty than the one provided for in the 4th level; (c) it is not necessary to use all the levels in every legal instrument; (d) it is not necessary to approximate penalties in regard to all the offences defined in each instrument.

In briefly *assessing* this approach, one notices that, as a result of combining elements from every proposal discussed within the Council, the method adopted somewhat satisfies all the *aims* expressed through those proposals. In particular, *preserving the coherence of national legal systems*, which was critical in the Danish proposal, is predominantly supported by the requirement for effective, proportion-

¹⁸ See different versions of the method in Council docs 13789/01, 7266/02, 7266/1/02 and 7266/2/02.

¹⁹ Doc 9141/02.

²⁰ These objectives are derived from the conclusions of the European Council in Tampere, to which Council doc 9141/04 (p. 4) refers. During the Council discussions on penalties, there were proposals on the factors that may justify approximation: “the circumstances or character of the offences” (7622/1/02, p. 4); “serious, transnational and organised crime” (7622/2/02, p. 5); “serious transnational or organised crime and, as appropriate, other serious crime”, “only transnational crime”, “serious transnational and organised crime, bearing in mind that the presence of such features need not as such establish the need for approximation” (7622/3/02, p. 5).

ate and dissuasive criminal penalties, and also by the flexibility of the penalty levels. *Achieving a satisfying degree of approximation*, which was the main goal of the UK's draft, is primarily pursued by the levels of ranges, and, up to a point, by level 4, in the sense that the 10 year threshold is very high and therefore restrictive. Finally, *providing severe penalties for serious offences*, which was pursued by the tactic originally used in the third pillar, is served by the fact that also levels with high penalties are included in the system, while level 4 is clearly destined for very serious cases.

Moreover, significant observations, and even rules directly connected to the principles of conferral and of subsidiarity, can be deduced from different parts of the Council's approach. First of all, *the guidelines* included in the Council's conclusions clearly suggest that approximating criminal penalties should neither be undertaken *irrespective* of approximating the definitions of criminal offences²¹ nor be pursued in a *general* manner.²² Second, *the basis* of the Council's method of approximation affirms the *fundamental* character of the requirement for effective, proportionate and dissuasive criminal penalties, allowing the assumption that these critical features must be satisfied not only by the national penalties chosen when the said requirement is explicitly used in EU legal acts, but *also* by the EU's provisions regarding the minimum-maximum penalty *and* by the respective implementation measures of the Member States.²³ Third, *the system's penalty levels* reveal a definite transition from mild penalties to *stricter* ones through *an escalation* of (a) the penalties placed on the *bottom* of each level (1 year, 2 years, 5 years, 10 years) and (b) the *width* of the ranges (unlike the original proposal of the UK), progressing from two years to three years, then to five years, and then to the absence of an upper limit on the last level. Finally, it becomes evident from the method itself and from the rules on how to use it that, when approximating criminal penalties, the EU must provide *distinct justification* in each particular case and demonstrate *why it is necessary* to establish minimum rules regarding the maximum penalty provided for in the Member States.

In total, the Council's method appears to be rational and functional. However, one cannot help but notice that permitting national legislators to go *beyond* the highest point of a level without any restrictions seems to essentially turn the levels of ranges into levels of single numbers of years. At the same time, this means that the discretion of the Member States to express their own evaluations regarding the gravity of the offences is broadened only for the sake of providing for *stricter* penalties, and not when they consider the maximum penalty determined by the EU as too strict. Even so, adopting *a system* was without doubt a *positive* development; it did take time to agree on its final version, but once it was formed, it could

²¹ *Asp*, BJCLCJ 2013, p. 56: "the competence to harmonise penalties forms an annex to the competence to establish minimum rules concerning the definition of certain offences".

²² On this issue, see also *Asp*, BJCLCJ 2013, pp. 55-56, *J. Vogel*, The European Integrated Criminal Justice System and its Constitutional Framework, Maastricht Journal of European and Comparative Law (MJ) 2005, p. 146.

²³ In COM (2011) 573, p. 9, approximation is connected with the goal "to ensure that the requirements of 'effective, proportionate and dissuasive' penalties are indeed met in all Member States".

actually *simplify* the discussions taking place before enacting new instruments. Furthermore, referring to *predetermined* rules which have been unanimously accepted adds to the *substantive legitimacy* of approximation.²⁴ Most importantly, the *consistent* use of *concrete* categories of penalties makes it possible to *compare the gravity* of offences described in *different instruments* and thus improve the application of the principle of proportionality at an EU level and enhance the coherence of EU legislation.

2. Evaluation of the provisions adopted in terms of the method used

Based on the method used, the EU provisions on the approximation of criminal penalties can be divided into 3 categories, depending on whether they were adopted before the Council's conclusions or according to those or under the Lisbon Treaty.

The first category consists of two framework decisions that require effective, proportionate and dissuasive criminal penalties which, in serious cases, may entail extradition, one framework decision that requires a certain minimum-maximum penalty for the offences it refers to, and four framework decisions that combine an obligation for effective, proportionate and dissuasive criminal penalties which may entail extradition in respect of all the types of conduct defined in each instrument (including participation and attempt) with provisions on the minimum-maximum penalty either for (serious cases of) basic offences or where aggravating circumstances apply.

| FD | effective proportionate dissuasive | that may entail extradition | crim. p. of a maximum not less than (years) | | |
|----------------------------------|------------------------------------|-----------------------------|---|-------------------|---------|
| | | | 4 | 8 | 15 |
| 2000/383/JHA (counterfeiting) | all ²⁵ | all | | basic | |
| 2001/413/JHA (means of payment) | all | serious | | | |
| 2001/500/JHA (money laundering) | | | all | | |
| 2002/475/JHA (terrorism) | all | all | | basic | serious |
| 2002/629/JHA (human trafficking) | all | all | | aggravated | |
| 2002/946/JHA (illegal entry) | all | all | | aggravated (or 6) | |
| 2003/80/JHA (environment) | all | serious | | | |

After the approval of the Council's conclusions, the system was repeatedly applied. The first level was used for the basic offences in four framework decisions, also for participation and attempt in one framework decision, and only for serious cases in another one. The second level was used once for basic offences and twice for aggravated ones. The third level was used for certain basic offences and some aggravated ones in one framework decision, as well as for aggravated offences in another one. The fourth level was used once, for particularly aggravated offences.

²⁴ See for example Council doc 9753/09, p. 3: "[the 2002 conclusions] offer a solution to apply in precisely these conflict situations – a solution that is acceptable to all Member States".

²⁵ Indication "all" includes basic offences, participation and attempt.

| FD | effective proportionate dissuasive | crim. p. of a maximum not less than (years) | | | |
|--|------------------------------------|---|------------|------------|-------------------------|
| | | 1-3 | 2-5 | 5-10 | 10 |
| 2003/568/JHA (private sector bribery) | all | basic | | | |
| 2004/68/JHA (sexual exploitation etc.) | | all | | aggravated | |
| 2004/757/JHA (drug trafficking) | all | basic | | aggravated | particularly aggravated |
| 2005/222/JHA (information systems) | all | basic | aggravated | | |
| 2005/667/JHA (ship pollution) | all | serious | aggravated | aggravated | |
| 2008/841/JHA (organised crime) | | | all | | |
| 2008/913/JHA (racism) | all | basic | | | |

Consequently, it becomes evident that: (a) the Council's system of penalty levels was consistently applied, although *one might have expected a more limited use*, due to the term that "in some cases, it may be sufficient to provide that the offences concerned must be punishable by effective, proportionate and dissuasive criminal penalties"; (b) *making extradition or surrender possible was regularly pursued*, through the requirement for criminal penalties that may entail extradition and then through the first level of the system; (c) as of the adoption of the Council's conclusions, *the EU's intervention concerning participation and attempt became much less intense*, since it went from asking for criminal penalties that may entail extradition to requiring for effective, proportionate and dissuasive criminal penalties; (d) *aggravated or especially serious offences were linked to a bigger variety of penalties under the Council's system* (: levels 2-4) than similar offences were until 2002 (: minimum-maximum penalty of 8 years).

