ACTA UNIVERSITATIS SZEGEDIENSIS

FORVM

Acta Juridica et Politica

IX. évfolyam
2. szám

SZEGED
2019

ISSN 0324-6523 Acta Universitatis Szegediensis
ISSN 2063-2525 FORVM Acta Juridica et Politica

A műszaki szerkesztést és a nyomdai kivitelezést az EFOP-3.6.2-16-2017-00007 azonosító számú, *Az intelligens, fenntartható és inkluzív társadalom fejlesztésének aspektusai: társadalmi, technológiai, innovációs hálózatok a foglalkoztatásban és a digitális gazdaságban* című projekt támogatta. A projekt az Európai Unió támogatásával, az Európai Szociális Alap és Magyarország költségvetése társfinanszírozásában valósul meg.

TARTALOMJEGYZÉK

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European Criminal Policy**

I. Criminal Policy – Introduction and Definition

Today, no one stands to argue that European criminal law exists, and as such, it is obvious that European criminal policy exists as well.[1] Traditionally and within the internal framework of states, criminal policy is legal regulation forming ideology stemming from social attitudes and value systems of a society, which is the basis for and at the same time, justification of the formation of criminal law and criminal justice. In many cases, it formulates some favourable social aim and tries to achieve it through legal regulation. However, it is also true that often times criminal policy changes occur for general political support (=to gain votes), taking advantage of the sensitivity of the masses concerning punishability, punishments, sense of justice, and of course fear.

Criminal policy is one of the tools for social control of crime,[2] therefore, it should be viewed as an activity of the state that reacts to this social phenomenon. *Jescheck* also highlights that criminal policy is about how criminal law can be developed most preferably in such a way in the interest of it being able to fulfil its main task – the protection of society. [3] *Garland* names two main strategies, on one hand hereby identifying the tools that make criminality tolerable (e.g. decriminalization), and on the other hand, those tools that aim to suppress criminal activity (e.g. crime prevention.[4] These can be further specified as *Aromaa* defined under four points: "the objectives of criminal policy are defined being fourfold: 1) to minimise the social costs of crime; 2) to minimise the costs of crime control; 3) to distribute these costs; and 4) to do this in a fair manner. "[5]

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** This research was supported by the project nr. EFOP-3.6.2-16-2017-00007, titled "Aspects on the development of intelligent, sustainable and inclusive society: social, technological, innovation networks in employment and digital economy". The project has been supported by the European Union, co-financed by the European Social Fund and the budget of Hungary.

1 Criminal policy and penal policy were discussed separately in criminology before, by understanding the latter in the context of penal execution, but in this paper, I do not follow this distinction.

2 M. ANCEL: *Social Defence.* Psychology Press. 1998. See more basic literature: H. D. BARLOW, S. H. DECKER, *Criminology and Public Policy*: Putting Theory to Work. Temple University Press, 2010.

3 H-H. JESCHECK, T. WEIGEND: *Lehrbuch des Strafrechts*, *Allgemeiner Teil.* Duncker & Humblot. Berlin, 1996.

4 D. GARLAND: *The limits of the sovereign state – Strategies of crime control in contemporary society.* In: *British Journal of Criminology.* 1996. p. 445 et seq.

5 K. AROMAA: *Responsible criminal policy / Crime and criminal policy.* In: Kriminologijos Studijos. 2014. p. 77.

All criminal policy traditionally stems from some underlying philosophical ideology, and as such, is either linked to or assigned to political ideas. That is, although it reacts to the same real-life phenomenon, liberal and conservative criminal policy provides radically different answers. At the same time, *Korinek* highlights that "the general political motivation is expanded with a new, unique element, which is independent of the aspiration for power, a role influenced to a great degree by the opportunities and methods."[6]

Kerezsi provides an outstanding summary when stating that taking into consideration international (and domestic) trends, criminal policy is characterised by the conjunction of the following: crime has become a determinative *political issue;* the interpretation of behaviour that can be defined as crime is increasingly broader, that is, specifically defining crime is increasingly becoming solely *political and not a professional question* and the technology employed in the system to suppress crime, as well as discourse concerning crime, and the metaphorical speeches about crime and criminal justice have in all regards become spectacular and visible, thereby providing excellent opportunity for them to be notice: *the government governs*.[7]

II. European Criminal Policy

1. Definition and Content

My opinion is that in European Union terms we should be using the term criminal policy, actually it is necessary, but it can only be meaningfully grasped by taking the following into consideration.[8]

Criminal policy, considered the tool of state crime control most certainly cannot be applied to the European Union arena without some restrictions. It does however suffice as a starting point, and therefore it can be stated EU criminal policy has become a tool for controlling crime, namely through the fact that its carrier and representative is such an entity that is capable of influencing criminal law and legal regulation concerning criminal justice at both member state level and in a narrower sense "supranationally" (European Public Prosecutor, EPPO, as well as establishing legislation at the level of legal decrees).

Considering that currently there is no independent, separate EU criminal justice in terms of a branch of law and justice system, the member states' criminal justice system are

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[6] L. KORINEK: *Kriminológia [Criminology]*. Volume I. Magyar Közlöny és Lapkiadó. 2010. p. 520

[7] K. KEREZSI: *Kriminálpolitika egykor és ma. [Criminal policy once upon a time and nowadays]* K. Karsai (ed): Essays for Honour of Ferenc Nagy. 2018. Szeged, p. 551.

