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Ultima Ratio and Subsidiarity in the European Criminal Law

1. Introduction

The principle of *ultima ratio* is acknowledged as an important limitation of States' power[1] and thus of *ius puniendi* in every European country but in Germany and its followers on the path of civil law doctrine. (Almost) every criminal law scholar talks about *ultima ratio*, but it is still somehow unclear what the concept implies.[2] In general, *ultima ratio* means that

„if interference is necessary, then aid, support, care, insurance and license arrangements should take precedence over coercive measures. If coercive measures are necessary, they need not consist in sanctions. If sanctions are necessary, private law sanctions might be preferable to administrative sanctions."[3]

ASHWORTH calls it the minimalist approach (he is 'in favour of minimalism'), which is based on a particular conception of the relationship of criminal law to other forms of social control. As he stated:

„criminal law is a preventive mechanism, but there are others. Morality, social convention and peer pressure are three informal sources of control, and in many spheres it seems preferable to leave the regulation of certain behaviour to those forces. Within the law itself there are at least two other major techniques in addition to criminalization: there is civil liability, best exemplified by the laws of tort and contract, and administrative regulation, which includes such measures as licensing and franchising."[4]

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[1] NAGY, FERENC: *A magyar büntetőjog általános része*. Hvg-orac, Budapest, 2010. 59.p. The opinions of the Hungarian scholars are analysed in KARSAI, KRISZTINA: *Az ultima ratio elvről – másképpen*. In: „Sapienti sat..." Ünnepi kötet Dr. Cséka Ervin professzor 90. születésnapjára (szerk.: FANTOLY ZSANETT – JUHÁSZ ZSUZSANNA – NAGY FERENC). Acta Jur. et Pol. Tomus LXXIV. Szeged, 2012. pp. 253–260

[2] JAREBORG, NILS: *Criminalization as Last Resort (Ultima Ratio)*. Ohio State Journal of Criminal Law 2004/2 p. 526.

[3] JAREBORG (2004) p. 524.

[4] ASHWORTH, ANDREW: *Principles of Criminal Law*. Clarendon Law Series, 1995. p. 33.

The *ultima ratio* principle is frequently said to entail that criminalisation should only be used as the „uttermost means in uttermost cases."[5] The question, that arises concerning these 'uttermost cases' is: in what comparison are they *'uttermost'*? What values and interests shall been compared to get the result in being 'uttermost'? Different substantive values, like in cases of robbery, rape, and forgery? Obviously not. Any and all such comparison shall find its footing in the fact of the similarity of values whose infringement shall be compared, and some of these becomes then labelled as 'uttermost'. *Ultima ratio* presupposes that the same social or individual interests shall be protected by different fields of law. As a consequence, criminal law is not used as an alternative but an additional means applied on the basis of pre-existing provisions of administrative or civil law.[6] It means that less severe injuries of the same (or comparable) interest shall be protected by less severe sanctions introduced by severe regulation, but the most serious violation of interest is to be punished by the harshest of sanctions. This flows also from the general acceptance of the principle of proportionality.

Therefore, criminal law – as a last resort – is the severest set of legal measures *only in comparison* with other legal interventions countering the infringement of the same or at least comparable legal interests. The forgery of luxury brands might be a good example for this: the confusing labelling of the product can violate (i) the statutory definition of competition infringement or (ii) that of advertisement infringement, (iii) of a regulatory offence or (iv) of a criminal offence dependent on the further objective and subjective circumstances to be taken into consideration. In this case, the similarity of protected interests is given; therefore, it is reasonable to talk about *ultima ratio,* if we would like to analyse criminal law implications.

