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The increasing power of the European Union in the field of criminal law and the consequences for the national law of the Member States*

Introduction

In the last years, we have been facing the increasing power of the European Union (hereinafter as “EU”) also in the scope of criminal law. Criminal law was a long time on the border of the interest of European legislation and there was no binding criminal law regulation at the EU level. The question remains, why the development has recently changed. In many Member States (hereinafter also as “MS”), people are not aware of what the term “European criminal law” means. People are usually unaware of the influence of EU law on the national legal order in the scope of criminal law and what consequences this legislation has. This article describes how intensive is the influence of the EU in the scope of criminal law today. We need to think, that “criminal policies and law enforcement are vehicles of social control which may seriously restrict their fundamental right to movement and other fundamental freedoms. At the same time, the EU’s cooperation in the area of criminal law touches upon essential functions of statehood including ‘core state powers’ such as the safeguarding of internal security and law enforcement”¹. So, we can conclude that “the exercise of EU public powers in the fields of criminal law and law enforcement have very tangible and adverse consequences for the liberties and well-being of individuals”².

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¹ J. Öberg, V. Mitsilegas, K. Caunes, *European integration in context: questioning the normative foundations of European criminal law*, „European Law Journal” 2021, Vol. 11(27), Issue 4–6, p. 352.

² *Ibidem*.

Brief history of the development of European criminal law

The history of the current European Union started to be written in the year 1951 when European Coal and Steel Community was created, followed by the other communities – European Economic Community (1957) and European Atomic Energy Community (1958). The original purpose of these communities was related to economic goals and not to criminal law. “For decades, as the predecessors of the Union developed, there was a denial of European level criminal law”³. However, in the following year couple of economic goals were fulfilled, so the direction of further development could have been redirected to other scopes of social life. In 1986, with the Single European Act, the three independent communities merged into one community and with the Treaty of Maastricht, the EU was finally created (1992). In that treaty for the first time also criminal law objectives were mentioned and from this year onwards we can speak about the beginning of European criminal law. In the next years, we witnessed the slow “Europeanisation” of the criminal law. At the start of its development, the criminal law objectives were not the traditional part of the so-called “union law” but created a separate part of the European policy in the so-called “third pillar”⁴. This three-pillar structure divided EU law into 2 groups – so-called “supranational” (1st and 2nd pillar) and “international” or “intergovernmental” (3rd pillar, including criminal law). The 3rd pillar was labelled as the “Area of justice and home affairs” or “Area of freedom, security and justice”. “The tripartite structure of the EU-law was partly created as a way to delimit the supranational influences, as well as to make way for national parliamentary control and European cooperation on a number of issues where it otherwise would have been politically unfeasible and in several member states constitutionally unacceptable. It was created as a supplementary system of integration in fields where the member states did not want to apply the supranational method of integration that had been applied in the fields of the common market”⁵.

“The third pillar can be described as instituting a kind of network of legislative deliberations that, although seen as binding on the member states parliaments’, offer supposedly only limited remedies if the member states choose not to adopt them”⁶.

“The creation of the Third Pillar in the Maastricht Treaty (1992) was a consequential effect of the construction of an internal market and the gra-

³ S. Miettinen, *Criminal law and policy in the European Union*, London 2012, p. 1.

⁴ A. Klip, *European criminal law. An integrative approach*, 2nd edition, Cambridge 2012, p. 18.

⁵ C. Lebeck, *Sliding towards supranationalism? The constitutional status of EU framework decisions after Pupino*, „German Law Journal” 2007, Vol. 8, Issue 5, p. 503.

⁶ *Ibidem*, p. 504.

dual opening of national borders which facilitated the movement of criminals across borders and the pursuit of transnational organised crime”⁷.

Only with the Lisbon Treaty (2007), the European criminal law became a part of “union law”, because since December 1, 2009, the three former pillars merged together in one legal order. “Since Lisbon (2007), there is an explicit competence in Article 82 TFEU and Article 83 TFEU to harmonise national criminal procedure and substantive criminal law, with further powers to engage in operational law enforcement activities via the criminal justice agencies Europol, Eurojust and the European Public Prosecutor’s Office (EPPO). The Lisbon Treaty thereto provides for important institutional reforms. The framework for criminal law, formerly embedded in a formal intergovernmental structure, has now been »communitarised«”⁸.

It means also that all rules developed by the Court of Justice of the European Union (hereinafter as “CJEU”) in its previous decisions now apply also to criminal law and the same legal sources are now valid and used also for the scope of criminal law⁹. However, also before adopting the Lisbon Treaty, the CJEU was interpreting the law also in 3rd pillar.

