The principle of *ultima ratio* and the real need for criminal law measures at EU level

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European Parliament | Unit for Justice and Civil Liberties of the Legal Service in collaboration with the Professional Training Unit

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debate so far

- extremely dogmatic
- leaving no room for ancillary functions of harmonization of substantive criminal law
- trying to ground it in EU law (below references)
- often fuzzily linking ultima ratio to necessity | in the sense of Article 82(2) TFEU (‘to the extent necessary to facilitate ... having a cross-border dimension’)? | in the sense of Article 83(2) TFEU (‘essential to ensure effective implementation of a Union policy ...’) | quid trending extension to MR? (no reference in Article 82(1) TFEU) | awareness of MR as the ‘lesser evil’?

proportionality (suitability, necessity, proportionality stricto sensu) | in the sense of Article 49(3) Charter? | quid administrative offences and administrative sanctions? | quid trending (distrust-based) calls for proportionality or merits tests, fundamental/constitutional rights or ordre public exceptions in MR?

subsidiarity | in the sense of Article 5 TEU? (including proportionality) | quid national sovereignty, self-centeredness & contradictory effects
autonomous function of approximation

- special part: *ultima ratio* often overstepped | examples (+ inflatable organized crime notion)
  - where respected, often *de jure* eroded by EU ability to only set minima
  - maximal offence scope & maximum sanction (or maximal maximum sanction)? | hindered by subsidiarity and historical choice for MR as the lesser evil
  - where respected, often *de facto* eroded by (wider) national criminalization
  - prompting perverse effects | dual criminality bubble in MR | MS’ self-centeredness

- general principles
  - jurisdiction to prescribe | often creating potential conflicts of jurisdiction
  - needs: minimum concept ‘participation’ and ‘liability of legal persons’

ancillary functions of approximation | often neglected though needed

- facilitating MR & judicial cooperation
  - vs incoherent dual criminality abolition
- defining EU (priority) crimes
- enabling EU crime statistics (jointly identified offence parts)
- facilitation ECRIS offences
- demarcation (stronger) mandates EU bodies & agencies
  - subsidiarity best served through limitation EU-worthiness or –eligibility
putting the carriage before the horse (no trust)
confusing carriage racing and jumping (cross-border dimension)
From lesser evil to Trojan Horse? (fundamental rights)
Procedural Roadmap bubble & distrust shifting
real needs
- halt Azerbaijan contradiction
- halt legitimization discriminatory approaches
- halt *forum regit actum* & one-directionality
- halt remedies/safeguards/judicial validation procedures as new defences
- EU minimum standards investigative measures (evidence admissibility)
- MR of procedural guarantees | best of both worlds | *lex mitior*
- reintroduce dual criminality | limit MR to jointly identified offence parts (EULeOCs)
- establish EU policy for disqualifications in criminal matters
do away with vast amount of incoherences
drop distinction judicial and law enforcement cooperation
fundamental debate on administrative/criminal character offences and sanctions (Engel criteria)
ECRIS-extensions | legal persons, TCN, Europol/Eurojust connectivity, legal effect inclusion following notification (Fourniret?), limited introduction EU-certificates of non-prior conviction
establishment of EPRIS
introduce (aut exequi aut tolerare) principle (Article 89 TFEU)
• physical border-crossing possibility in view of active investigation while respecting local legislation and/or agreed EU minimum procedural guarantees
establishment of double generic severity rankings
• sanctions (+ combining nature & duration)
• sanction execution modalities (idem)
utilise EULOCS as official benchmark (infra)
bench-mark for enhanced internal coherence of the EU's criminal policy

- including in the area of criminal records infoex

improved ECRIS classification

- exclusive categories

- incorporating/centered around EU approximation acquis
  - clustering of common denominator underneath “jointly identified parts of offences”
  - i.e. much wider acquis than 32 MR list, for which dual criminality test can be omitted
  - i.e. joint acquis = trust-building
  - = also tool for delineating Europol/Eurojust access (mandated offences incorporated)

- including definitions (usually from binding EU acquis) for interpretability in application FD 2008/675/JHA
## EULOCS illustrated

### 0906 00 MONEY LAUNDERING

<table>
<thead>
<tr>
<th>0906 01</th>
<th>Offences jointly identified as Money Laundering</th>
</tr>
</thead>
<tbody>
<tr>
<td>0906 01 01</td>
<td>The conversion or transfer of property</td>
</tr>
<tr>
<td>0906 01 02</td>
<td>The illicit concealment or disguise of property related information</td>
</tr>
<tr>
<td>0906 01 03</td>
<td>The illicit acquisition, possession or use of laundered property</td>
</tr>
<tr>
<td>0906 02</td>
<td>Other forms of Money Laundering</td>
</tr>
</tbody>
</table>