Moreover, one can form a scale with the minimum-maximum penalties set before the adoption of the Council's conclusions and compare it with the scale of the latter:

| Before the Council's conclusions | After the Council's conclusions |
|----------------------------------|---------------------------------|
| 15 years (one FD) | 10 years (one FD) |
| 8 years (four FDs) | 5-10 years (two FDs) |
| 4 years (one FD) | 2-5 years (three FDs) |
| extradition (six FDs) | 1-3 years (six FDs) |

This comparison along with the abovementioned observation (c) illustrate that, due to the application of the Council's conclusions, the *level* of the minimum-maximum penalties in EU instruments was generally *lowered*. Furthermore, EU documents show that the focus of the discussions concerning the choice of the appropriate penalty at an EU level went from *achieving a compromise* in finding a penalty strict enough but not too problematic for national legislations,²⁶ to *expres-*

²⁶ For example, in Council docs 12647/01 (p. 2) and 14845/01 (p. 11) regarding the framework decision on terrorism, one finds arguments concerning the complexity of the penalty provisions or the need for "a strong political signal" to be given or achieving "real harmonisation".

ing estimations about the gravity of an offence.²⁷ This major evolution occurred exactly because the system served as a *unique reference point*, which was common not only to all negotiating parts, but also to the preparation of each and every framework decision. Therefore, the Council's approach was the *catalyst for the principle of proportionality* to become a *criterion* (and not just a limit) in determining the minimum rules regarding criminal penalties.

At the same time, though, the *scope* of the approximation became *wider*, since the EU went from approximating penalties for the most serious offences to doing so for the basic ones as well. One might say that this is not a problem, unless there is a breach of the principle of proportionality; however, it is obvious that the expansion of the EU's intervention also exerts pressure on Member States, while, in addition to *the absence of justification for the use of the various penalty levels*, it suggests that approximation may have become *an end in itself*.

When the Lisbon Treaty came into force in 2009, the Council adopted conclusions "on model provisions guiding its criminal law deliberations", in which it declared that "When it has been established that criminal penalties for natural persons should be included it may in some cases be sufficient to provide for effective, proportionate and dissuasive criminal penalties [...]. In other cases there may be a need for going further in the approximation of the levels of penalties. In these cases the Council conclusions of April 2002 [...] should be kept in mind, in the light of the Lisbon Treaty".²⁸ The Commission, on the other hand, which in 2005 had expressed its intention to determine penalties according to the 2002 system (when laying criminal law measures to ensure the effectiveness of Community policies),²⁹ in 2009 suggested that there should not be a reference to the 2002 approach in the Council's model provisions³⁰. Subsequently, a different practice has been followed ever since. First of all, the directive on human trafficking uses "as a basis"³¹ levels 3 and 4 of the Council's system, but *in the form of single numbers* of years (5, 10), meaning that the upper limit of level 3 has been removed.³² Deviating from the system is directly acknowledged in the preamble of directive 2011/93/EU,³³ which "contains an exceptionally high number of different offences" and thus "requires, in order to reflect the various degrees of seriousness, a differentiation in the level of penalties which goes further than what should usually be

²⁷ See Council doc 6623/02, pp. 2-3, regarding the sexual offences against children: "The creation of three levels of seriousness for the penalties, as proposed below, means that there can be differentiation between the types of conduct defined in Articles 2 and 3 of the Framework Decision according to their *gravity*"; "the type of conduct referred to in Article 2(c)(iii) [...] should be placed in Level II instead of Level III" etc.

²⁸ See Council docs 16542/2/09 (p. 6), 16798/09 and 16883/09.

²⁹ Communication from the Commission to the European Parliament and the Council on the implications of the Court's judgment of 13 September 2005, COM (2005) 583 (para 10, fn. 7).

³⁰ Council doc 15565/09, p. 8. In *just the final version* of the conclusions there is a differentiation concerning article 83(2) TFEU (approximation "should follow the practice of setting the minimum level of maximum penalty"), which was placed in a *footnote* (see model provision "Criminal penalties for natural persons with approximation of levels") and is not mentioned in the relevant guideline.

³¹ See para 12 of the preamble of directive 2011/36/EU.

³² Also, participation and attempt are linked to an obligation for penalties that may entail surrender.

³³ See para 11.

provided in Union legal instruments”. Although this declaration seemed to verify that the 2002 Council’s conclusions would be regularly applied in the future, all the other directives adopted so far use *single numbers of years, that do not necessarily correspond to the lowest points of the levels of the system*, while the overall picture of the minimum rules adopted with regard to criminal penalties since 2009 is rather *complex*.

| 1. Directive 2011/36/EU (human trafficking) | | 4. Directive 2014/57/EU (market manipulation) | | | | | | | | | |
|---|---|---|------------------------------------|---|-------|-------------|-------|-------------|-------------|----|-------|
| 2. Directive 2011/93/EU (sexual abuse etc.) | | 5. Directive 2014/62/EU (counterfeiting) | | | | | | | | | |
| 3. Directive 2013/40/EU (information systems) | | | | | | | | | | | |
| obligation to criminalise | effective proportionate dissuasive crim. p. | maximum penalty: imprisonment | crim. p. that may entail surrender | crim. p. of a maximum not less than (years) | | | | | | | |
| | | | | 1 | 2 | 3 | 4 | 5 | 8 | 10 | |
| 1 | participation attempt | | participation attempt | | | | | | basic | | aggr. |
| 2 | participation attempt | | | basic | basic | basic aggr. | | basic aggr. | basic aggr. | | aggr. |
| 3 | | all | | | basic | aggr. | | aggr. | | | |
| 4 | | all | | | basic | | basic | | | | |
| 5 | | all | basic | | | | | basic | basic | | |

These recent developments are of great significance for the following reasons.

- *Replacing ranges with single numbers of years.* Under the Council’s system, national legislators could go beyond the highest point of the range selected by the EU; this rule did make the upper limit of each range weak, *but it did not render it unnecessary*.³⁴ The upper limit of a range is *a clear indication of how high even the most severe maximum penalty provided for in national law needs to be*. In this way, a range *facilitates approximation* more than a single number, especially when it comes to Member States with *strict* criminal legislations, where the level of the penalties is generally high; in fact, for a single number to facilitate approximation, the EU should either provide for *high* penalties which leave a small margin of discretion to national legislators, or expect that Member States will adopt the *exact* given number; however, both *unjustified severity* and *rigidity* are obviously negative features. Besides, removing the upper limit of the ranges has no added value as far as preserving the *coherence* of national penalty systems is concerned, because national legislators could already go beyond the level chosen by the EU whenever necessary.
- *Deviating from the Council’s conclusions.* The Council’s approach was decided after extended negotiations and taking into account the probable effects of various draft systems. If this approach, whose advanced structure took methodology a step forward in the EU, is abandoned *without being replaced* by an equivalent one, approximation of criminal penalties *will go back* to earlier stages, i. e. to being unregulated and entirely open to debate in view of each new directive. In sum,

³⁴ In this sense, the estimations that “a maximum of at least one to three years of imprisonment [...] means an obligation for the Member States to provide for at least one year of a maximum penalty” (Council doc 8795/11, p. 3) and, especially, that “The presentation in the form of ranges is a purely cosmetic exercise” (COM (2004) 334, p. 17) are imprecise.

not employing a predetermined, structured, single method of approximation comes with a greater risk of adopting problematic provisions (like the ones rejected during the 1998–2002 discussions) which may threaten the *coherence of national laws* and the *efficiency of approximation*; moreover, it signifies the absence of a *unique reference point*, pre-approved to be used during the preparation of every legislative provision on approximation, making it more challenging to respect the principle of *proportionality* and to ensure *consistency at an EU level*.

- *The 'legacy' of the Council's approach.* Despite the current developments, two basic characteristics of applying the 2002 Council's conclusions seem to have become an integral part of approximating criminal penalties: setting *different levels* of penalties within each directive and expanding approximation to (usually) *all* criminal offences described in a directive.

III. Evaluation of the approximation in terms of the proportionality principle and the effect on coherence

The *broad scope* of the approximation of criminal penalties, i. e. the fact that the EU has expressed its assessment of the gravity of most of the criminal offences that fall under its competence, adds to the significance of the approximation, on the one hand because of the *correlations* created between offences regulated in different legal acts, and on the other hand due to *the complexity of the obligations and the proportionality issues* deriving even from a single legal act.

1. Comparative review

In order to appraise the EU's estimations regarding the seriousness of the criminal offences it describes, it is important to *classify* (the basic forms of) these offences according to the penalty chosen for each one (bearing in mind that the EU has not always applied the same method to approximate criminal penalties)³⁵. Since it is only the 2002 Council's system that provides a *categorisation of penalties at an EU level*, it is both useful and proper to refer to those categories, and more specifically to the first, the second and the third level of the system (as the fourth level has been used just for aggravated forms of the offences). Thus, moving from more serious cases to less serious ones, *the criminal offences of the third category* (*: minimum-maximum penalty of five years or between five and ten years*) are:

- Participating in the activities of a terrorist group – 8 y.
- Fraudulent making or altering of currency – 8 y.
- Causing a child under the age of sexual consent to participate in prostitution / in pornographic performances – 8 / 5 y.
- Engaging in sexual activities with a child under the age of sexual consent – 5 y.