“The Amsterdam Treaty retained the Court’s limited mandatory jurisdiction, but also created a general possibility for MS to opt into Court’s jurisdiction on the validity and interpretation of 3rd pillar instruments”¹⁰.

“With the CJEU jurisdiction over the final interpretation of the legislation adopted under the third pillar, the most important aspect of EC-law is retained also in the context of the third pillar. (...) The CJEU has historically tended to increase the effectiveness of EC-law”¹¹.

It means that the Lisbon Treaty only confirmed what was actually already recognised by the practice and accepted by the MS. “The effective legal protection of individuals subject to EU criminal law is easier under post-Lisbon arrangements for judicial review and access to SJEU”¹². Today the power of the SJEU to interpret the treaties and the legal instruments also in the scope of EU criminal law is based on the Article 267 TFEU.

We can conclude, that “transition from a denial of EU criminal law to relatively effective criminal law instruments at EU level has taken place in a short, and recent, period of time. (...) During the Maastricht era of EU, 1993–1999, the Union gained and invoked express competences in the field of criminal law. From 1999 to 2009, EU criminal law instruments were replaced with legally more robust framework decisions. The Lisbon Treaty ended the

⁷ J. Öberg, V. Mitsilegas, K. Caunes, *op. cit.*, p. 350.

⁸ *Ibidem*.

⁹ A. Klip, *op. cit.*, p. 19.

¹⁰ S. Miettinen, *op. cit.*, p. 32.

¹¹ C. Lebeck, *op. cit.*, pp. 508, 511.

¹² S. Miettinen, *op. cit.*, p. 3.

nominal division between the European Union and the European Community, and simplified both the competencies of the Union and the methods by which they are judicially examined”¹³. “Treaty amendments in Maastricht and Lisbon, (...) have helped push criminal justice to the centre stage of EU policy-making”¹⁴.

Character of the European criminal law

The crucial terms of European law are “harmonization” and “mutual recognition”. Harmonization means getting closer of the legal orders of Member States, but it does not mean that these legal orders must be unified. The harmonisation means, that the MS try to diminish the differences in the legal orders to a minimum and to keep them in an acceptable manner. Then mutual recognition follows. If a certain level of harmonisation has been achieved, then the remaining differences remain acceptable, and the MS are obliged to accept them. This principle is even more visible in the scope of criminal law, where the core part of cooperation is based on the mutual recognition of the decisions from other MS. Mutual recognition is based on mutual trust, and all these differences in the legal orders of MS are not so huge, that the particular MS could not accept them. Mutual trust also means that the executing state believes, that in issuing MS all rules of law were obeyed and that the procedure was just and lawful. “Mutual recognition requires mutual trust that itself is conditioned on a belief that other MS’ criminal justice systems satisfy minimum standards”¹⁵.

When we are talking about European criminal law, we cannot forget that this scope of the law is more European law than criminal law and understanding the principles of EU law is crucial also for this scope of law. The main principle is that this scope of the law is always developed not only by the legislative powers of EU institutions (Council of EU, European Parliament) but mainly by the jurisdiction of CJEU (e.g., Cases C-176/03, C-440/05)¹⁶.

The main principles developed through the years by the CJEU have been transformed into Lisbon treaties, mainly into the Treaty on the European

¹³ *Ibidem*, p. 5.

¹⁴ J. Öberg, V. Mitsilegas, K. Caunes, *op. cit.*, p. 350.

¹⁵ S. Miettinen, *op. cit.*, p. 1.

¹⁶ See: Judgment from September 13, 2005, CJEU, *Commission vs. European Parliament*, C-176/03, ECLI: EU:C:2005:542, <https://curia.europa.eu/juris/showPdf.jsf?jsessionid=941F009B23B81945B2F1A8D3E1FABD8E?text=&docid=59714&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=5015961>; Judgment from October 27, 2007, CJEU, *Commission vs. European Parliament*, C-440/05, ECLI: EU:C:2007:625; <https://curia.europa.eu/juris/showPdf.jsf?text=&docid=70715&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=5017473>.

Union (hereinafter as “TEU” – former Treaty of Maastricht, 1992). These are the principles of conferral, subsidiarity and proportionality¹⁷:

– Conferral (Art. 2, par. 2 TEU) = EU has in certain fields the exclusive competence, in others has the “shared” competencies with MS (in criminal law there are mainly shared competencies, exclusive competence is typical for common market);

– Subsidiarity (Art. 5, par. 3 TEU) = EU acts only if the achieved goals are not sufficiently achieved by the MS;

– Proportionality (Art. 5, par. 4 TEU) = the EU approach could not exceed the objectives sought by the Treaties.