[8] See further basic literature: S. MANACORDA: *Public Policy and the Court of Justice: The „Combinatorical logic" in the framework of criminal law.* In: *New Journal of European Criminal Law.* 2010. pp. 59–83. A. H. GIBBS: *Reasoned Balance in Europe's Area of Freedom, Security and Justice.* In: European Law Journal. 2011. pp. 121–137. J. B. BANACH-GUTIERREZ, CH. HARDING (EDS): *EU Criminal Law and Policy. Values, Principles and Methods*. 2016. J. OUWERKERK, J. ALTENA, J. ÖBERG, S. MIETTINEN (EDS.): *The Future of EU Criminal Justice Policy and Practice. Legal and Criminological Perspectives.* Brill. 2019. S. PEERS: *EU Justice and Home Affairs Law.* Volume II: EU Criminal Law. Policing and Civil Law. 4th ed. 2016. pp. 174–183.

those that continue to *directly* affect crime and criminal procedures. National criminal law regulations therefore function as a well perceivable "buffer" that filters and transforms EU criminal policy "fruits", prior to their entry into the domestic legal order. Because of this buffering effect EU criminal policy has developed a fundamentally important characteristic: because its mode of action cannot prevail directly under crime control, the aspects that literally politicize national criminal policy (collecting votes, symbolic functions) are of no importance here. Because of this, its directions can be determined based on grounded scientific results, evidence-based research[9], and real criminal problems. For the EU legislator, gaining power cannot be interpreted through tools of criminal policy; this cannot be achieved through legislative procedures nor through general mechanisms of exercising EU-level power – therefore, there is no such endeavour. Therefore, EU criminal policy could just be a professional question, even if the moral panics sweating up member states pacify to simple opinions through the course of developing EU criminal policy.[10] One rather important consequence in the twenty-five year development of European criminal law is that already behind the many new legal institutions are scientific concepts and results, but even the essence of these are not lost during the political decision-making processes. (see below).

Today there is no doubt concerning the concept of European criminal law: this branch of European law contains every legal norm issued on the legal basis of the third pillar and of its successor, the policy of Area of Freedom, Security and Justice (AFSJ). European criminal law (ECL) has its counterparts in several domestic criminal laws, which constantly deal with accommodating the impact and developments brought about by European movement (in the form of 'harmonised criminal law'). The conception of a definition for this new legal terrain faced initial difficulties due to uncertainty of the Member States (MS) and the political implications of the question of whether the way they try to follow is the proper and suitable one.

Due to terminological correctness, it is necessary to underline that the very specific term 'union's policy' on the AFSJ (in shared competence) means only the activities of the EU entitled by Articles 67-89 TFEU (Treaty on the Functioning of the European Union) for. But this activity – from the point of view of the establishment of European criminal policy, constitutes only one of the elements of European criminal policy, namely that of influencing national criminal law systems (and national criminal justice). The other not less important element of European criminal policy flows from the goal to protect jointly and supranationally the financial interests of the EU, if necessary, through criminal law (Article 325 TFEU).

Since in a broader sense, European criminal law has three different goals taking from the text of TFEU, European criminal policy covers this triangle of aims, they are as follows: the protection of separated interests represented by the EU (mainly and recently financial interests); the aim of effective joint crime control (in the MS) and the sanctioning of violations of EU law.

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[9] W. DE BONDT, *Evidence Based EU Criminal Policy Making: In Search of Matching Data* in *European Journal on Criminal Policy and Research.* 2014. pp. 23–49.

[10] K. KEREZSI: *Kriminálpolitika egykor és ma. [Criminal policy once upon a time and nowadays].* cit. p. 548.

It is important to underline *a significant element in this development*: the role of the scientific ideas and the criminal law schools in this field is essential. Many ideas[11] that emerged later as legal norms were born in the '*Petri* dishes' of criminal law professors in Paris, London, Rome, Berlin, Luxemburg and Brussels (etc.). The real impact of academic concepts on politics in Europe is most traceable in this domain. Professors of law have real opportunities to develop new ideas and try justifying new models because European politicians and Eurocrats need as many alternatives as possible for building the future and to be able to choose the 'best' one after due deliberation. Of course the 'best' solution is the one that fits directly into the actual political picture, but if the basic concepts are elaborated upon by academics, the professional control upon these ideas could be more effective and the legislative will make use of this academic origin and enhance consultation with the 'parents' as they try to find a legal form that does not destroy the original idea itself. Even for the MS, it is easier to accept a new idea if there is broad (Europe-wide) consent on the academic level. However, there is another factor that has strengthened and continues to strengthen the position of legal academia in this domain. The Commission itself subsidises many transnational academic research projects[12] in the field of criminal law and criminal justice, and the calls for proposal of the Commission to lay out the general problems in need of global academic concepts to resolve them. High-level academic work and networking through Europe is induced by granting funding for these projects in the special fields of criminal law; and networking enables professionals to think together in a broader context and on a wide horizon concerning the future of ECL. All these stakeholders of the academic world are actors of the European criminal policy as well.

2. Actors of European Criminal Policy

The bearer of European criminal policy is the Committee, the parliament, or even the Council alone. With regards to content, we are talking about criminal policy activity when these actors take part in legislation of criminal law that has an effect on member states in the scope of fighting crime transnationally through joint effort with regard to substantive law and procedural law. It is important to establish that the other component of European criminal policy shall be interpreted separately from this (but also in parallel), which is in the scope of laying down the protection of sui generis EU criminal law interests.

The activity of the Court to develop law, in my opinion, cannot be considered criminal policy, because its aim is not to control crime (or its some intermediate goal of that, see above *Aaroma*), but rather to provide for the adequate and uniform functioning of EU law, as well as uniform interpretation of law, clarification of questions of jurisdiction, to make

[11] CORPUS JURIS introducing provisions for the purpose of the financial interests of the European Union, under the direction of MIREILLE DELMAS-MARTY (1997); THE MANIFESTO ON EUROPEAN CRIMINAL POLICY (2009) See below.

[12] After the Treaty of Amsterdam entered into force the Commission published its first agenda for the development of JHA (Tampere Program, 1999), which was a „high-profile multiyear program offering political direction" (Peers, 274) and which was a legal basis for projects financed by the Commission. The Hague Program (2004–2009), the Stockholm Program (2009–2014) of the Commission serves the same goals and seems to function very effectively.

decisions concerning legal debates based on EU law (not criminal claims!), and the elimination of legal acts that violate EU law.

3. Birth of European Criminal Policy

It can be raised as a further relevant question: *from what point are we speaking* of European criminal policy? In the European discourse, step in the development of European criminal law could not have been regarded as ideology developed beforehand or the step by step realization of priorities, because no master plan had existed, and thus the development of European criminal law did not qualify a uniform policy in the EU scope.