³⁵ Certain choices should be explained on the basis of the method used and not be interpreted as assessments of the gravity of the offences; e.g. setting a minimum-maximum penalty of 1–3 years for corruption in the private sector in the 2003 framework decision, while not asking for a specific penalty for corruption of public officials in the 1997 convention nor for human trafficking in the 2002 framework decision does not mean that the EU considers corruption in the private sector to be more serious.

- Trafficking in human beings – 5 y.

The criminal offences of the second category (: minimum-maximum penalty of two years or between two and five years) are:

- Money laundering – 4 y.
- Insider dealing and market manipulation – 4 y.
- Production of child pornography – 3 y.
- Participation in a criminal organisation – 2-5 y.
- The basic criminal offences against information systems – 2 y.

Finally, the criminal offences of the first category (: minimum-maximum penalty of one year) are:

- Trafficking in drugs and precursors – 1-3 y.
- Active and passive corruption in the private sector – 1-3 y.
- Offences concerning racism and xenophobia – 1-3 y.

Given that the EU's legislation in the field of substantive criminal law *should*³⁶ and *does*³⁷ aim to protect certain interests, the classification of criminal offences can further be read as *the EU's evaluation scale of protected interests*.³⁸ Taking this into consideration as well, it seems rather fair to say that both the classification of the criminal offences based on their respective penalties and the EU's evaluation scale of protected interests *are not indicative of any serious problems of consistency*. First of all, the danger to several interests of an unidentified number of persons, which occurs due to the activities of a *group* established to commit *serious* offences with a special *purpose* (: to intimidate a population or to destroy the fundamental structures of a country etc.) is placed at the top of the EU's evaluation scale ("participating in the activities of a terrorist group"); as a consequence, the *less grave* danger to various interests of an unidentified number of persons that derives from the activities of a *group* established to commit offences *of a wider range and gravity*, with a special purpose *not equivalent* to terrorism (: obtaining a material benefit) is rightfully placed at the second level ("participation in a criminal organisation"); similarly, the danger to certain interests of an unidentified number of persons caused by serious as well as *low-gravity*³⁹ acts of distributing drugs where the existence of a group with a special aim is not necessary is convincingly placed at a lower level. Hence, *an inner consistency* runs these comparable parts of the EU's evaluation scale. In addition, inner consistency

³⁶ In accordance to fundamental principles of substantive criminal law (see *European Criminal Policy Initiative (ECPI)*, A Manifesto on European Criminal Policy, ZIS 2009, p. 707, *M. Kaijafa-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 (EuCLR)* 2011, pp. 12-17, *C. Roxin*, The Legislation Critical Concept of Goods-in-law under Scrutiny, *EuCLR* 2013, pp. 3 et seq), it was stated by the European Parliament (resolution of 22.5.2012, Q.3, first dash) that "the criminal provisions focus on conduct causing significant pecuniary or non-pecuniary damage to society, individuals or a group of individuals", and by the Council (doc 16542/2/2009, p. 4) that "Criminal law provisions should be introduced when they are considered essential in order for the interests to be protected".

³⁷ At an abstract level (: without checking whether the definitions of the offences are restricted to actually harmful types of conduct) all legislative acts (or their proposals) refer to an object of protection.

³⁸ *A. Klip*, *European Criminal Law*, 2009, pp. 197-202, categorises "eurocrimes" according to the "legal value" they protect.

³⁹ See Council doc 9718/02, p. 10, and the minority's opinion in the European Parliament's report A5-0095/2004.

seems to basically run *each* separate level of the scale. The third level includes, as expected, offences relevant to interests *vital to the EU* (counterfeiting, terrorism), but also offences that affect significant interests of a rather *personal* nature (human trafficking, sexual exploitation or abuse of children). Up to a point, the same goes for the second level (organised crime, money laundering / child pornography), with the exception of the penalty chosen for the offences of market abuse, which is *too high* compared to the rest, especially because the acts described in directive 2014/57/EU are not explicitly required to harm any interests and because moving from non-criminal penalties to criminal ones is already an important step when it comes to approximation under article 83(2) TFEU.⁴⁰ As far as the first level of the scale is concerned, it should always be taken into account that the minimum–maximum penalty of one year is linked to facilitating surrender, which in practice might dictate the choice of a penalty that does not correspond to the actual gravity of an offence;⁴¹ nonetheless, most of the challenges regarding some of the offences of the first level derive from their definitions⁴², not the penalty provisions.

Despite the absence of any serious problems of consistency, though, since the application of the EU's provisions concerning substantive criminal law is dependent on the legal systems of the Member States, it is also essential to confirm that consistency at an EU level allows Member States to *smoothly* transpose the EU's assessments into their national legislation. For this purpose, it seems logical to compare the EU's classification of criminal offences to the national ones. Using as examples the Greek, the Finnish and the Swedish "original" provisions on criminal penalties, i. e. as they stood before being affected by EU law, it becomes clear that the classification scales of these Member States *were not that different* from the one of the EU.⁴³ Hence, it would appear as though consistency at the EU level would not

⁴⁰ The proposal of the directive in its original version (COM (2011) 654) and for as long as it was being discussed within the Council entailed only the requirement for effective, proportionate and dissuasive criminal penalties; the European Parliament (report A7-0344/2012) added provisions on the minimum–maximum penalties, arguing that "If the need for this legal instrument lies on the fact that Member States sanctioning regimes are in general weak and heterogeneous, sanctions should be to a certain extent harmonised". However, considering criminalisation and penalty approximation as two different steps is more consistent with the ultima ratio principle and the ratio of article 83(2) TFEU as well, since in the areas of EU policies the EU must examine in each particular case the added value of *criminalisation itself* (COM (2011) 573, p. 12), let alone of approximation.

⁴¹ This aim was critical in deciding the penalty for distributing drugs – Council doc 13918/02 (see discussions in 10321/02, 14542/02, 15102/1/03).

⁴² Strong criticism targets particularly the offences of bribery in the private sector, especially in view of the problems in identifying the exact interest protected (*M. Kaijafa-Gbandi*, Punishing corruption in the public and the private sector: the legal framework of the European Union in the international scene and the Greek legal order [in Greek], *Poinika Chronika* 2010, pp. 13–14, *E. Symeonidou-Kastanidou*, Bribery in the Private Sector as a Criminal Offence: Recent Developments in the European Union and their Impact on National Legislations – With a Focus on Greek Criminal Law, *EuCLR* 2013, pp. 26 et seq).

⁴³ If one were to divide into three categories the national offences that corresponded to the 14 offences placed in the EU's evaluation scale, these main differences would emerge: (a) drug trafficking did not fall in the lowest category of any of the national scales; (b) market manipulation fell into the lowest category of each national scale; (c) in the *Greek* scale, participating in a terrorist organisation and human trafficking fell into the medium (not the highest) category and producing child pornography fell into the lowest (not the medium) category, in the *Swedish* scale, engaging in sexual activities with a child under the age of sexual consent fell into the lowest category (not the highest one), as did money laundering and child pornography (not falling into the medium category), and, in the *Finnish* scale, racism and bribery in business fell into the medium (not the lowest) category.

result in “disturbing” these national penalty systems; however, this is a false assumption. More specifically, in the Greek legal order, whenever a type of conduct described by the EU was already a criminal offence, the maximum penalty provided for was higher than (or at least equal to) the one required by the EU; therefore, given that approximation is carried out with *minimum* rules, the basic inner consistency of the EU’s evaluation scale *in combination with the severity of the Greek penalty system*⁴⁴ allowed the latter to remain intact⁴⁵. Conversely, the Finnish and the Swedish systems, where the penalty levels are not as high,⁴⁶ were faced with bigger challenges. For instance, although the maximum penalty for counterfeiting was among the severe ones in both systems, it was only 4 years, i. e. *half* of what the EU required; this means that both Member States would have to not just raise but *double* the maximum penalty for counterfeiting, placing it among the exceptionally serious crimes of their national systems. If they were to conform, without their views on the gravity of counterfeiting having changed accordingly, there could be some major implications, such as the new provisions being incompatible with the principle of proportionality at a national level and unjustified in the eyes of their citizens, or the new legislation affecting the penalties for other offences as well (due to the correlations between offences). In conclusion, owing to the minimum-rules concept, national penalty systems with generally high maximum penalties may be unaffected by approximation, while *penalty systems with generally low maximum penalties* are obliged to become more severe and *can be seriously affected by the slightest inconsistency* in EU law.

2. Categorisation of the obligations deriving from the EU’s penalty requests

The significance of the principle of proportionality for criminal law is directly acknowledged in article 49(3) of the Charter of the EU and by the institutions of the EU.⁴⁷ Despite the fact that the principle is binding on both the EU and the national legislators, *it may entail different tasks for each side, depending on the extent of the EU’s intervention*: the more the EU goes into approximating penalties (and thus into restricting the discretion of the Member States), the more it falls upon its own provisions to ensure compatibility with the principle of proportionality. The EU’s obligations, and central aspects of the approximation (below, 1–5), become clear when examining the legislative acts divided into the following categories.