Without pre-existent extrinsic protections for comparable interests outside of the field of criminal law, criminal law cannot serve as the last means but the only one (*'sola ratio'*). If in a legal order there are important values of a society which are protected only by criminal law, it is not reasonable to talk about the *ultima ratio* in connection with those. For example personal freedom and sexual freedom (today)[7] could typify as protected interests (*Rechtsgut*) in criminal law, but if other fields of law are „activated" in connection with these, they might only contain rules on further consequences but not on less liability for the forbidden behaviour itself.[8]

We shall not mistake these cases for those where the non-criminal laws contain prohibitive provisions but criminal law itself is silent. By this I mean that infringements of private or administrative law do not always amount to afore-said 'uttermost' cases. Criminal law is therefore rather 'fragmented'[9] because the existence of prohibitive provisions in any other branch of law is not (always) sufficient to activate criminal law.[10] Consequently, the texture of every (democratic and proportional) criminal law system is mosaic-like. Therefore, if the assault on a protected social value or interest does not es-

[5] JAREBORG (2004) p. 534.

[6] LAGODNY, OTTO: *Strafrecht vor den Schranken der Grundrechte*, Mohr Siebeck, 1996. p. 348.

[7] According to Hungarian criminal law.

[8] See more at KARSAI, KRISZTINA: *Fogyasztóvédelem és büntetőjog*, Hvg-orac, 2011. pp. 37–51.

[9] Fragmentary criminal law is a concept of KARL BINDING (1902) used until today. See ROXIN, CLAUS: *Strafrecht. Allgemeiner Teil.* 4. Auflage. München, C. H. Beck, 2006. p. 45.

[10] See more FELIX, DAGMAR: *Die Einheit der Rechtsordnung.* Mohr Siebeck, 1998. p. 297.

calate and/or only criminal law is invoked to protect it, *ultima ratio* is not comprehensible. The limits of state power are only formulated by proportionality.

Ultima ratio is rather a *tool for comparison of legal answers* to infringements. This is a correct delimitation without creating a better position for *ultima ratio* because to be able to decide upon the 'uttermost means' it would be necessary to differentiate between less severe, severe, more severe or uttermost (etc.) sanctions in the legal order. *Ultima ratio* itself does not have the necessary substantial elements to qualify for this test. Such testing can be accomplished in connection with proportionality – therefore, and that is what I argue for herein, we shall avoid any general and vague reference to *ultima ratio* when speaking of criminal law, we shall limit *ultima ratio* to contexts of *escalating violations* of the same social value in the legal order.

For example in the case of rape, criminal law is not the last resort, it is the only one. Consequently, if such principle is not generally valid in its scope of application, there is no reason to speak about the *ultima ratio* as a principle in criminal law. Therefore, it can only be acknowledged if we examine different chains of escalating violations of the same social value or interest.

In every modern democratic society, the subsidiarity of criminal law is an acknowledged principle, which entails that criminal law and responsibility based on criminal law shall apply only if the infringement of the legal interests in question cannot be dealt with by way of measures of other – less severe – legal regulations. This concept of severity has two definitive elements: criminal law is both substantively and structurally more severe or the most severe in comparison with other branches of law. Substantive severity would mean that criminal law is always considered as the most severe branch of law due to the abstract possibility of imposing the harshest sanctions (imprisonment) and the biggest restrictions on personal freedom against any violation of the law. By differentiating this structurally based (system-based) severity from investigating the substantive element (i.e. sanctions), we need to point out that if we focus on the institutional background and the regulation of the procedures in question, and the power of the state in designing and influencing the entire framework and the dynamics of the procedure, we come to the conclusion that the bigger the power of the state in these areas, the more rigorous the structure of the system. Today, it is also obvious that the outlines of the categorisation of different fields of law based on the severity of sanctions applied are rather blurred, the imposition of increased fines by administrative authorities (or an obligation set by a civil court resulting in a payment of damages in the settlement of a tort claim) is not always considered to be less severe than a sentence of suspended imprisonment, to mention one example.

This principle of subsidiarity is in a strict connection with *ultima ratio*, which provides an additional element enabling the enforcement of subsidiarity; this additional element – added by the ultima ratio – is the 'uttermost'. If other legal regimes have failed for whatever reason in remedying a violation of the law, subsidiarity would allow activating criminal law protections, and here, *ultima ratio* is a 'material and qualifying element' meaning that the criminal law shall be activated only in case the most important social values sustain the most severe injuries. Consequently, in cases of *sola ratio,* subsidiarity of criminal law cannot be enforced.