Meanwhile clear criminal law contents appeared already in EU law as a result of legislation from the former third pillar (Judicial and Home Affairs), those were not identified as part of a 'criminal policy' – the concept of European criminal policy was born with the AFSJ provided by the TFEU after Lisbon (since 2009). Some steps were taken by the Commission by issuing the so-called green papers that addressed specific legislative issues of criminal justice[13] and this activity can be identified as the early emergence of fragments of a criminal policy, but these steps did not build a comprehensive policy because of the lack of a 'masterplan' and the general entitlement for creating sui generis criminal law on an EU level. The multi-annual programmes (Tampere, Haag, Stockholm) of the European Council had similar effects as well, they establish general and political goals in the area of Justice and Home Affairs of the third pillar without calling them pieces of criminal policy.

The "Manifesto on European Criminal Policy"[14] signalled the need for a comprehensive 'policy' on European criminal law legislation in 2009 and addressed core issues of criminal justice which belongs to the regulatory field of EU legislation in shared competence. Although this memorandum was a project of non-actors of policy fields (academia), its function as forerunner and warm-up-initiative should not be underestimated. A bit later, in 2011, the Commission published its communication entitled "Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law".[15] According to the preamble "this Communication aims to present a framework for the further development of an EU Criminal Policy under the Lisbon Treaty. The EU now has an explicit legal basis for the adoption of criminal law directives

[13] For instance, Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union. Brussels, 19.2.2003. COM(2003) 75; Green Paper on Conflicts of Jurisdiction and the Principle of ne bis in idem in Criminal Proceedings. Brussels, 23.12.2005. COM(2005) 696; Green Paper on the Presumption of Innocence. Brussels, 26.4.2006. COM (2006) 174; Green Paper on Obtaining Evidence in Criminal Matters from one Member State to Another and Securing its Admissibility. Brussels, 11.11.2009. COM(2009) 624.

[14] In December 2009 the "European Criminal Policy Initiative", an international research group consisting of 14 university professors from ten Member States of the European Union published the so called "Manifesto on European Criminal Policy" in the German Online-Journal "Zeitschrift für Internationale Strafrechtsdogmatik" (www.zis-online.com) in seven languages. The principles and guidelines for a reasonable criminal policy on the European level established therein have attracted great interest throughout the European Union. See www.crimpol.eu

[15] COM(2011) 573; Brussels, 20.9.2011.

to ensure the effective implementation of EU policies which have been subject to harmonisation measures. An EU Criminal Policy should have as overall goal to foster citizens' confidence in the fact that they live in a Europe of freedom, security and justice, that EU law protecting their interests is fully implemented and enforced and that at the same time the EU will act in full respect of subsidiarity and proportionality and other basic Treaty principles." The endeavour to be a tool of crime control appears in this agenda in connection with the EU policies.

III. European Criminal Policy in Actio

The need for joint action to combat crime as part of European integration, essentially and in a legally relevant way, appeared in the '90s, more precisely with the creation of the EU (1993), when the MS determined the so-called matters of common interests. The last twenty-five years' history in European criminal law demonstrate dynamic development that started by labelling 'traditional forms' of mutual cooperation in criminal matters as 'European' ones, then went on to elaborate new – singular and independent – forms of cooperation. Simultaneously, a new philosophy of cooperation was born and became stronger in the field of criminal law, which is generally followed in present legislation and applying the law.

In the past twenty-five years, there has been a significant development of law in this field as well, including, in general, the following: it is a key question to the MS, how much of their punitive power derives from sovereignty and how exactly will they transfer to the organization they established for the sake of progress, with particular attention to the fact that in many cases, combating transnational crime is more effective and more successful at the EU level. The protection of sovereignty is guarded by the balancing system of mutual guarantees and principles, which not only sets up a framework, but also excludes effective cooperation in urgent cases, or when the case concerns more than two states. However, in Europe and in the European Union, the development of law is going through a fundamental change of approach regarding the system of rules in criminal cooperation. Even though community integration, originally did not extend to criminal cooperation, the European Union established by the Maastricht Treaty opened room for it as well, and it could be said that the EU MS tightened the web of EU legal protocols in the field of criminal cooperation.

As a general characteristic of the relevant regulation it may be mentioned that the conventions and treaties concluded by the MS, on the one hand, reflect and reinforce the former agreements – mostly adopted under the aegis of the Council of Europe –, but on the other hand, operating with such novel and hitherto desirable tools, which truly show the commitment of the states to develop a more effective criminal cooperation, and its introduction is verified by the slowly ubiquitous European integration.

For these reasons, the development basically proceeds with baby steps. It has two directions: political consensus precedes legal changes, which are then reflected in some legislative act being enacted, the execution of which will strengthen the change. The other way of development is when change becomes a necessary consequence, as a result of the

existing legal situation, primarily due to the activity of the Court of Justice of the European Union and the courts of the MS. The landmark decisions of the courts indicate the path of this development, but these innovations and changes only apply to a small section of law (to a specific type of case, to a specific legal institution). As an example, the earlier battle of the Council and the Commission may be mentioned on whether EU law regarding crimes damaging the environment should be issued by so-called directive or framework decision. The problem is easy to understand without a detailed explanation: considering that the EU policy on environmental protection is an EU competence, the question was, whether this power includes criminal law as a means of protection and the establishment of its frames at the EU level. Not a political consensus was necessary here, but the interpretation of one provision of the EU Founding Treaty, which was done by the Court of Justice by declaring that in the interest of implementing EU policy, criminal law as a regulatory system is applicable, such regulation does not behave differently.[16]

In the establishment of the legal framework evolving along the above two lines, we may see the following substantial key points:

- facilitating and legalizing criminal cooperation between the MS (legal assistance type of cooperation and police cooperation as well),
- working on achieving the joint European justice region (e.g. development concerning jurisdictional conflicts, prohibition of double jeopardy, ne bis in idem, etc.),
- approximation of the facts and sanctions of crimes,
- legal approximation in criminal procedure, primarily by introducing the same standards in the fundamental rights context,
- strengthening the obligation of EU-conform interpretation of criminal law rules.