⁴⁴ The Greek scale previously mentioned consists of maximum penalties above 10 and up to 20 years (which correspond to 5 or between 5–10 years in the EU’s scale); maximum penalties above 5 and up to 10 years (: 2 or between 2–5 years in the EU’s scale); maximum penalties up to 5 years (: 1 year in the EU’s scale).

⁴⁵ Even so, the Greek legislator introduced special offences (e.g. for human trafficking, terrorism, child pornography) that were linked to penalties higher than the ones provided for by the pre-existing provisions that applied in the cases of these offences.

⁴⁶ The Swedish scale mentioned above consists of maximum penalties of 4, 3 and 2 years, while the Finnish one contains maximum penalties of 4, 2 and 1 year.

⁴⁷ See COM (2011) 573 (“towards an EU Criminal Policy”), p. 8, and the European Parliament’s resolution of the 22.5.2012 (“on an EU approach to criminal law”), Q.3, fifth dash.

a) Acts not requiring penalties involving deprivation of liberty

The directives on the protection of the environment, on ship-source pollution and on measures against employers of illegally staying third-country nationals as well as the PIF protocol on money laundering solely require effective, proportionate and dissuasive criminal penalties. In such cases, the discretion of the Member States in determining the type and the level of the penalties is wide and, therefore, their responsibility for respecting the principle of proportionality is dominant. Even so, *the EU should contribute to satisfying this obligation by forming the definition of an offence in the logic of the principle* (1), e. g. by citing separately a less serious version of the offence.

b) Acts requiring criminal penalties that may entail extradition

Certain acts call for effective, proportionate and dissuasive criminal penalties that make extradition possible; this goes for serious cases of offences related to non-cash means of payment, and for serious cases of fraud and corruption according to the relevant conventions. In general, *a problem occurs when the requirement for penalties that may entail extradition involves offences whose gravity is too low* (2). However, the aforementioned legal acts limit the requirement to the *serious* cases of the offences and leave the choice of the critical types of conduct to the Member States.

c) Acts providing one minimum-maximum penalty

Some framework decisions set *one* minimum-maximum penalty either exclusively (money laundering, participating in a criminal organisation) or together with the obligation for effective, proportionate and dissuasive criminal penalties (corruption in the private sector, racism). In this category, national legislators are under extra pressure, because the minimum-maximum penalties provided for concern all the offences of each framework decision (not just “serious cases”), and because the level of two of these penalties is higher than one year (i.e. the threshold to which the extradition requirement corresponds). The main issue, though, is that the definition of each of these offences *contains various types of conduct of different gravity*; as a result, a national legislator may decide not to set *one* maximum penalty for *all* the cases of participating in a criminal organisation (for example), but *different levels* of maximum penalties, based on the criterion of the severity of the offences the organisation is planning to commit;⁴⁸ in doing so, the legislator would be obliged, due to the minimum-rules concept, to use the EU’s standard for the *least serious* forms of the offence and *more severe* maximum penalties for the rest. In other words, *if a definition formulated by the EU includes not only types of conduct of similar gravity but also a much less serious type of conduct, then the minimum-maximum penalty that concerns the majority of the types of conduct is in reality higher than the one provided for* (3).

⁴⁸ See *M. Kaijafa-Gbandi*, Towards a new approach of organized crime in the EU – New challenges for human rights, ZIS 2007, p. 541.

d) Act providing one minimum–maximum penalty along with the requirement for penalties that may entail extradition

Since the adoption of the directive on counterfeiting, this category has only been left with the aggravated facilitation of unauthorised entry. Framework decision 2002/946/JHA provides a general request for criminal penalties that may entail extradition and a special minimum–maximum penalty (of 8 years) regarding just the offence mentioned above; thus, it has an *inner scale, which adds to the responsibility of the EU as to ensuring consistency and respecting the principle of proportionality* (4). In this case, aggravated facilitation of illegal entry is indeed much more serious than the basic offence, because it has to be committed for financial gain *and* either as an activity of a criminal organisation or while endangering the lives of the persons whose entry is facilitated; at the same time, national legislators are given the opportunity of choosing a lower maximum penalty (6 years), if it is imperative to preserve the coherence of the national penalty system and the maximum penalty chosen “is among the most severe maximum sentences available for crimes of comparable gravity”. However, it must also be kept in mind that *providing the minimum-maximum penalty for the aggravated form of the offence is obviously very likely to affect the maximum penalty for the basic form of the offence as well* (5).

e) Acts providing various minimum–maximum penalties

This category consists of more legislative acts than any previous one (framework decisions on terrorism and drug trafficking / directives on human trafficking, sexual crimes against children, attacks against information systems, market abuse and counterfeiting). Needless to say, the structure of these instruments is *complex*, as each inner scale has many levels of minimum–maximum penalties; thereby, the discretion of the Member States when transposing them is considerably limited (and all the abovementioned issues 1–5 are relevant). Accordingly, the responsibilities of the EU are even greater, since any inconsistency may have multiple negative effects.

Serious problems regarding the principle of proportionality arise particularly due to *including types of conduct of different gravity in the definition of an offence*. In such a case, Member States may be compelled to break down the definition and use more maximum penalties for the types of conduct it covers (as noted before), *and then do the same for the aggravated form of the offence*. For instance, according to the directive on attacks against information systems, the same minimum–maximum penalty is linked to “illegal system interference” *and* to “illegal data interference” (although the latter includes types of conduct that are also means for committing the former) *and* to “illegal access” (which refers to an earlier stage of harming the protected interest) *and* to types of conduct regarding “tools used for committing offences” (which cover even earlier stages).⁴⁹ Should a national legislator decide to set a

⁴⁹ See also E. Symeonidou-Kastanidou, Attacks against information systems [in Greek], in: e-Themis, Cyber law, 2013, pp. 77–79, Y. Naziris, ‘A Tale of Two Cities’ in three themes – A critique of the European Union’s approach to cybercrime from a ‘power’ versus ‘rights’ perspective, EuCLR 2013, p. 343.

different maximum penalty for each offence, it would be necessary to use the directive's threshold (: 2 years) *for the least serious offence* and then move upwards; next, *whatever differentiation is chosen* would have to be *further* applied to the penalties for the aggravated forms of “illegal system interference” and “illegal data interference” linked to a minimum–maximum penalty of 3 years, *and afterwards* to the penalties for the aggravated forms linked to a minimum–maximum penalty of 5 years. National legislators may have to follow a similar path when choosing maximum penalties for human trafficking (especially in order to demonstrate the different gravity of the *means employed*)⁵⁰ or insider dealing (e.g. due to its difference from “*recommending or inducing* another person to engage in insider dealing”).

One might think that the answer to these issues would be for the EU to build *even more analytical* inner scales. However, such penalty scales put immense pressure on the Member States and make transposition extremely difficult; at the same time, they are likely to introduce *more obvious inconsistencies and more direct problems concerning the principle of proportionality*. The exhaustive regulation of directive 2011/93/EU is an evident example, despite the efforts of the EU legislator to respect the principle of proportionality: the factor that the child has not reached the age of sexual consent increases the maximum penalty sometimes by *one* step of the directive's penalty scale and other times by *two* steps⁵¹; causing a child to participate in prostitution is considered either as *equally serious* to engaging in sexual activities with a child⁵² or as *more serious* than that⁵³; causing a child to participate in pornography is either *just as serious* as engaging in sexual activities with a child⁵⁴ or *less serious* than that⁵⁵; causing a child over the age of sexual consent to participate in prostitution is linked to a 5 year minimum–maximum penalty *regardless of the use of coercion*⁵⁶, which in other cases increases the minimum–maximum penalty; similarly, engaging in sexual activities with a child not having reached the age of sexual consent is linked to a 5 year minimum–maximum penalty *regardless of recourse being made to child prostitution*, although the latter is crucial when it comes to the

⁵⁰ See H. Satzger, F. Zimmermann, G. Langheld, The Directive on Preventing and Combating Trafficking in Human Beings and the Principles Governing European Criminal Policy – A Critical Evaluation, EuCLR 2013, pp. 112–113, M. Kaijafa-Gbandi, N. Chatzinikolaou, A. Giannakoula, T. Papakyriakou, The FD on combating trafficking in human beings. Evaluating its fundamental attributes as well as its transposition in Greek criminal law, in: A. Weyembergh, V. Santamaria (eds.), The evaluation of European criminal law. The example of the Framework Decision on combating trafficking in human beings, 2009, p. 178.