These principles are within the scope of criminal law connected with the so-called “breaks” incorporated into Art. 82 par. 3 Treaty on Functioning of EU (hereinafter as “TFEU” – former Treaty establishing the European Economic Community, 1957) and Art. 83 par. 3 TFEU, which protects the fundamental national principles of law, history and traditions of MS: “Where a member of the Council considers that a draft directive would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure”¹⁸.

The sources of European criminal law

In the EU law, we recognise different types of legal sources. Traditionally we divide the EU law into primary and secondary law, however, there are more legal sources of EU law, e.g. general principles of EU law (community principles, principles overtaken by national legal orders, fundamental rights and freedoms, principles of international law), international treaties and the judicial practice of SJEU¹⁹. The primary law is created mainly by the founding treaties and the secondary law is created mainly by the legislation adopted by the EU bodies.

Primary law²⁰:

¹⁷ A. Klip, op. cit., p. 34; S. Miettinen, op. cit., p. 47.

¹⁸ Art. 82 par. 3, art. 83 par. 3 TFEU.

¹⁹ M. Šiman, M. Slašťan, D. Žiláková-Ivanová, *Primárne právo Európskej únie*, 2. vydanie, Bratislava 2006, pp. 26–27.

²⁰ <https://eur-lex.europa.eu/EN/legal-content/summary/the-european-union-s-primary-law.html> (accessed: 1.04.2023).

- founding treaties²¹;
- amending treaties;
- accession treaties;
- protocols annexed to those treaties;
- supplementary agreements amending specific sections of the founding treaties;
- the Charter of Fundamental Rights (since the Treaty of Lisbon).

Treaty on EU, Treaty on Functioning of the EU and Charter of Fundamental Rights “form the core EU primary law. Provisions of the TFEU and TEU are capable of being relied on in the EU and national courts. The Charter of Fundamental Rights has the same legal value after the Lisbon Treaty. Together, these three treaties help determine the sources of EU law, the mechanisms by which it is interpreted and enforced, and in some cases establish rights which can be relied on by individuals and MS”²².

Secondary law (Art. 288 TFEU):

- Common positions + Framework decisions (prior to 2014, international treaties, no direct rights that citizens could invoke);
- Directives (post 2014, implementation within 2 years, binding only in effect);
- Regulations (direct applicability, national legislation only enforce them);
- Soft law (political pressure and diplomatic tools);
- Decisions (binding for the precise subject);
- Recommendations (non-binding);
- Opinions (non-binding).

The “old” secondary sources of European criminal law

Prior to Lisbon Treaty the harmonization of criminal law was made in the “three-pillar structure”. Until the Lisbon Treaty the harmonisation was made through:

- joint positions, joint actions, EU conventions (1992, Maastricht)²³,
- common positions, EU conventions, framework decisions and the “decisions” – replacing the joint positions and joint actions (1997, Amsterdam)²⁴.

²¹ Most important treaties creating the primary law today are these founding treaties amended with Lisbon Treaty: Treaty on EU (TEU, consolidated version from 2016), Treaty on Functioning of the EU (TFEU, consolidated version from 2016), Treaty establishing the European Atomic Energy Community (consolidated version 2016).

²² S. Miettinen, *op. cit.*, p. 84.

²³ *Ibidem*, p. 25. See also: A. Klip, *op. cit.*, pp. 49–57.

²⁴ S. Miettinen, *op. cit.*, p. 30. See also: A. Klip, *op. cit.*, pp. 49–57.

A “convention” is a traditional international treaty that sets goal that all EU countries must achieve. However, this treaty as normal other international treaties needed to be ratified by MS²⁵.

“Joint actions” were more common than EU conventions. They were used to harmonise criminal law and procedure. These were adopted on a wide range of substantive and procedural issues. “Joint actions were considered by the Council legal services to be capable of being legally binding, whilst Conventions were treated as other international instruments and required ratification. (...) Early 3rd pillar instruments sought not only to define certain offences, but to coordinate the responses of MS on policy issues such as the extent of sanctions, but left such significant margins of appreciation to MS on both definitions and responses that it is difficult to describe a common policy beyond coordination”²⁶.

“Joint positions” related mostly to agreements between MS as to their negotiating positions for non-EU international conventions²⁷.

The Amsterdam Treaty rewrote the list of the legal instruments that could have been adopted in the 3rd pillar.

“Common positions” defined the approach of the EU to a particular matter, mainly for use in international negotiations to which the EU was party²⁸.