However, there is another path that I have to mention as part of this 'bigger picture'. The efficient application of Community law and the necessary assurances safeguarding the functioning of the *sui generis* legal order required new principles and new methods of legal thinking. The evolution of Community law undoubtedly yielded fruit in criminal law as well, even if sometimes these fruits were bitter. This sense of bitterness further ensued on several occasions, when it became clear that in order to achieve the goals of European integration, even the (national) criminal law frameworks shall be triggered; moreover, that the supranational entity of the economic integration (first the Community then the Union) vindicates the right to be heard in matters of criminal law as well. As part of this movement the birth of new general principles is thus not rooted in criminal law, but in such matters that are in direct connection with economic integration. However, in the late '90s a moment arrived when deepened integration set foot on the terrain of the criminal law and a general quest for legal basis was duly placed on the common agenda. The most important aspect of this development was how the traditional domestic criminal law horizon became broader and was enriched by new aspects flown from the legal reality of economic integration.

The joint objective, as set out above, has not eroded since in the *modus operandi* of European policy-making: it always served as basis for next steps, for new ideas, for path-seeking, and – of course – for the 'invention' of new sui generis legal institutions

[16] European Court of Justice, judgement of 13 September 2005, case C-176/03. *Commission v Council.*

contributing to the evolution of ECL. It is important to see in this process, it is not substantial that during legislation, necessary political consultations have always smoothed the sharpness (and sometimes even the anachronism) of proposals and revolutionary ideas. The development has not stopped, only the steps remain smaller in nature in comparison to former proposals we have seen in this field. Still, the progress of development is undeniable. Its period is short: barely twenty-five years, but it was enough to arrive from a state of 'nothing in common' to present unification efforts and to the common policy of the AFSJ. It must be noted that "the trade-off for this evolution has been (as with the creation of monetary union) an opt-out for those Member States with misgivings about applying a supranational institutional framework to this area."[17] This 'deal', however, does not seem to overshadow revolutionary innovation but it is key in possibilities to develop the framework in such a radical way both at institutional and legislative levels.

The development of ECL is similar to that of European integration: there was no clear vision of what the future will hold neither a layout nor blueprint with floor plans of the building that is the EU today. There were only seeds: common ideas for the Community to realize, which translates – in the context of criminal law – into the one very important common idea aimed at joint combat against crimes in Europe-wide perspective. This seed was sowed and with careful nourishment a tree was grown from it. The branches and canopy of this tree developed based on the common interests and common aims, but the specific measures and the subsequent steps were not always defined as clearly foreseeable parts of the big plan. However, the tree became stronger and stronger, its development was sometimes slow and not-linear, some branches have withered or broken, but the tree is still standing and growing[18] – the idea of (legal and) economic integration is alive; it is the true reality for everybody in Europe.

The same is valid for the development of the ECL; its organic growth is on-going, but the European achievements in the field of criminal law did not – yet – build up to form a comprehensive system contrary to that which is already established in Member States. This characteristic makes ECL for a colourful mosaic of legal norms and institutions, with the binding agent of everyone bringing something new, something 'European' (in the sense of not national) to the table, that changes the traditional features of domestic criminal law and legal thinking.

IV. Area Independent Attributes of the European Criminal Policy

In this section I don't focus on the very important general and often discussed leading principles of European criminal policy as subsidiarity, proportionality, necessity and minimum ruling. I argue rather for the existence of additional inevitable attributes of criminal policy-making on European level independently from the area of criminal policy or of the true content of the legislation.

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[17] S. PEERS: *EU Justice and Home Affairs Law (Non-Civil).* In: The Evolution of EU Law (ed: P. Craig, G. de Búrca). Oxford University Press. 2011. p. 269.

[18] I am indebted to Mr. JANOS BOKA for the tree allegory.

1. European Territoriality

Traditionally criminal justice is 'detained' in the glass cell of sovereignty, it means that neither the exercising state power outside of the national territory nor the acceptance of foreign state power at the own territory are options for authorities in criminal matters not even for accelerating procedures or enhancing effectivity of investigations or judicial procedures. The integration within the EU has changed the landscape in this regard and introduced the concept of European territoriality also in criminal matters which is a leading principle of current and future legislative ideas on the EU level. The core of this concept is the integration idea, based on which the judicial systems of the different MS shall be viewed not as if they were systems of separate states independently of one another, but instead as if being made up of one common area. This means that the relationships and allocation of tasks among the single units within the system regulation would be governed based solely on regulation through jurisdictional competence, and not from the perspective of jurisdiction. Under the common European legal and jurisdictional area, cooperation would be based not on the jurisdiction of the foreign MS, but instead under the authority with jurisdiction and competence. Within this area, there would be no barriers to using evidence collected by such an authority, but there are also no limitations on taking procedural action for acts committed in the territory of another MS. The fundamental character of the principle is that the conflict of jurisdiction would be conceptually excluded, procedural resources can be allocated along both territorial competence- and jurisdictional regulation. Logically therefore, this goes together with jointly opening up the punitive demands of MS, that is, it means that the MS shall cease their independently articulated and represented prosecution claims. Of course, we are presently far from this, but the partial enforceability of European territoriality is 'in the ballpark' of achieving this with regard to certain crimes in is limited to investigation only. If however partial enforceability were to be implemented, then further 'spill over' could be expected, because multiple procedural systems operating in conjunction and in parallel would result in such discrepancies and discriminative procedures that their dissolution would require even further integration. Or, the development of a dual system similar to that in the US. The European principle of territoriality would also be capable of reducing the risk of forum shopping to a minimum. In the event of full acknowledgment of the principle, the theoretical and legal issues that arise from an authority of an MS in this capacity could initiate procedural (or operative) action in the territory of another MS and only according to specific regulation would diminish, because under a unified jurisdiction, representatives of public authority may undertake acts in connection with legal procedures according to identical regulation.

2. Enhancing Mutual Trust

Maintaining and enhancing mutual trust is crucial for European criminal policy, because this is the philosophical basis of the functional principle of mutual recognition and at the same time, the latter requires the former. Meanwhile, mutual recognition is the engine of cooperation in criminal matters between MS, mutual trust is the fuel.