⁵¹ The inner scale of the directive consists of maximum penalties of 1, 2, 3, 5, 8 and 10 years. In the case of causing a child to participate in prostitution or coercing a child to participate in pornographic performances the age factor increases the maximum penalty from 5 to 8 years (one step); on the other hand, in the case of engaging in sexual activities with a child where coercion is used or coercing a child into prostitution it increases the maximum penalty from 5 to 10 years, in the case of engaging in sexual activities with a child where abuse is made of a recognised position of trust or of a particularly vulnerable situation of the child it raises the maximum penalty from 3 to 8 years, and in the case of causing a child to participate in pornography or coercing a child into prostitution it takes the maximum penalty from 2 to 5 years (two steps).

⁵² When coercion is used – see articles 4(6) and 3(5)(iii) of directive 2011/93/EU.

⁵³ See articles 4(5) and 3(4) of directive 2011/93/EU.

⁵⁴ See articles 4(2) and 3(4) of directive 2011/93/EU (5 years).

⁵⁵ See articles 4(3), 3(5)(iii) και 4(6) of directive 2011/93/EU (8 / 10 years).

⁵⁶ See article 4(5),(6) of directive 2011/93/EU.

criminalisation of this conduct concerning a child over the age of sexual consent⁵⁷ (etc). Hence, it is quite clear that, at least in some cases, even carefully formulated minimum rules in the field of criminal penalties can be very problematic, putting the benefits of approximation into question.

IV. Concluding observations on the characteristics of approximation

Approximation in the field of substantive criminal law evolves around *two axes*, which correspond to the arguments used by the Council in 1999 in order to explain the need for approximation: *facilitating judicial cooperation* and *combating crime*.⁵⁸ Approximating criminal penalties has *consistently* been satisfying the major goal of the *first axis*, since most of the basic offences regulated by the EU are linked either to the requirement for penalties that may entail extradition or to a minimum–maximum threshold of 1 year (or more). Generally speaking, such a choice seems justified, given the importance of judicial cooperation in criminal matters according to the EU primary law. Still, *the need* for this kind of approximation *is not self-evident*, especially in view of the EU often adopting *definitions of a wide scope* which may include types of conduct not serious enough to justify the extradition requirement (thus giving rise to proportionality issues) and because of the fact that in some cases, *other goals* are principally pursued (the main objective of the second axis / the effective implementation of an EU policy).

As far as the *second axis* is concerned, the EU's attitude has changed over time. At first, approximating criminal penalties was moderate and focused on the most serious type of conduct defined in each instrument; today, it usually involves all the types of conduct in each instrument and takes the form of multi-levelled penalty scales. However, the EU, unlike national legislators, is not obliged to supplement the definitions of the offences with rules on penalties; on the contrary, the EU may adopt such rules *under the condition* that they have *an added value in relation to approximating the definition* of an offence, and *that they are necessary*. In this sense, the EU's effort to make the Member States single out the fraudulent *making* of currency according to framework decision 2000/383/JHA and punish it as a *serious* criminal offence, just before the euro currency was put in circulation, was comprehensible; in recent EU directives, though, *approximating criminal penalties seems to have become an end in itself*, despite its consequences⁵⁹.

⁵⁷ See articles 3(4) καὶ 4(7) of directive 2011/93/EU.

⁵⁸ They also correspond to the two functions of the approximation of criminal law, the *autonomous* and the *auxiliary* one – A. Weyembergh, The functions of approximation of penal legislation within the European Union, MJ 2005, pp. 155 et seq; J. Vogel, Why is harmonisation necessary? A Comment, in: A. Klip, H. van der Wilt (eds.), Harmonisation and harmonising measures in criminal law, 2002, pp. 59–60, refers to political and normative goals, while J. Spencer, Why is harmonisation necessary? in: A. Klip, H. van der Wilt (eds.), Harmonisation and harmonising measures in criminal law, 2002, pp. 43 et seq, to ideological and pragmatic reasons (see also P. Asp, Basic Models of a European Penal Law. Mutual Recognition, Harmonisation, Cooperation, in: 4th European Jurists' Forum, Proceedings, Speeches – Presentations – General Reports – Concluding Lecture, 2008, p. 263).

⁵⁹ The impact of the EU's intervention is significant even with regard to the penalty provisions themselves (i.e. without examining the effect on rules and procedures dependent on the kind and the level of a criminal penalty – see for example G. Vermeulen, Where do we currently stand with harmonisation in Europe?, in: A. Klip, H. van der

Therefore, it is vital to determine *the exact reasons that justify the need for approximation*, and then restrict the scope of approximation accordingly. In addition, it is equally significant for the EU to settle on the *method* of approximation. In fact, one might even ask whether approximating on the basis of *minimum rules* should be reconsidered. In national law, the *maximum* penalty linked to a criminal offence *guarantees* that the penalty imposed on a person cannot be any higher than what this maximum limit dictates;⁶⁰ in EU law, no such guarantee follows from the provisions on maximum penalties, precisely because the latter introduce the *minimum* obligations of the Member States. Nevertheless, given the extent and the depth of the EU's interventions concerning substantive criminal law, it is no longer enough for this guarantee to exist merely at a national level, just as there is no excuse for the EU to favour the *severity* of criminal law⁶¹ without setting any *specific limits to repression* in the field of approximating criminal penalties.⁶²

V. Future perspectives and proposals

It has already been noted that although the approximation of criminal penalties is currently carried out without the use of a fixed system, it has certain *positive* features that are directly related to the past use of a system for a period of about six years (: providing a variety of penalty levels and not setting minimum–maximum penalties for participation and attempt are clearly in line with the principles of proportionality and subsidiarity). So far, only the 2002 Council's conclusions offered a common reference point to approximation, by introducing the aforesaid system; bearing in mind that they also had a positive effect on *consistency* and lead to the provision of *milder* penalties on behalf of the EU, the Council's conclusions (reaffirmed in 2009) serve as a basis for *proposals on the method to approximate criminal penalties* presented in the following pages.

1. First stage: basic requirements

In view of adopting a directive under article 83 TFEU, the EU should at first employ the general requirement for *effective, proportionate and dissuasive criminal*

Wilt (eds.), *Harmonisation and harmonising measures in criminal law*, 2002, p. 75); e.g. the requirement for a maximum penalty of at least 8 years is hard to be transposed as such in Greek law (as it is rarely used), so it actually corresponds to a 10-year requirement, while it leads to a *minimum* penalty of 5 years under article 52(3) of the Greek Criminal Code (see such examples in *Elholm*, EJCCLCJ 2009, pp. 214–215).

⁶⁰ N. Paraskevopoulos, in L. Margaritis, N. Paraskevopoulos, *Penology*, Articles 50–133 CC [in Greek], 2005, p. 37.

⁶¹ The EU allows Member States to enhance the protective nature of the criminal-law provisions that are based on its secondary law, while it escalates the level of the maximum penalties itself where aggravated circumstances apply. On the contrary, it does not allow Member States to adopt milder penalties than the ones chosen at an EU level, it did not render the upper limit of the ranges binding, and nowadays it does not even include an indication as to how high severe maximum penalties need to be; at the same time, it does not introduce any mitigating circumstances (see an example in Council doc 9718/02, p. 6, article 4(6)) except for the cases where offenders renounce certain criminal activities and provide authorities with information that help them prevent crimes or identify other offenders.

⁶² See *Vögel* (fn. 58), p. 58, on *restrictive* harmonisation and not accepting a level of incrimination which is in conflict with human rights.

penalties in connection to the types of conduct that *must be criminalised* by the Member States. One might suggest that this provision, which calls for estimations on the part of the *national* legislators, should not be used for types of conduct that are to be linked to specific minimum–maximum penalties, since the latter express estimations of the *EU* legislator; however, these two requirements can co–exist, on the one hand because also the estimations of the EU should satisfy the three fundamental characteristics (effectiveness, dissuasiveness, proportionality) and on the other hand because even a provision of a particular minimum–maximum penalty leaves room for manoeuvre to the national legislators. *Exclusively* requiring effective, proportionate and dissuasive criminal penalties is entirely appropriate when it comes to participation and attempt, due to the vast differences among the relevant national rules⁶³ as well as the EU’s limited powers in relation to the general part of substantive criminal law; in any other case, it corresponds to the notion of the principle of subsidiarity and the EU’s commitment to respect the different legal systems and traditions of the Member States according to article 67(1) TFEU.