2.The Ultima Ratio Character of European Criminal Law

In searching for European aspects of *ultima ratio* we shall bear in mind the following questions: 1) How can – if ever – the ultima ratio principle limit the already unveiled splits of *ius puniendi* of the European legislator? 2) Can *ultima ratio* be somehow acknowledged by the EU or the ECJ? 3) Is there, and if yes, to what extent, a connection between *ultima ratio* and the European subsidiarity principle?

According to the argumentation above, ultima ratio as a limiting principle might only be used if activating criminal law (on the European level) follows the less severe measures in case of less severe infringements for *the same value or interest.* This would mean that the competences laid down in Article 82, 83 and 325 TFEU could be used only in cases if EU law contains express prohibitions in protecting certain values, which values are simultaneously safeguarded by criminal law as well. Competences to adopt procedural or jurisdiction rules do not fall within the scope of *ultima ratio* and EU measures cannot be considered as last resort in comparison to the national level of criminal law. The latter context is rather relevant to the discussion on the links between subsidiarity and *ultima ratio.*

Observing the status quo on the European level, the picture is much more complicated than expected. The competence as set forth in paragraph 1, Article 83 does not represent neither the possibility of the most severe legal reaction against 'extreme' violations of interests protected by other means of European Law nor the presupposed chains of escalating violations of same interests. This is well described by JAREBORG, who argues that from the definition of *ultima ratio* it follows logically „that criminalization should be used only as [the] uttermost means in [the] uttermost cases" and he also asserts that the word 'only' shall be discarded. He argued to „look at what we could do with the phrase 'uttermost means in uttermost cases' in a principled way! The *ultima ratio* principle has always been regarded as a principle against criminalization – as stating a necessary condition. If it is instead taken to state a sufficient condition, it will be transformed into a principle for criminalization."[11]

By analysing *ultima ratio* on the European level, JAREBORG's thesis can be reaffirmed and applied. Paragraph 1, Article 83 contains measures against particularly serious crimes „with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis." This special need could serve as basis for *ius puniendi,* without being able to limit its use. Moreover, I would argue that in terms of these competences, *ultima ratio* must be understood as defined by JAREBORG, a principle for (i.e. in favour of) criminalization (in a broader sense). Limits of such competences are rather flown from proportionality and subsidiarity, as it will be discussed below.

Prima facie, the same could be expected by analysing the competences set out under paragraph 4 Article 325. The Union legislator shall adopt „the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union", as it has been already invoked above. The interpretation of „necessity" as apparent in this rule could result in similar content as that of the competence provided

[11] JAREBORG (2004) p. 534.

under paragraph 1 Article 83. Until this competence is first activated by the legislator, the academia is forced to navigate through a foggy quagmire of abstract concepts. The good news is, however, that the Commission has uttered to take a stand on this issue, in connection with the directive's proposal on the protection of financial interests.

„[C]riminal investigations and sanctions may have a significant impact on citizens' rights and include a stigmatising effect. Therefore, criminal law must always remain a measure of last resort ('ultima ratio'). This is reflected in the general principle of proportionality (as embodied in the Treaty on European Union and, specifically for criminal penalties, in the EU Charter of Fundamental Rights). For criminal law measures supporting the enforcement of EU policies, the Treaty explicitly requires a test of whether criminal law measures are 'essential' to achieve the goal of an effective policy implementation. Therefore, the legislator needs to analyse whether measures other than criminal law measures, e.g. sanction regimes of administrative or civil nature, could not sufficiently ensure the policy implementation and whether criminal law could address the problems more effectively. This will require a thorough analysis in the Impact Assessments preceding any legislative proposal, including for instance and depending on the specificities of the policy area concerned, an assessment of whether Member States' sanction regimes achieve the desired result and difficulties faced by national authorities implementing EU law on the ground."[12]

It is important to see that if the European legislator interprets the Article as described above then the restricted *ultima ratio* principle elaborated in this study might be of significance.