### 0201 00 OFFENCES JOINTLY IDENTIFIED AS PARTICIPATION IN A CRIMINAL ORGANISATION

<table>
<thead>
<tr>
<th>0201 01</th>
<th>Directing a criminal organisation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 2 (b), Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime</td>
<td>Conduct by any person consisting in an agreement with one or more persons that an activity should be pursued which, if carried out, would amount to the commission of offences, even if that person does not take part in the actual execution of the activity.</td>
</tr>
<tr>
<td>0100 00 Open Category</td>
<td>CRIMES WITHIN THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT</td>
</tr>
<tr>
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<td>------------------------------------------------------------------</td>
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<tr>
<td>0101 00</td>
<td>GENOCIDE</td>
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<tr>
<td>0102 00</td>
<td>CRIMES AGAINST HUMANITY</td>
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<tr>
<td>0103 00</td>
<td>WAR CRIMES</td>
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<tr>
<td>0104 00</td>
<td>CRIMES OF AGGRESSION</td>
</tr>
<tr>
<td>0200 00 Open Category</td>
<td>PARTICIPATION IN A CRIMINAL ORGANISATION</td>
</tr>
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<td>0201 00</td>
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</tr>
<tr>
<td>0201 01</td>
<td>Directing a criminal organisation</td>
</tr>
<tr>
<td>0201 02</td>
<td>Knowingly participating in the criminal activities, <em>without being a director</em></td>
</tr>
<tr>
<td>0201 03</td>
<td>Knowingly taking part in the non-criminal activities of a criminal organisation, <em>without being a director</em></td>
</tr>
<tr>
<td>0202 00</td>
<td>OTHER FORMS OF PARTICIPATION IN A CRIMINAL ORGANISATION</td>
</tr>
<tr>
<td>0300 00 Open Category</td>
<td>OFFENCES LINKED TO TERRORISM</td>
</tr>
<tr>
<td>0301 00</td>
<td>PARTICIPATION IN A TERRORIST GROUP</td>
</tr>
<tr>
<td>0301 01</td>
<td>Offences jointly identified as participation in a terrorist group</td>
</tr>
<tr>
<td>0301 01 01</td>
<td>Directing a terrorist group</td>
</tr>
<tr>
<td>0301 01 02</td>
<td>Knowingly participating in the activities of a terrorist group, <em>without being a director</em></td>
</tr>
<tr>
<td>0301 02</td>
<td>Other forms of participation in a terrorist group</td>
</tr>
<tr>
<td>0302 00</td>
<td>OFFENCES LINKED TO TERRORIST ACTIVITIES</td>
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<tr>
<td>0302 01</td>
<td>Offences jointly identified as linked to terrorist activities</td>
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<tr>
<td>0302 01 01</td>
<td>Public provocation to commit a terrorist offence</td>
</tr>
<tr>
<td>0302 01 02</td>
<td>Recruitment for terrorism</td>
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<tr>
<td>0302 01 03</td>
<td>Training for terrorism</td>
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<td>0302 01 04</td>
<td>Aggravated theft with the view of committing a terrorist offence</td>
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<tr>
<td>0302 01 05</td>
<td>Extortion with the view of committing a terrorist offence</td>
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<td>0302 01 06</td>
<td>Drawing up false administrative documents with the view of committing a terrorist offence</td>
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<td>0302 01 07</td>
<td>Financing of terrorism</td>
</tr>
<tr>
<td>0302 02</td>
<td>Other offences linked to terrorist activities</td>
</tr>
<tr>
<td>0303 00</td>
<td>TERRORIST OFFENCES</td>
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<tr>
<td>0303 00</td>
<td>Offences jointly identified as terrorist offences</td>
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<tr>
<td>0303 01</td>
<td>Terrorist attacks upon a person's life</td>
</tr>
<tr>
<td>0303 02</td>
<td>Terrorist attacks upon a person's physical integrity</td>
</tr>
<tr>
<td>0303 03</td>
<td>Terrorist kidnapping or hostage taking</td>
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<tr>
<td>0303 04</td>
<td>Causing extensive terrorist destruction</td>
</tr>
<tr>
<td>0303 05</td>
<td>Terrorist seizure of transport</td>
</tr>
<tr>
<td>0303 06</td>
<td>Terrorist activities related to weapons</td>
</tr>
<tr>
<td>0303 07</td>
<td>Terrorist release of dangerous substances, or causing fires, floods or explosions</td>
</tr>
</tbody>
</table>
EULOCS. The EU level offence classification system

A benchmark for enhanced internal coherence of the EU's criminal policy
Cross-border execution of judgements involving deprivation of liberty in the EU

Overcoming legal and practical problems through flanking measures

Gert Vermeulen
Anton van Kalmthout
Neil Paterson
Marije Knapen
Peter Verbeke
Wendy De Bondt
Material detention conditions, execution of custodial sentences and prisoner transfer in the EU Member States
Rethinking international cooperation in criminal matters in the EU

Moving beyond actors, bringing logic back, footed in reality

Gert Vermeulen
Wendy De Bondt
Charlotte Ryckman
(eds.)

Principal
European Commission
DG Justice
(JLS/2009/JPEN/PR/0028/E4)
Free Gathering and Movement of Evidence in Criminal Matters in the EU

Thinking beyond borders, striving for balance, in search of coherence
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Liability of legal persons for offences in the EU

G. Vermeulen
W. De Bondt
C. Ryckman

Principal European Commission
DG Justice
(JLS/2010/JPEN/PR/0009/E4)
The disqualification triad

Approximating legislation
Executing requests
Ensuring equivalence

Gert Vermeulen
Wendy De Bondt
Charlotte Ryckman
Nina Peršak

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Questions and discussion

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