Next, the requirement for *effective, proportionate and dissuasive [non-criminal] penalties* should be employed if the EU estimates that it is *unnecessary to criminalise* a conduct included in the definition of an offence.⁶⁴ Because of the nature and the content of the EU’s competence in the field of substantive criminal law,⁶⁵ the need for this requirement is expected not to occur often⁶⁶ but only in the cases where the EU was unable (e.g. owing to disagreements during negotiations) or unwilling to form a more accurate definition which would not include any type of conduct that should not be criminalised.⁶⁷ Besides, as the minimum–rules concept allows Member States to implement EU measures by adopting stricter ones, it is possible for national legislators to *criminalise* types of conduct linked to the requirement for effective, proportionate and dissuasive penalties. Thus, if it is the estimation of the EU that a certain conduct *must* not be criminalised, then an obligation to abstain from criminalisation should be clearly stated.⁶⁸

⁶³ See *K. Ambos*, *Is the Development of a Common Substantive Criminal Law for Europe Possible? Some Preliminary Reflections*, MJ 2005, pp. 182–186, and a comparative research concerning 19 national legislations in *L. Picotti*, *Expanding forms of preparation and participation*. General report, *Revue Internationale de Droit Pénal* 2007, pp. 405 et seq.

⁶⁴ Council doc 16542/2/09: “(11) There *may* also be a need to differentiate between conduct that should be *prohibited* but does not necessarily have to be established as a criminal offence and conduct that should be *criminalised*”.

⁶⁵ Article 83(1) TFEU refers to “*particularly serious crime*”, while article 83(2) TFEU covers *serious violations of EU law* according to the Commission (COM (2011) 573, p. 11) and to the European Parliament (resolution of 22.5.2012, Q.3, third dash).

⁶⁶ As it has happened so far; see articles 2(2) of the PIF convention, 5(4) of framework decision 2004/68/JHA and 4(2) of framework decision 2005/667/JHA (also 18(4) of directive 2011/36/EU and 6 of directive 2011/93/EU).

⁶⁷ It is not uncommon for the EU to adopt *wide* definitions accompanied by *optional exceptions*, although this seems to oppose the minimum–rules concept. Such is the structure, for example, of the offences regarding racism, the content of which was strongly *disputed* by Member States (see Council docs 5983/02, 10817/02, 11460/02, 12221/02, 13447/02, 14283/02, 15490/02, 6658/03, 7280/03, 7275/05, 5118/07), and also of the facilitation of unauthorised entry, which the EU was *reluctant* to define more precisely, after having removed the reference to “*financial gain*” in order to “*eliminate the need for proving*” this element (Council doc 5645/01, pp. 3–4).

⁶⁸ Such an obligation is introduced e.g. by article 4(3) of directive 2009/52/EC on measures against employers of illegally staying third-country nationals provides (see also the following section).

2. Second stage: approximation of penalties involving deprivation of liberty

Subsequently, the EU should decide whether there is a need to apply the system of penalty levels (1-3, 2-5, 5-10, 10 years) with regard to the maximum penalty to be provided for a certain offence by the national legislators. Keeping in mind the outcome of studying the methods used and the provisions adopted so far, the following proposals are an effort to satisfy two key requirements: an approximation of criminal penalties must be undertaken *only when necessary* and indeed not be an end in itself, while, apart from serving goals connected to repression, it should also provide *guarantees* deriving from the fundamental principles of substantive criminal law.⁶⁹ In this sense, it is suggested that it is crucial to preserve the *ranges* introduced by the Council in 2002 because they are considered to ensure flexibility and because (as noted above) the upper limit of a range indicates how high even the most severe maximum penalty provided for in national law needs to be;⁷⁰ what's more, the only argument against them has been that they are redundant. The particular numbers chosen by the Council in 2002 are not re-examined here, since they were determined after long negotiations, and mostly for the reason that the following thoughts focus on *the existence of a system of levels of ranges*, regardless of the exact numbers of years. Moreover, broadening the scope of the approximation so as to include the *minimum* penalty is not suggested, due to numerous reasons: the legal systems of those Member States that do not link each criminal offence to a specific minimum penalty⁷¹ would suffer massive chain effects; causing such results as well as claiming that "since many Member States already provide for the concept of minimum penalties, it is appropriate and consistent that the concept [...] be used at Union level"⁷² are hardly compatible with the principle of subsidiarity and the EU's duty to respect the different legal systems and traditions of the Member States,⁷³ which are both connected with ways of affecting the legislative procedure in the EU;⁷⁴ the benefits from approximating minimum penalties are questionable,

⁶⁹ The significance of the fundamental principles in relation to approximation is being increasingly stressed, both in literature and by the EU's institutions; what is more, these principles are directly connected to EU law – see G. Corstens, J. Pradel, *European Criminal Law*, 2002, pp. 516-522, J. Pradel, G. Corstens, G. Vermuelen, *Droit pénal européen*, 2009, pp. 685-690, Klip (fn. 38), pp. 141-147 (with reference to the ECJ case-law), C. Mylonopoulos, *Community Criminal Law* [in Greek], Poinika Chronika 2010, pp. 161-162, and mainly *ECPI*, ZIS 2009, pp. 707 et seq, as well as *Kaiafa-Gbandi*, EuCLR 2011, pp. 7 et seq, P. Asp, *The importance of the principles of subsidiarity and coherence in the development of EU criminal law*, EuCLR 2011, pp. 44 et seq, M. Böse, *The Principle of Proportionality and the Protection of Legal Interests*, EuCLR 2011, pp. 35 et seq.

⁷⁰ For this, and for reasons that become apparent in the following subsection, one could suggest for an upper limit to be added on the forth level (10-20 years).

⁷¹ See information on the Member States that do not provide for minimum penalties in SWD (2013) 19, part 2/2, pp. 28 et seq in relation to counterfeiting.

⁷² COM (2013) 42, p. 7.

⁷³ See also Asp, EuCLR 2011, p. 55, and M. *Kaiafa-Gbandi*, *The Commission's Proposal for a Directive on the Fight Against Fraud to the Union's Financial Interests by Means of Criminal Law* (COM (2012) 363 final) – An Assessment Based on the Manifesto for a European Criminal Policy, EuCLR 2012, p. 328, who in addition refers to problems with the principle of proportionality, with the nature of a directive as a legal instrument and with the assimilation principle (regarding fraud).

⁷⁴ That is the emergency brake procedure and the early warning procedure.

while the Commission's arguments on the subject are weak (in most cases they are speculative, or referring to issues connected to the level of the penalties in general, or related to other factors of combating crime, e. g. the efficiency of the authorities);⁷⁵ embarking on approximating minimum penalties before having solved the problems occurring when approximating maximum penalties is (at least) a risky choice.

a) Minimum-maximum as “maximum-maximum” penalties?

The estimation that pursuing approximation through minimum rules brings about “more repression” is often accompanied with proposals on *limiting* the discretion of the Member States to adopt *stricter* measures than the ones of the EU.⁷⁶ While addressing firm and demanding restrictions to the national legislators seems to be incompatible with the minimum-rules concept,⁷⁷ introducing certain limitations so as *to prohibit violations of fundamental criminal law principles or of central aspects of EU policies* cannot be excluded⁷⁸ due to the obligations deriving, on the one hand, from the EU primary law provisions on the fundamental principles and, on the other hand, mainly from article 4(3) TEU.⁷⁹ Thus, in order (a) to enhance the functioning of the EU's provisions on maximum penalties as *guarantees* (: in the way that national provisions on maximum penalties function as guarantees), (b) to improve the ability of the citizens to *foresee*, when knowing the EU's provision, the maximum penalty to be provided for in national law for a certain criminal offence, and (c) to deter national legislators from adopting stricter rules just for *symbolic* purposes (: only to “prove” the effect of EU law to their legislation), it is essential *to strengthen the binding force of the upper limits of the ranges*.

More specifically, the upper limit of each range could be considered binding, *as long as* there is no EU or national statement to the contrary. Exceptions to the binding force of the upper limit would not necessarily be narrow but would have

⁷⁵ See the arguments in COM (2012) 363, p. 10, SWD (2012) 195, pp. 35–38, COM (2013) 42, pp. 2–4, SWD (2013) 19, part 1/2, pp. 7, 9–17, 31 et seq, SWD (2013) 19, part 2/2, pp. 7, 10, 16–20, 31 et seq, and important counter-arguments in Council doc 10719/13, where the Opinion of the European Economic and Social Committee ECO/346 (23.5.2013) is included.

⁷⁶ T. Vander Beken, Freedom, security and justice in the European Union. A plea for alternative views on harmonisation, in A. Klip, H. van der Wilt (eds.), *Harmonisation and harmonising measures in criminal law*, 2002, pp. 98–99, refers to introducing “maxima” instead of “minima” (see also Vogel (fn. 58), p. 58, previously mentioned); N. Chatziminikolaou, The criminal treatment of illegal migration – Theoretical framework and fundamental issues of legal interpretation [in Greek], 2009, p. 75, argues that having competence to determine the minimum gravity of an offence should by definition go together with competence to exclude those penalty levels that are too high for the same offence.