Finally, paragraph 2 Article 83 can be applied for any measure „which proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures". In my view, this provision does refer to other regulatory regimes of European Law, to fields outside of criminal law, and the aim of this competence (created through Article 83) is to establish a gapless legal texture against violation of legal domains „which [have] been subject to harmonisation measures". Simultaneously, this means that the regulatory regimes ('harmonised areas') have *the same subjects in terms of protected values* and interests as those of the envisaged criminal law measures.

In searching for further invocations of the *ultima ratio* principle, we can find further inferences among the justifications provided for political documents. In connection with the EU drug strategy, it has been stated that it is constructed around „law enforcement

[12] Communication from the Commission: Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law COM (2011) 573 final, 20.9.2011, Nr 2.2; and also Commission Staff Working Paper; Accompanying the document Proposal for a Directive of the European Parliament and of the Council on the protection of the financial interests of the European Union by criminal law SWD (2012) 195 final, 11.7.2012, Annex II, 2.

measures, which should only be used as a last resort (*ultima ratio*)."[13] Another instance that made reference to *ultima ratio* stated that:

„Given the punitive and controversial nature of criminal sanctions, the criminalisation of States by the Union for a particular form of conduct should be a last resort (*'ultima ratio'*). The difficulties faced by Member States in the implementation of an EU policy, compromising the effectiveness of that policy, should not in themselves be sufficient to justify recourse to criminal law. The conduct in question must also constitute a serious violation of an interest which is considered to be fundamental.[14]

3. Awareness of Ultima Ratio on the EU Level

Ultima ratio seems to be a broader concept on the level of EU law than on the level of the MS; it is not only used in the context of criminal law due to the structural considerations the EU is built around. A basic and fundamental concept of *ultima ratio* is connected to the basic *philosophy* of any legal order, through which legal norms are construed to be the last resorts in regulation; the law itself is the ultima ratio.

„In the field of rules or 'what should be', what characterises 'legal' provisions, as opposed to moral or aesthetic rules, is forcibility; the possibility that compliance can be demanded by the courts and that a breach can be sanctioned. One typical feature of the *'ius cogens'* or 'compelling law' is the possibility of 'enforcement', in principle by means of a judicial mechanism, to ensure that the law is applied, or, in the event it is not, that those in breach are penalised. At the very heart of 'what should be', however, is the concept that compliance with laws is, generally speaking, voluntary and that recourse to legal proceedings is the exception — the *'ultima ratio'*. Without the voluntary and widespread agreement of the public to comply with the duties imposed by the rules, their effectiveness would be irremediably compromised. Hence the legislator's responsibility to lay down laws that by and large encourage people to observe them voluntarily and to comply with them spontaneously. These responses are, in fact, prerequisites for everyone's rights to be respected and are a cornerstone of living as part of society. Against this backdrop, the concern for 'good law-making' and 'better law-making' takes on particular significance and has major implications for the interpretation, integration and application of laws."[15]

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[13] Opinion of the European Economic and Social Committee on the "Communication from the Commission to the European Parliament and the Council — Towards a stronger European response to drugs" COM(2011) 689 final, OJ C 229, 7.31.2012, pp. 85–89.

[14] Opinion of the European Economic and Social Committee on the "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law" COM(2011) 573 final, OJ C 191, 29.6.2012, 97–102 Nr 1.4.

[15] Opinion of the European Economic and Social Committee on The proactive law approach: a further step towards better regulation at EU level OJ C 175, 28.7.2009, 26–33 Nr 3.

Ultima ratio is more tangible in cases where sectorial regulatory frameworks might be affected. Relevant to the present financial crisis, the common European crisis management framework could be the ultima ratio in comparison with 'normal' functional frameworks of the financial market.