Mutual trust means that the MS have mutual trust vested in one another's criminal justice systems and that each of them recognizes the criminal law in force in the other MS, even if the outcome of a criminal procedure would be different if its own national law were to have been applied. The acknowledgement of mutual trust leaves no doubts on the proper functioning of another MS (criminal) justice system. It declares that if criminal law applies in a MS and its legal consequences or results shall be enforced or used in another MS, this 'foreign' link cannot be referenced solely as refusal of cooperation. Mutual trust is a political principle anchored in the TFEU without a norm-content, it serves and embeds for the legitimation of new legal tools and instruments on an EU-level and furthermore for judgements of Court of Justice of the EU (CJEU). However, the recent development in connection with Article 7 of TEU[19] challenges the mutual trust (see later in this paper).

As we all know, mutual trust was simply assumed to be existent by the European Council of Cardiff, and equally presupposed by the Council of Tampere. In reality, this trust is still not spontaneously felt and is by no means always evident in practice, even if mutual confidence between MS judicial and prosecution authorities appears to be growing.[20] It is important to note that MS are willing to articulate *in concrete cases* that there is no trust and there is nothing mutual; but on European level – on criminal policy level – the general withdrawal from mutual trust is indefensible. Maintaining mutual trust also means the acknowledgement of a certain common responsibility for the proper functioning criminal justice systems within the EU – "by entering into a system of closer cooperation in criminal matters (…), they not only share the benefit of more efficient criminal law enforcement, but they also more closely share the burden of maintaining the rule of law and protecting the human rights of citizens throughout the Union. If anywhere within the Union human rights are endangered, no Judicial Authority of a requested state can wash his hands in innocence."[21]

3. EU Functionality

In this paper, functionality will be applied for identifying legal concepts which can be labelled as tools of a "better functioning EU" and which transform the EU from an independent (supranational) institution to an actor capable of representing its own interests and of taking action for them. I would like to mention two important concepts: criminal

[19] Article 7 TEU aims at ensuring that all EU countries respect the common values of the EU, including the rule of law. The preventive mechanism of Article 7(1) TEU can be activated only in case of a 'clear risk of a serious breach' and the sanctioning mechanism of Article 7(2) TEU only in case of a 'serious and persistent breach by a Member State' of the values set out in Article 2. The preventive mechanism allows the Council to give the EU country concerned a warning before a 'serious breach' has actually materialised. The sanctioning mechanism allows the Council to suspend certain rights deriving from the application of the treaties to the EU country in question, including the voting rights of that country in the Council. In that case the 'serious breach' must have persisted for some time.

[20] See more in G. VERNIMMEN, V. TIGGELEN, L. SURANO: *Analysis of the future of mutual recognition in criminal matters in the European Union*. 2008.

[21] N. KEIJZER: *The European Arrest Warrant and Human Rights. Current Issues in European Law and the Protection of Financial Interests.* Dubrovnik, 13–14 May 2005. Asser Institute. www.asser.nl

law can be deployed for ensuring European policies on one hand, and on the other hand, for the extension of the primacy (supremacy) of EU law.

Article 83, 2 TFEU contains a rule fixing the broad concept of Community competences initially originating from judicial interpretation[22] attributing them constitutional effect. According to Article 83 paragraph 2 MS criminal law can be invoked to enforce EU policies: "if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76."

This provision means an important commitment on one hand in the interest of the functioning of the EU and realization of its policies, and on the other hand, it also demonstrates the cooperation where member states criminal law may also serve as tools for assuring EU functions. It must also not be forgotten that many criminal policy issues currently falling under the area of AFSJ first arose as direct and indirect consequences of establishing a common market. As such for example, protection against counterfeiting of the Euro arose upon its introduction, and is in connection with the transnational ne bis in idem and problems of legal authorities, and in relation to the freedom of movement. Therefore, the two components of EU criminal policy serve the functionality of the EU – somewhat similarly to national criminal policy principles provided by the state's criminal law.

CJEU had to decide in the last 30-40 years in cases where the primary Community law had to be applied directly in criminal procedures, while also defining elements of offences or providing lawfulness for certain 'common market relevant' behaviours. The jurisdiction of the CJEU follows a clear path with clear limits: case law in criminal matters cannot fill gaps of punishability, Community law (union law) cannot extend or establish criminal responsibility if the (written) domestic law does not provide a solid basis for it. With gaining ius puniendi on an EU level, it must be added that diverging development occurs in the future, but CJEU still sticks on this doctrine. Especially in *Taricco* I[23] we could observe how important EU functionality was, but in *Taricco* II[24] we witnessed its restriction, which led back to the limits-doctrine.[25]

In *Taricco* I namely, the CJEU stated that "a national rule in relation to limitation periods for criminal offences (…) — which provided, at the material time in the main proceedings, that the interruption of criminal proceedings concerning serious fraud in relation to value added tax had the effect of extending the limitation period by only a quarter of its initial duration — is liable to have an adverse effect on fulfilment of the Member States' obligations under Article 325(1) and (2) TFEU if that national rule prevents the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union, or provides

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[22] *Commission v Council, cit.*

[23] Court of Justice of the European Union, judgement of 8 September 2015, case C□105/14, *Ivo Taricco and others.*

[24] Court of Justice of the European Union, judgement of 5 December 2017, case C□42/17, *M.A.S., M.B.*

[25] K. KARSAI: *The legality of criminal law and the new competences of the TFEU.* In Zeitschrift für International Strafrechtsdogmatik. 2016. pp. 24–39.

for longer limitation periods in respect of cases of fraud affecting the financial interests of the Member State concerned than in respect of those affecting the financial interests of the European Union, which it is for the national court to verify. The national court must give full effect to Article 325(1) and (2) TFEU, if need be by disapplying the provisions of national law the effect of which would be to prevent the Member State concerned from fulfilling its obligations under Article 325(1) and (2) TFEU." This ruling triggered very intensive academic debates, because it argued for EU law primacy (which belongs to the functionalist concept of EU law) against the principle of legality: this judgement says that the interests of the EU to protect its financial interest with effective, proportionate and deterrent sanctions overrules the prohibition of retroactive application of detrimental criminal law provisions (in connection with the statute of limitation). Certain national provisions shall not be applied, which would result in the consequence of penalties possibly not being imposed on persons who would have been imposed on, had those provisions been applied. This means that the conditions of criminal liability were stricter than those in force at the time the offence was perpetrated.[26]

But this decision went too far[27] – the legality principle is still a strong limit for extending criminal responsibility even on the detriment of EU functionality.