⁷⁷ See H. Nilsson, How to combine minimum rules with maximum legal certainty, *Europarättslig Tidskrift* 2011, p. 673, on sanctions, and M. Kaijafa-Gbandi, *European Criminal Law [in Greek]*, 2011, pp. 29, 34, H. Satzger, *International and European Criminal Law*, 2012, p. 78, Böse *EuCLR* 2011, pp. 42–43, P. Asp, *The Substantive Criminal Law Competence of the EU*, 2012, p. 127, on decriminalisation.

⁷⁸ See Asp (fn. 78), p. 121, Klip (fn. 38), pp. 163, 32–33.

⁷⁹ Article 4(3) TFEU: “[...] The Member States shall *take* any appropriate measure [...] to ensure fulfilment of the obligations [...]. The Member States shall [...] *refrain* from any measure which could jeopardise the attainment of the Union's objectives”. See E. Herlin-Karnell, *The Constitutional Dimension of European Criminal Law*, 2012, pp. 16–19, on the effects of the principle of loyalty, and A. Giannakoula, *Crime and sanctions in the European Union [in Greek]*, 2015, pp. 436–455, on the relationship between article 4(3) TFEU and the minimum-rules concept as well possible restrictions to the latter.

to be clear, reasoned and recognised by the system of approximation. This means that it would be a mistake on behalf of a Member State to set the maximum penalty for a criminal offence higher than the upper limit of the range previously chosen by the EU *if* the EU had not stated this as possible *and* the Member State did not base its decision on reasons recognised by the system of approximation. Since the binding force of the upper limits of the ranges is intended to realise significant features of the fundamental principles of substantive criminal law, the reasons allowing exceptions should be aiming at the same direction. Hence, justifications related to *respecting the principle of proportionality and preserving the coherence*⁸⁰ of criminal legislations should be of central importance. In that regard, the EU legislator should clearly make it possible for national legislators to go beyond the upper limit of the chosen range, when the latter *is not actually indicative of the EU's estimation on the gravity of an offence*⁸¹ (e.g. when disagreements during negotiations preceding the adoption of a directive lead to *settling for a lower penalty*). Moreover, a national legislator should be able to set the maximum penalty higher than the upper limit of the range, even if such a possibility is not expressly mentioned in the directive, when the national provision on the maximum penalty under approximation *already exceeds* the EU standard *and is well-adjusted in national law*, or (with regard to a “new” offence) when the national provisions on maximum penalties concerning criminal offences that are *similar or interconnected* to the one regulated by the EU call for the adoption of a maximum penalty that exceeds the upper limit of the range selected by the EU.⁸²

For example, the minimum–maximum penalty of 1–3 years for the basic offences of drug trafficking in framework decision 2004/757/JHA is quite low from the perspective of some Member States (e.g. in Greece the maximum penalty is 20 years according to article 20(1) of statute 4139/2013). Still, since there were objections (: the Netherlands persisted on being able to be more lenient towards trafficking of small quantities of drugs) and the definition of the offence actually covers types of conduct of different gravity,⁸³ the EU rightfully⁸⁴ chose the first

⁸⁰ In 2002, Germany proposed adding to the Council's penalty system “a text reflecting that a Member State should only provide for higher penalties where this is necessary in order to *maintain the coherence* in its national penalty system” (doc 7266/4/02 REV 4). The proposal came at the end of the negotiations and was not discussed further. It also met the objections of France, UK and Ireland; that was to be expected, since it was the first two that had proposed the inclusion of the term that nothing should prevent the Member States from going further than the levels of the system.

⁸¹ See this rationale in article 1(4) of framework decision 2002/946/JHA regarding aggravating forms of facilitating illegal entry (and also the proposal for the adoption of a similar provision concerning drug trafficking – Council doc 10321/1/02 REV 1 ADD 1), where the EU set a high minimum–maximum penalty and allowed Member States to adopt a lower one, under the condition that this is “*imperative to preserve the coherence of the national penalty system*”. Although it favours severity more than adopting a low maximum penalty and allowing Member States to go further, this tactic is also important to consider.

⁸² Permitting exceptions to the binding force of the upper limit would be vital to *keeping down the penalty level in the EU*, because otherwise Member States with generally high maximum penalties would probably try to influence the EU law accordingly, in order to avoid having to lower the maximum penalties provided for in their own legislations.

⁸³ See fn. 39.

⁸⁴ Any national concerns on an EU penalty level being too high can be treated exclusively *before* the adoption of an EU act (unless a Member State chooses not to conform).

level of the system. According to the proposal on the binding force of the upper limit of the ranges, this would be a case for the EU to expressly grant the discretion of going further than its own choice; if not, the Greek legislator would have to state the reasons justifying the need for such a higher maximum penalty, while this might even be a chance to rethink the rationale of that penalty. In any case, there would be no motivation for adopting even harsher provisions just to demonstrate compliance or for other symbolic reasons, while a *better degree of approximation* could be achieved.

b) Reasons justifying the need to approximate criminal penalties

Not identifying *which specific factors make the approximation of the maximum penalties necessary* was a serious shortcoming of the 2002 Council's conclusions and of all the methods used so far to approximate criminal penalties. Regardless of the exact structure a future system may have, it is imperative to determine the reasons justifying the estimation that *requiring effective, proportionate and dissuasive criminal penalties is not sufficient*.

The principal objective pursued through approximation has been *to facilitate extradition and surrender*. To satisfy this objective, the EU legislator initially used the requirement for penalties that may entail extradition and then the requirement for a minimum-maximum penalty of 1[-3] years (: as far as the Council's approach is concerned, that is the *first level* of its system). It has been already mentioned that, in order to ensure compatibility with the principle of proportionality and to avoid turning substantive criminal law into a mere instrument for serving the goals of judicial cooperation, the aforesaid requirements should only be linked to criminal offences whose gravity corresponds to the specific maximum penalty (or to a higher one) based on the assessment of the EU. This rule is obviously an important one within the framework of any penalty system; however, limitations emanating from the fundamental principles of substantive criminal law can indicate when to abstain from using a level of the system, not when it is necessary to use it.

A solid answer to this issue seems to be provided by the logical assumption that facilitating surrender is mostly necessary as regards criminal offences in relation to which *the need for the perpetrator to be moved from one Member State to another is likely to be presented often*. This condition is not met for all the offences regulated by the EU, since its competence does not cover only "crime with a *cross-border* dimension"; furthermore, the scope of the latter under EU primary law is particularly *broad*, leaving room for distinctions. In that sense, the need for the perpetrator to be moved from one Member State to another may be generally considered as possible to be presented frequently regarding offences of *trafficking* (e.g. human or drug trafficking, where perpetrators often cross the borders of more Member States or cooperate with people from other Member States), offences that are to a serious degree *committed by citizens of various Member States in the territory of (perhaps even) one* that is more *tolerant* of the commission of such offences (e.g. sexual exploitation of children), offences where *the object affected is not restricted locally* (e.g. environment) or

is meant to be *circulated* (e.g. currency). On the contrary, the need for a perpetrator to be moved to another Member State does not seem at an abstract level to be predominant when it comes to *offences affecting EU interests or EU policies*, where priority is given to ensuring that the Member States protect EU interests and take the measures necessary to improve the efficiency of EU policies.

When the condition portrayed above is satisfied, the EU is justified to use the first level of the Council's system, which is connected to facilitating surrender;⁸⁵ more precisely, the EU's intervention is justified *only* with regard to the *first* level of the system, *even if the gravity of the offence corresponds to a higher maximum penalty*; in that case, for the EU legislator to use the proper penalty level, different needs must be identified.⁸⁶

As a next step, it is important to bear in mind that approximation in the field of substantive criminal law is a key factor to applying instruments of judicial cooperation without obstacles, not only because it promotes the provision of the necessary penalty level in all the Member States, but in addition because it is expected to *weaken the objections* deriving from the most important obstacle, *the double criminality requirement*, and to contribute into building *mutual trust*. Yet, since approximation as a method is (unlike unification) aiming (only) to reduce the dissimilarities between national legislations⁸⁷, and since the EU began adopting legal acts concerning procedural criminal law *almost in parallel* with embarking on approximating the definitions of criminal offences and their penalties, judicial cooperation is not strictly dependent on offences being defined and punished uniformly in the legal systems of the Member States. Taking also into consideration that the lists incorporated in legislative acts such as the framework decision on the European Arrest Warrant include "traditional" criminal offences, for the content and the gravity of

⁸⁵ Using substantive criminal law as an instrument for achieving goals related to procedural law and to the functioning of judicial or police authorities is criticised due to resulting into violating fundamental principles of substantive criminal law more often than not (*Kaiafa-Gbandi, Chatzinikolaou, Giannakoula, Papakyriakou* (fn. 50), p. 187). The request for penalties that may entail extradition is serving these goals as straightforward as any; however, such a request was already been used in international law when the EU began to employ it, while the penalty level allowing extradition was a common reference point in Europe as far as criminal penalties were concerned. Thus, it was logical for the EU to use it, especially at the beginning of its approximating efforts; besides, the content of the obligation addressed to the Member States is nowadays one of the least demanding.