„To the extent that the risk of sovereign debt crises still remains relevant even under such strengthened fiscal and macroeconomic surveillance, and with the purpose of safeguarding the stability of the euro area as a whole, it is desirable to establish a permanent crisis management framework which can, as *ultima ratio*, provide temporary financial support to Member States whose currency is the euro experiencing impaired access to market financing. Such framework should be designed in a way that minimises moral hazard and reinforces incentives for pre-emptive fiscal and macroeconomic adjustment."[16]

Another emblematic example can be, when the European norm shall serve as the *ultima ratio* in connection with national regulatory systems:

„[O]ption 6 is best suited to achieve objective 3. It would ensure safety of cosmetic products without negative impact on innovation and on new developments as it would permit turning to the detailed regulation of individual ingredients only as *ultima ratio*."[17]

A delicate connection was implied by *avocat général* Mischo in relation to strict national housing rules for migrant workers (requiring that the family live under normal housing circumstances). He argued that „the provisions in issue in reality constitute merely an *ultima ratio*, a sort of 'sword of Damocles' intended to encourage migrant workers to comply with the rule."[18]

Ultima ratio demonstrates an ability to adapt to the environment and context of interpretation on the EU level. Under ex-Article 224 TEC[19] it is invoked for the protection of certain crucial interests of the Member States, construed as a safety valve for the MS, hence an exception from the obligations normally incumbent upon Member States under Community law.

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[16] Opinion of the European Central Bank of 17 March 2011 on a draft European Council Decision amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (CON/2011/24) OJ C 140, 11.05.2011, 8–11 Nr 2.

[17] Commission staff working paper: Impact assessment. Report on simplification of the "Cosmetics Directive" SEC (2008) 117 final, 5.2.2008, Nr 6.

[18] Opinion of Mr *avocat general* MISCHO delivered on 17 January 1989. Case 249/86 Commission of the European Communities v Federal Republic of Germany [ECR] 1989 1263 Nr 6.

[19] Article 224 TEC: Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbance affecting the maintenance of law and order, in the event of war or serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.

„This latter consideration has led the Court (...) to regard Article 224 as ancillary vis-à-vis other Treaty provisions, constituting the *ultima ratio* to which recourse may be had only in the absence of any Community provision enabling the demands of public order in question to be met. That, indeed, is the main reason why this provision of primary Community law has never so far been applied.[20]

Lastly, a *procedural aspect* is highlighted as infringement proceedings against a MS could be labelled as means of last resort.

„The Commission endeavours to make the fullest use of the pre-litigation stage of the infringement proceedings to persuade the offending Member State to remedy its deficiency or to negotiate a settlement. As the Court has held, referral of an action to it is the last resort, *'the ultima ratio'* enabling the Community interests enshrined in the Treaty to prevail over the inertia and resistance of the Member States"[21]

If jurisdictions conflict in criminal matters and the dispute is set to be resolved amicably through mediation, it has been declared that:

„in any case, the main objective should be to achieve consensual solutions, so that the possibility of a binding decision should be considered an ultima ratio where the mediation process has failed."[22]

As demonstrated, the use of '*ultima ratio*' as a reference base is often apparent in the arguments of EU institutions; however, without a significant common ground. European Law uses the notion in a restrictive sense, of more restrictive procedure and of more restrictive rules – this is the only common aspect, i.e. the threat to introduce more rigorous sanctions in case of omission or undesirable action on the part of the MS. Whatever this really means.

In my view, is the EU concept of ultima ratio is not – yet – sufficiently definite for it to be invoked as a justified last resort; it is very decorative but severely lacks the „sex appeal" of well-solidified legal grounds.

4. Ultima Ratio and Subsidiarity in the EU

European integration is characterised at is core by the general principle of subsidiarity, which – after several initiatives[23] in the early years – was first mentioned in an explicit manner in December 1992 when the Edinburgh European Council issued a declaration on the principle of subsidiarity, laying down the rules for its application. The Treaty of

[20] Opinion of Mr *avocat general* COSMAS delivered on 23 March 2000, C-423/98 Alfredo Albore [ECR] 2000 I-5965.