The CJEU reconsidered itself in *Taricco* II and established two exemptions from the original *Taricco*-statement: "Article 325(1) and (2) TFEU must be interpreted as requiring the national court, in criminal proceedings for infringements relating to value added tax, to disapply national provisions on limitation, forming part of national substantive law, which prevent the application of effective and deterrent criminal penalties in a significant number of cases of serious fraud affecting the financial interests of the EU, or which lay down shorter limitation periods for cases of serious fraud affecting those interests than for those affecting the financial interests of the MS concerned, unless that disapplication entails a breach of the principle that offences and penalties must be defined by law because of the lack of precision of the applicable law or because of the retroactive application of legislation imposing conditions of criminal liability stricter than those in force at the time the infringement was committed."

4. Human Rights

The Charter did not create new fundamental rights nor did it extend the scope of the already achieved protection by the Union law, it mirrors rather the state of art in this regard, but indeed its obligatory character opened a new horizon for enforcing fundamental rights within EU law – according to its original function correctly. On one hand, the EU

[26] See more e.g. M. KRAJEWSKI: *Conditional primacy of EU law and its deliberative value an imperfect illustration from Taricco II. 2017.* http://europeanlawblog.eu/2017/12/18/conditional-primacy-of-eu-law-and-its-deliberative-value-an-imperfect-illustration-from-taricco-ii/

[27] The Italian Constitutional Court asked for preliminary ruling by the CJEU as well: according to the Constitutional Court, the application of the "Taricco rule" in the Italian legal system would violate Articles 25(2) and 101(2) of the Constitution and could not, therefore, be allowed, even in light of the principle of supremacy of Union law. However, in the Constitutional Court's view, Taricco I appeared to exclude such an application in cases where a conflict with the constitutional identity of the Member State would arise, entailing a violation of the principle of legality in criminal law.

institutions shall follow and obey human rights as enshrined in the Charter while exercising their competences, and Member States are also addressees "only when they are implementing Union law"[28] on the other hand. As the fifth preamble section underlines: "his Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights."

Any European criminal policy shall apply the achievements of human rights protection, in particular with regard to the very specific criminal justice implications (ne bis in idem, legality, fair trial, presumption of innocence, guilt, protection of life, prohibition of torture and inhuman, degrading treatment etc.).

V. Challenges of European Criminal Policy

1. Uncertainties of the European Territoriality

The real procedural law test of European territoriality will be the European Public Prosecutor's Office, in terms of criminal cases.

The efforts to combat transnational- and cross-border crime had brought the area based on freedom security, and justice to life in the first place (obviously, starting based on its history), and that the joint efforts of the MS would provide sufficient and effective solutions to modern forms of crime. The result of the joint efforts was that criminal prosecution and criminal justice operating under the national framework has opened, and many such achievements have come to life that have raised the national instruments of the judiciary for exercising power to a supranational European- or cooperative level between MS.

Whereas EPPO follows the European territoriality principle *within* the MS of the enhanced cooperation, the same regime would *reactivate* 'state borders' in its cooperation with non-participating MS inflating the achievements in area of freedom, security and justice. I believe that the external effects of this so-called enhanced cooperation will be significant, necessary, and inevitable – and the conflicts emerging because of these will presumably only be solvable if all MS enter the EPPO system.

Any system allowing the opting out of certain geographic territories from the unified territorial competence and allowing for independent decisions to be passed in a proceeding with the case by authorities independent from each other, creates a fundamental 'hotbed' of

[28] Article 50, 1: „The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties."

forum shopping resulting from the collision of jurisdictions: it applies both for the prosecutors of crime and the criminals. In addition, there can be another layer can further aggravate such a situation: when there are also political reasons behind opting out of EPPO.

2. Challenges for Mutual Trust

The principle of mutual trust (political) prevails well for the most part in a significant part of the cases, this way it provides the functionality of legal instruments based on mutual recognition. However, in some concrete cases, it demonstrates significant deficit and can even jeopardize cooperation between member states.

Concrete cases of doubting mutual trust may well be colourful, and a MS can be both a 'victim' and 'perpetrator' of this mistrustful state's behaviour. Hungarian criminal justice was for instance 'victim' of mistrust exercised by Irish authorities in the Ciaran Tobin extradition case[29], but is a true 'perpetrator' in case of the chief manager of the Hungarian national oil company, who is charged with severe corruption allegations by Croatian authorities and sought by European arrest warrant. This person was not surrendered to Croatia despite a lawfully issued and enforceable arrest warrant; and moreover, the surrender obligation was creatively circumvented by a parallel Hungarian criminal procedure. For now, the case is still open, because the CJEU decided in a preliminary ruling procedure on this 'second' Hungarian criminal procedure[30] with a consequence that it has no effect on the surrender request, according to EU law, Hungary should surrender the concerned person to Croatia. I don't think that such individual cases can truly violate or inflate the mutual trust generally, but indeed they make dark shadows on the expectation of citizens towards authorities to carry out fair cooperation in criminal matters.

In this regard, the more disturbing phenomenon which has serious potential to harm mutual trust is that if the legal system (within criminal justice) as such will be questioned or at least institutional doubts will be formulated against a MS. In the case of Poland[31] and Hungary[32], that is the situation recently (based on the Article 7 TEU) and so the risk is

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[29] P. BÁRD: *bűnügyi együttműködés csapdái: a Tobin-ügy. [The Traps of Criminal Cooperation: the Tobin case.]* In: *Kriminológiai tanulmányok.* 2014. pp. 93–108. http://www.okri.hu/images/stories/KT/kt51_2014_sec.pdf

[30] Court of Justice of the European Union, judgement of 25 July 2018, case C□268/17, *European arrest warrant against AZ.*

[31] "Rule of Law: European Commission acts to defend judicial independence in Poland. European Commission - Press release. Brussels, 20 December 2017. „Despite repeated efforts, for almost two years, to engage the Polish authorities in a constructive dialogue in the context of the Rule of Law Framework, the Commission has today concluded that there is a clear risk of a serious breach of the rule of law in Poland. The Commission is therefore proposing to the Council to adopt a decision under Article 7(1) of the Treaty on European Union. The European Commission is taking action to protect the rule of law in Europe. Judicial reforms in Poland mean that the country's judiciary is now under the political control of the ruling majority. In the absence of judicial independence, serious questions are raised about the effective application of EU law, from the protection of investments to the mutual recognition of decisions in areas as diverse as child custody disputes or the execution of European Arrest Warrants."