⁸⁶ One could search for such needs the same way as above: a) a maximum penalty of at least 3 years allows the execution of certain procedural tools *without verification of the double criminality* of the act; b) a maximum penalty of at least 4 years connects offences with the *extended confiscation* procedure and with the *definition of the criminal organisation* etc. – see in this direction *W. De Bondt*, The missing link between "necessity" and "approximation of criminal sanctions" in the EU, EuCLR 2014, pp. 147 et seq. However, it is the view of this study that following that path should be avoided as much as possible, because the reasons for which the facilitation of surrender is an accepted criterion *are exceptional*, the requirements mentioned here are *more demanding* (: concerning higher penalties), and especially the double criminality issue is extremely delicate and *controversial*. Moreover, using substantive criminal law as an instrument should not be generalised, because it *reverses the proper sequence of legal reasoning*, since falling within the scope of application of other provisions must be a *consequence* of the penalty chosen, not a defining factor; besides, approximating penalties at a legislative level is strongly estimated to have limited effect on the overall approximation that would be necessary to exist in order to consider any deeper interventions in substantive criminal law for the sake of cooperation.

⁸⁷ Council doc 8232/98, p. 2: "[...] four possible levels (in ascending order) of penal code integration [...] – cooperation [...] – assimilation [...] – harmonisation, involving the framing of similar laws founded or drawing on the same values. 'Harmonised' national laws have a minimum degree of similarity whilst respecting national legal traditions [...] – unification [...]. Approximation is one of these stages intermediate between assimilation and harmonisation".

which there is a *general common understanding* (e.g. murder, rape, arson), as well as “modern” offences⁸⁸, which *have been affected by the functioning of the EU* (cross-border elements, EU interests or policies), one might say that, as a minimum, there is a fundamental need to create an *EU-wide common perception of the content and the gravity* of the latter, too.

Even though this task has primarily been assigned to the approximation of the definitions of the offences, approximating criminal penalties is essential in *eliminating extreme differences* and *addressing offences justly*. In this direction, *the need to approximate criminal penalties*, that is to intervene further than simply ask for effective, proportionate and dissuasive criminal penalties, appears *when it is the EU’s reasoned estimation that the criminal penalties which are going to be provided for by the national legislators will not fulfil the three critical features* (effectiveness, proportionality, dissuasiveness) as they should.⁸⁹ Therefore, before forming the provisions of a new directive, the EU should examine the penalties provided for in the legislations of the Member States in relation to the criminal offence about to be regulated (or, where this does not exist as such, to the criminal offence currently covering the types of conduct to be regulated, or, otherwise, to criminal offences of similar gravity that harm a relevant legal interest). If (a) it is the outcome of this examination that the penalty level provided for by a Member State is lower than what corresponds to the EU’s own evaluation of the gravity of the offence and (b)(i) it is substantiated by evidence that this penalty level is causing a rise in crime or inability to effectively apply the law and combat the offence in that Member State, or (ii) it is rightfully expected that this Member State will link the offence regulated by the EU to a particularly low penalty level which seriously undermines the common perception of its gravity, then there is ground for the EU legislator to intervene and set a minimum standard for the national legislators to follow.

For example, prior to the adoption of a directive on “illicit arms trafficking”, the EU may come to the conclusion that the basic types of conduct to be included in its definition of the offence are punishable in national legislation either by penalties indicative of a gravity somewhat similar to the one attributed by itself or by lower penalties which however are neither extremely low nor cause concrete problems for the efficiency and the dissuasiveness of national laws; in such a case, the EU would most likely (: if the directive’s definition actually involves acts of trafficking) be justified to use the first level of the Council’s system so as to facilitate surrender, but there would be no reason to introduce other minimum rules on penalties.

The thoughts articulated above are directly referring to views expressed by the EU institutions,⁹⁰ but they are additionally built on the notion that factors related to the need for the EU to act should be taken into account not only when they favour EU action, but also when they do not, in which case they serve as *restrictions*.

⁸⁸ *Satzger* (fn. 78), p. 74.

⁸⁹ The general significance of the three features is evident in the Commission’s statement concerning the EU setting penalties under article 83(2) TFEU (COM 2011/573, p. 11): “The type of sanction that is considered to be the most appropriate to reach *the global objective of being effective, proportionate and dissuasive* should be chosen”.

⁹⁰ Such as the ones in COM (2012) 363, p. 10.

The need to approximate criminal penalties in order to ensure that the penalties provided for by the Member States *will be* effective, proportionate and dissuasive where there are strong indications to the contrary seems most likely to occur with regard to *criminal offences affecting EU interests*, as it may often not be certain that the Member States will provide the necessary protection, even if types of conduct that affect the corresponding *national* interests are punishable with satisfying penalties. On the other hand, though, when it comes to directives concerning EU policies (article 83(2) TFEU), where establishing a strict connection between criminalisation and protecting a particular interest could prove to be a challenge, it must be clear that (also under the spectrum of the principle of subsidiarity and the *ultima ratio* principle) moving from non-criminal penalties to criminal ones is already a considerable step. Besides, given the degree of integration achieved in the EU, it is usually for the Member States' own benefit to protect EU interests and policies.

Moreover, the abovementioned need to approximate criminal penalties may only cover *some* of the types of conduct described in a legislative act. A clear distinction must be made especially between *the basic and the aggravated forms* of the offences, in the sense that, when it is proven necessary to approximate penalties as far as the basic forms of an offence are concerned, the need to do so for its aggravated forms should be examined *separately*. For instance, it is quite likely that the EU would indeed be justified to regulate the minimum-maximum penalty for the basic forms of human trafficking, and hence demonstrate the special features of this offence and ensure that it is addressed as modern-day slavery in all its territory. Since projecting the true gravity of the offence would thus be fulfilled, the EU, according to the principle of subsidiarity and its commitment to respect the different legal systems of the Member States, should in addition only clarify that the aggravating forms must be linked to higher penalties and then *allow the appropriate penalty to be chosen on the basis of the principle of proportionality*. Nevertheless, the EU would be justified to set the minimum-maximum penalty for an aggravated form of the offence as well, e. g. for the trafficking of *children*, should it be substantiated that (for example) a Member State is expected to provide a problematically low penalty level that is incompatible with the EU's assessment of the significance of protecting children and the free development of their personality. Therefore, adopting acts with *inner penalty scales* should not be prohibited,⁹¹ although it must become clear that the need for the EU to form penalty scales is not self-evident.

3. Alternative versions

Having stressed the importance of using a system, one could even go back to some of the original proposals of the Member States and reassess their significance in view of the current traits of approximation. Since the benefits of basing approximation on common numerical standards are questioned, and especially since the

⁹¹ Besides, in the case of directive 2011/93/EU, whose inner scale is the most complex one, Member States asked for elaborate provisions (Council doc 9049/09, p. 3), because the Commission proposed a *single and extremely high* minimum-maximum penalty (: 6 years) for all the types of conduct of the act.

argument that national legislations with generally low maximum penalties are more inefficient than the rest remains a hypothesis, it is not unreasonable to reconsider the proposals favouring a more substantive approximation; that is, proposals (like the Danish one) entailing categories of criminal offences (“serious”, “more serious” etc.) or categories of criminal penalties (“of average / long duration” etc.). On the other hand, one could suggest the adoption of a system with two sets of levels both existing in parallel (for example, a Finnish proposal⁹² consisted of levels of 1–2 years, 2–4 years, 4–8 years, and at least 8 years), in which case each Member State would apply the set consistent with its national penalty system. Furthermore, it could also be suggested that, at an intermediate stage between the basic requirements and the approximation of penalties, the EU should be able to define which act ought to be punishable “by a maximum sanction which provides for imprisonment”.⁹³ This option could somewhat limit the EU’s intervention, as it would not be obligatory to set a certain minimum–maximum penalty every time it is thought necessary to prohibit the imposition of fines. However, attention should be paid, given the tendencies in EU law so far, to not replacing the general requirement for effective, proportionate and dissuasive criminal penalties.

VI. Conclusion

Criminal penalties fall into the core of criminal law. Most notably, they express national beliefs and evaluations concerning the proper response to each offence, as well as define the procedure and the instruments to be used in applying criminal law. Being directly connected to deeply-rooted national characteristics on the one hand and to concrete consequences for individuals on the other, it is no surprise that limited EU intervention regarding criminal penalties that involve deprivation of liberty is still a reasonable demand.

⁹² See Council doc 7266/3/02 REV 3.

⁹³ See article 5(2) of directive 2014/62/EU.