[21] Thirteenth annual Report on Monitoring the Application of Community Law COM(1996) 600 final, OJ C 303, 14.10.1996 Nr 1.D.

[22] Commission staff working document: Annex to the Green Paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings {COM(2005) 696 final} SEC (2005) 1767, 23.12.2005, Nr 4.

[23] European Union. Report by Mr. LEO TINDEMANS, Prime Minister of Belgium, to the European Council. Bulletin of the European Communities, Supplement 1/76. (commonly called the Tindemans Report).

Amsterdam continued to set in stone further details in its Protocol on the application of the principles of subsidiarity and proportionality:

„[T]he principle of subsidiarity provides a guide as to how those powers are to be exercised at the Community level. Subsidiarity is a dynamic concept and should be applied in the light of the objectives set out in the Treaty. It allows Community action within the limits of its powers to be expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified."

The Treaty of Lisbon is also complemented by a similar Protocol (Nr 2) which elaborates on the content of Article 5 TEU and provides important procedural aspects for the 'institutional' testing of subsidiarity (and proportionality).

Article 5 TEU: Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments shall ensure compliance with that principle in accordance with the procedure set out in that Protocol.

Subsidiarity concerns all draft legislative acts and allows national parliaments to object to a proposal on the grounds that it breaches the principle, as a result of which the proposal may be maintained, amended or withdrawn by the Commission, or blocked by the European Parliament or the Council. In the case of breach of subsidiarity, the Committee of Regions may also refer directly to the CJEU.[24] Subsidiarity also plays an important role in establishing boundaries for the broad interpretation of EU competences in general.

The Union can act, if the action forms part of the competences conferred upon the Union by the Treaties (shared competences in the field of AFSJ). The principle of conferral is fulfilled due to the express competences set forth in TFEU. In the context of shared competences, EU-level action is justified if it is most relevant in order to meet the objectives set by the Treaties (principle of subsidiarity). The last requirement is for the Union to apply its law if the content and form of the action does not exceed what is necessary to achieve the objectives set by the Treaties (principle of proportionality).

With regard to criminal law competences defined in TFEU, *it is necessary to delineate subsidiarity by defining its core content.*

The first question is whether a *conceptual link* between subsidiarity of the domestic criminal law and that of the European level could be established. It is important to stress that only the first element of subsidiarity under Article 5 TEU demonstrates connections with subsidiarity (as construed in MS) based on the common content of these two. The principle of subsidiarity in criminal law ('criminal law and responsibility based on

[24] See DE NORIEGA, ANTONIO ESTELLA: *The EU Principle of Subsidiarity and Its Critique.* Oxford University Press, 2002 and DOUGLAS-SCOTT, SIONAIDH: *Constitutional Law of the European Union.* Pearson Education, 2002. pp. 173–186.for more details.

criminal law shall apply only if the infringement of legal interests in question cannot be dealt with by way of measures of other – theoretically less severe – legal regulations') includes a true comparison in terms of the possibilities of using different legal regulations enacted by the national legislator. It can decide what legal protections shall be activated for different social phenomena, subsidiarity allows for the use of more severe sanctions if others are not efficient to deal with the problematic violation at issue. *Ultima ratio* provides criminal law with proper tools for the 'uttermost' cases.

Although the principle of subsidiarity itself (in European terms) attributes a special character to any European legal regulation compared to domestic legal regimes, this does not necessarily mean that the EU regulation would be of substantive severity. However, it could be seen as a modality of system-based severity; but not in the field of ECL. This means that the domestic principle of subsidiarity with regard to criminal law does not have a conceptual link with the European interpretation of subsidiarity. Therefore, the former shall be understood as was „traditionally", as if it had not been changed by the flow of European integration.