[32] "Rule of law in Hungary: Parliament calls on the EU to act. European Parliament - Press Release, 12 September 2018. EP sees a clear risk of a serious breach of the EU founding values in Hungary Judicial independence, freedom of expression, corruption, rights of minorities, and the situation of migrants and refugees are key concerns Council may address recommendations to Hungary to counter the threat Parliament has asked EU member states to determine, in accordance with Treaty Article 7, whether Hungary is at risk of breaching the EU´s founding

increasing that national courts in other MS which had to decide on requests of judicial authorities from these two countries for any form of cooperation in criminal matters will mistrust the countries and so deny the cooperation. That is a real danger. That was the opinion of the Irish High Court as well through requesting a preliminary ruling[33] in a European arrest warrant case against a Polish citizen.[34]

The CJEU stated in its milestone decision[35] that the judiciary has an important role on serving rule of law: "the executing judicial authority, called upon to decide whether a person in respect of whom a European arrest warrant has been issued has material (…) indicating that there is a real risk of breach of the fundamental right to a fair trial (…) on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, that authority must determine, specifically and precisely, whether, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant, and in the light of the information provided by the issuing Member State (…) there are substantial grounds for believing that that person will run such a risk if he is surrendered to that State."

The usage of Article 7 poses the consequence that mutual trust as a political declaration became the subject of *political* concerns. CJEU added a certain legal content to the political declaration of mutual trust and made "judges monitoring the judges"[36] – this decision makes judges obliged to be aware of rule of law and fundamental rights implications through adjudication, and they have to read 'between the lines' based on the information provided by the requesting judicial authorities.

3. EU-Functionality v National Legal Traditions

Having an independent EU policy based on freedom, security and the enforcement of law makes the survival of national legal traditions an especially important question (namely in the scope of criminal justice), and the question of adhering to the tradition, especially when the legal institutions deriving from these is fundamentally different from that of another

values. The request was approved by 448 votes to 197, with 48 abstentions. To be adopted, the proposal required an absolute majority of members (376) and two thirds of the votes cast - excluding the abstentions. This is the first time that Parliament has called on the Council of the EU to act against a member state to prevent a systemic threat to the Union's founding values. These values, which are enshrined in EU Treaty Article 2 and reflected in the EU Charter of Fundamental Rights, include respect for democracy, equality, the rule of law and human rights. MEPs called on EU countries to initiate the procedure laid down in Article 7(1) the EU Treaty, noting that despite the Hungarian authorities' readiness to discuss the legality of any specific measure, they have not addressed the situation, "and many concerns remain". They stress that this is the preventive phase of the procedure, providing for a dialogue with the country concerned, and that it is "intended to avoid possible sanctions".

[33] http://www.courts.ie/ Minister for Justice and Equality -v- Celmer (No.1) [2018] IEHC 119; 12. March 2018.

[34] P. BÁRD, W. VAN BALLEGOOIJ: *Judicial Independence as a Precondition for Mutual Trust*, in VerfBlog, 2018/4/10, https://verfassungsblog.de/judicial-independence-as-a-precondition-for-mutual-trust/

[35] Court of Justice of the European Union, judgement of 25 July 2018, case C□216/18 PPU, *European arrest warrants issued against LM.*

[36] T. T. KONCEWICZ: *The Consensus Fights Back: European First Principles Against the Rule of Law Crisis (part 1).* VerfBlog, 2018/4/05, https://verfassungsblog.de/the-consensus-fights-back-european-first-principles-against-the-rule-of-law-crisis-part-1

member state or from those determined supranationally. It is important to note however, that currently, European criminal policy has not made the unification of laws a top priority, but nonetheless it is obvious that the most effective form of the approximation of laws is by all means unification. By enforcing European arrest warrants (EAW) became clear that 'convictions in absentia' and the possibility of ensuing right to a retrial could be a subject of doubt and could be a real obstacle of EAW' functioning due to different national laws. In order to eliminate national diversity and to facilitate mutual cooperation and recognition in criminal matters, the modification of the framework decision was necessary in 2009.

Raising minimum regulation to the rank of the basic treaty is in itself a *type* of unification, and as such is of fundamental importance in integration, in this area, the differences among member states cannot be referred to. The criminal law traditions of different member states can be relevant in unique cases, where during legislation, the emergency break procedure occurs, but in order to prevent this, the minimum regulation techniques can be used very creatively and should be applied.

4. Human Rights and Functionality

The question is more complex when different legal institutions based on member state traditions plays a direct and unique role for the protection of a fundamental rights, because in such a case the member state protection pertaining to the individual (accused, victim, witness) appears to be 'stronger' and 'firmer', and in concrete cases serious doubt can arise against the application of the EU norm. An even more difficult question is if the legal institution of the given member state is that part of its constitutional identity[37] that can be said to be the most important building blocks of criminal justice. Constitutional (national) identity can be pulled forth at any time with regard to questions of criminal justice, a 'trump' card that in theory can be capable of causing distress in the legislative process. However, for the time being, all we see is that this distress is brought about and strengthened by the application of law, so that it can in turn resolve it: the *Melloni* case (2013), the *Fransson* case (2013), the *Taricco* case (2015) and the afterlife of these plot out the difficulties and concrete problems well regarding the practice of European criminal policy (namely joint EU legislation). The German Federal Constitutional Court submitted its vote regarding this question – in a German constitutional complaint case about a European arrest warrant, without consulting the CJEU in the question of interpretation of EU law (!) – and specified national constitutional identity as a strict limitation in this scope: "the Federal Constitutional Court, by means of the identity review, guarantees without reservations and in every individual case the protection of fundamental rights indispensable (…). The strict requirements for activating the identity review are paralleled by stricter admissibility requirements for constitutional complaints that raise such an issue. The principle of individual guilt is part of the constitutional identity. It must therefore be

[37] Article 4, 2 TEU: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."

ensured that it is complied with in extraditions for the purpose of executing sentences that were rendered in the absence of the requested person during the trial. German public authority must not assist other states in violating human dignity. The extent and the scope of the investigations, which German courts must conduct in order to ensure the respect of the principle of individual guilt, depend on the nature and the significance of the points submitted by the requested person that indicate that the proceedings in the requesting state fall below the minimum standards required by Art. 1 sec. 1 GG."[38]

The question of whether EU (law) functionality can interfere with human rights will not appear in policymaking or in legislation on criminal justice, because subsidiarity and proportionality must be accurately tested and therefore, the need also arises EU level instruments to be justified in pieces of legislation as inevitable requirements in the legislative process. Meanwhile in the application of law, the picture is much more different.

Human rights protection belongs to the competences and duties of the states through national constitutions, national courts, and legal order. The development triggered by the European Human Rights Convention and by the smart jurisprudence of the European Court of Human Rights (ECtHR) has led to a certain level of protection in every MS guaranteed by their constitution and legal order, enforced by their courts.

The 'old' role of the CJEU in human rights protection shall not be underestimated (before the Charter), in many cases it decided in favour of better protection based on the human rights standards developed by ECtHR and derived from general principles of Community law.[39] But those efforts had entirely different character and consequences than that under current law. CJEU has to apply and enforce the Charter, therefore the human rights protection became an important function and competence of the CJEU parallelly with the protection of union law. In the milestone cases of the last five years, we saw the CJEU's steps to ease the tension between lower protection provided by supreme union law and more protective national norms, because national courts (also constitutional or high courts) were requesting the CJEU to observe this tension (see above '*Taricco* II').

VI. Expanding Criminalisation? No.

The EU receives serious criticism for its criminal policy, expressing that over the past twenty years, the EU has been exercising its criminalisation powers very actively. It is a question of fact that with the establishment of the third pillar, but especially following the amendment of the Treaty of Amsterdam, EU-level legislation that would affect criminal law systems began.

This was fundamentally different from criminal law norms appearing in traditional conventions of international public law regarding legal characteristics, legislative process, and implementation.

The content of the norms was determined based on which area and for what purpose the prevailing basic treaty would allow for the EU to bring legislation. In this regard, it

[38] Order of 15 December 2015 2 BvR 2735/14. http://www.bverfg.de/e/rs20151215_2bvr273514en.html

[39] G. DE BÚRCA: *The Evolution of EU Human Rights Law. In: The Evolution of EU Law.* (eds.: P. Craig, G. de Búrca). Oxford University Press. 2011. pp. 465–498.

cannot be ignored that basically the TEU created the competence for approximation regarding crime (and sanctions), which means that punishment itself and punishments with reasonable boundaries could be the task of the EU. That is, within the scope of punishment, it shall only determine which are the behaviours that shall *definitely* be punished, because their subjective weight is so extreme, and thus it is of key importance that they be appropriately sanctioned in all member states. And with regard to the punishment, the expression of this judgment must be present – determining minimum sanctions for crimes that are to be punished in all cases.

Logically, criminalization is dominant, as on one hand, these norms without community law history qualify some act punishable, so in legal terms they criminalize but in reality, the dominant judgment in the member state is raised to EU-level. During this course, it can be possible that in some member state, some act in question had not been qualified as a crime, but considering the areas of legislation it can be said that these are adequate corrections from the viewpoint of effective protection of joint values. The joint criminal policy has not yet reached the point where decriminalization expressly appears somewhere, in an EU norm that affects some criminal law subsystem, but for the time being, this is not yet necessary. *Namely, the effect of decriminalization is triggered by European law itself* through EU policies infiltrated in areas of European law by primacy and its direct effect, as well as by the prevailing legal guarantee of the four freedoms of the common market. It is unnecessary for example, to state that the cultivation of industrial hemp is not drug cultivation or smuggling cannot be committed of goods arriving from EU member states, etc., but we also do not need to separately record that an abortion performed by a doctor legally or a brothel operated legally cannot be a crime in another member state. These, and similar acts, as such cannot be subject to criminal prosecution if the national law would possibly require this, because EU law indirectly causes the decriminalization.

Based on the above, it is my opinion that criticism concerning the expansion of criminalization should be rejected.

VII. Conclusion

In this study, I summarized the short development of European criminal policy and its main, generally considered to be valid criteria. My aim is for us to understand the characteristics and speciality of European criminal policy, in contrast to our national criminal policy, primarily of course, the differences, because these are the novelties that that can free criminal policy from the agenda and aims of actual- and party politics. By this, they serve as assurance that criminal policy always be active based on a professional basis, as an effective tool for realistic aims, Europe-wide control of crime.

KARSAI KRISZTINA

EURÓPAI KRIMINÁLPOLITIKA

(Összefoglalás)

Az európai kriminálpolitika létezése és főbb jellemzőinek megállapítása, valamint analitikus bemutatása a jelen tanulmány célja. Az európai kriminálpolitika – ami jelentősen különbözik és markánsan elkülönül a tagállami kriminálpolitikáktól – legfőbb jellemzője az, hogy nem érzékeny a tagállami pártpolitikai befolyásokra, míg ezzel szemben a kriminálpolitika a hagyományos nemzeti keretrendszerben értelmezve nem létezik és alighanem nem is létezhet enélkül. A szerző bemutatja az európai kriminálpolitika rövid előtörténetét, megszületésének körülményeit, jelenlegi aktorait és a fent említetten kívüli főbb attribútumait, amelyek az európai területiség elvéből, a kölcsönös bizalomból, az uniós jog funkcionalitásából és az emebri jogok uniós védelméből építkeznek. A tanulmány kitér arra is, hogy e fő jellemzőket a jelenlegi uniós közpolitikai és jogalkotási tendenciákban milyen hatások érik, valamint a szerző megfogalmazza az elemzésein alapuló prognózisait az európai kriminálpolitika jövőjét illetően is.