In the following, we shall analyse the *meaning of the European principle of subsidiarity if* the criminal law competences (particularly that of the split *ius puniendi*) of the TFEU are exercised. Article 5 TEU requires the failure of a national legal order as the precondition of subsidiarity to be activated and thus the possibility of European legislation: „only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member cannot be sufficiently achieved by the Member States, either at central level or at regional and local level". This precondition has to be understood as if there was a need for ECL action because national measures under the failed domestic criminal law framework. Several exceptions can however be detected if similar violations or endangerments of protected values are categorised differently by the MS (i.e. protected not by the umbrella of criminal law but by the law of regulatory offences or through further deterrent regimes in administrative law[25]). These exceptions are considered to be „labelling issues"; hence, they are not substantial in nature.

It shall be also noted that in the probable case where an MS does not invoke neither criminal law nor any other protection for combating the violation at issue, targeted to be regulated by European Criminal Law (ECL) in the future, the MS will have justification for obstructing the Union's legislation. There is no doubt that in terms of serious forms of organised crime (NB: jurisdiction of AFSJ and ECL to combat these through joint effort) the probability of absent criminal law reaction in any MS cannot be excluded. In terms of competences for the realization of EU policies or to combat fraud, the existence of very differing domestic legislations is real. It is noteworthy hereby that there are several research projects directed to mapping these dissimilarities between MS and to offer adequate solutions to remedy the detrimental effect of this situation.[26]

On the European level, subsidiarity – if activated – might not amount to actual rigorous reactions, and in this respect, it cannot be compared to the national level (in terms of the activation of subsidiarity in the domestic sense). European legislation is just 'an-

[25] E.g. the combat against irregular migration or several traffic offences etc.

[26] Tender JUST/2011/JPEN/PR/1012/B3 – „Study on criminal sanction legislation and practice in representative Member States" 2012–2013; 19.1.2012 JUST/A4/mps – (2012) 61209.

other one' with different rules and regimes, but cannot be compared to domestic principles, not even in the field of criminal law. Therefore, if the precondition for the (first element of) European subsidiarity is fulfilled and national (criminal) law has failed, then the activation of ECL does neither presuppose nor require 'more severe' EU regimes – in substantial terms – than the national ones. The subsidiarity rule only allows for the establishment of another regulatory regime. However, the competences in the field of ECL (and those of the split *ius puniendi*) does not exclude the enactment of European legislation equipped with more severe content in terms of the substantial severity of criminal legal regulations. Obviously, this also means that these competences can be also used to define offences (and punishments, cf. 'power to define') when criminal law regulation first appears on the European level, but also for others – in case of escalating violations of the same social value within the domestic legal order. In this case, the Union will act in protection of the same (or comparable) values in lieu of the (failed) domestic regulation.

There is no need to further analyse the *second element of European subsidiarity*; at this point, I would only like to point out the several peculiarities in the wording: the Article uses the expression 'better achievement' of the proposed objectives instead of 'achievement' (in general). Semantically, 'better achievement' is significantly different from a mere statement of 'achievement' and is not in contradiction with the following wording 'cannot be sufficiently achieved'. It could be also interpreted in a way that the new law will achieve the objectives and it will be better. I do not argue for the assumption that the Article differs 'intentionally' in this regard, therefore this second element shall be understood as stating the expectation that the C/UL norm be able to achieve the goals specified under C/UL.

5. Summary

As evidenced above, the ultima ratio principle cannot be used as a general legal basis for ECL legislation, albeit there are competences (cf. paragraph 2, Article 83 and paragraph 4, Article 325), where the restricted interpretation of the ultima ratio principle (as shown) can play a role in opening doors for ECL legislation.

Ultima ratio is used as an effective argument by the institutions of the Union; however, with criminal law being the focal point of present research, it is obvious that the principles of subsidiarity and ultima ratio often appear in an interchangeable manner in EU documents. The MANIFESTO assumes a clear position by mentioning both principles and stating that:

„[T]he European legislator may only demand that an act be criminalised if it is necessary in order to protect a fundamental interest, and if all other measures have proved insufficient to safeguard that interest. Only if this condition has been satisfied can criminal law be regarded as 'necessary' and in conformance with the European principle of proportionality."

Generally, the substantial content of the subsidiarity principle in criminal law cannot be linked to the European subsidiarity, merely the wording is similar.