“Framework decision” is a legislative act that sets out a goal that MS must achieve. However, it is up to the individual countries to devise their own laws on how to reach these goals. It is an international treaty, but does not need the ratification by the MS. “Framework decisions are similar to directives in how they are drafted, and they generally pursue similar objectives of approximating legislation in different areas, but they do so without creating common national rules. Framework decisions in the third pillar and directives in the first pillar are similar and since both require incorporation into national law by national legislatures in order to have effect”²⁹.

“Decisions” entitled the EU to create them for any purposes other than approximation. They were expressly denied direct effect and could therefore not be relied on to create rights. They were used namely to set up institutions and agencies³⁰.

“Thus, the Amsterdam Treaty took several steps to transform what was viewed as an intergovernmental area of cooperation governed by international law to a more supranational legal system that closely resembled European Community system. (...) After Amsterdam, the legislative initiative was extended to the Commission in all areas of the 3rd pillar. This had the effect

²⁵ S. Miettinen, *op. cit.*, p. 26.

²⁶ *Ibidem*, p. 29.

²⁷ *Ibidem*, p. 91.

²⁸ *Ibidem*.

²⁹ C. Lebeck, *op. cit.*, p. 507.

³⁰ S. Miettinen, *op. cit.*, p. 91.

of gradually reducing the dependency of EU 3rd pillar on the interests of MS”³¹.

With the Lisbon Treaty all “old sources” of EU criminal law were dismissed. However, all previous acts remain valid until they are repealed, annulled or amended³². It means that also many of older previous legal acts are still valid also today. The Lisbon Treaty and its “new” tools should have been effective in the scope of criminal law after 5-year transitional period, e.g. since December 1, 2014³³.

The “new” secondary sources of European criminal law

In the current EU the secondary law is based on Art. 288 TFEU which states that in the EU there are mainly two secondary legislative acts: 1) directives, and 2) regulations.

A “directive” is a legislative act that sets out a goal that all EU countries must achieve. However, it is up to the individual countries to devise their own laws on how to reach these goals³⁴. In the scope of European criminal law, they are used mainly for substantive and procedural law. The MS can maintain higher standard of rights, directive sets only minimum level (e.g. minimum level of punishment, could be stricter, but with respecting the standards in other countries not to hinder the free movement of EU citizens.). “Directives are perhaps typical legislative instrument which is used to give effect to EU policy goals”³⁵.

A “regulation” is a binding legislative act. It must be applied in its entirety across the EU³⁶. In the scope of European criminal law, they are used mainly in the area of “Police and judicial cooperation”. “It is inconceivable that the EU can create binding criminal law regulations even though the political and legal obstacles are substantial”³⁷.

The ground for limiting legislative power for substantive and procedural criminal law mainly for directives has been widely discussed after the decision of Court of Justice (current SJEU) in case *Criminal Proceedings against X*: “ECJ (SJEU) concluded that the regulation could not give rise to criminal

³¹ *Ibidem*, pp. 30–31.

³² Treaty on European Union – Protocol (No. 36) on transitional provisions, Art. 9.

³³ Treaty on European Union – Protocol (No. 36) on transitional provisions, Art. 10 par. 3.

³⁴ Art. 288 TFEU.

³⁵ S. Miettinen, *op. cit.*, p. 87.

³⁶ Art. 288 TFEU.

³⁷ S. Miettinen, *op. cit.*, p. 86.

liability in the absence of implementing national law”³⁸. These practice remains respected by the EU also after Lisbon Treaty.

The current European criminal law

The strict definition what should be labelled as the “European criminal law” is not clear. “EU law may be subject to legitimate criticism for a lack of grand design in its criminal law measures or of a coherent blueprint for what a system of EU criminal law ought to contain”³⁹.

Currently the primary law that rules also the criminal law is incorporated in the Treaty on Functioning of EU. The criminal law is mainly the Title V of the TFEU called “Freedom, security and justice”:

- Border checks, asylum, immigration (Art. 77–80 TFEU);
- Judicial cooperation in criminal matters (Art. 82–86 TFEU);
- Police cooperation (Art. 87–89 TFEU).

Part of the criminal agenda is conferred exclusively to EU, partly is jointly exercised by the EU and Member States, e.g. EU creates norms, but their implementation is on MS:

1st part: EU substantive criminal law, EU procedural criminal law (EU has mainly the “normative influence” = indirect enforcement – MS rule the law, mainly national legislation, enforced by national bodies = joint power of EU and MS),

2nd part: EU judicial and police cooperation in criminal matters (EU directly rules the criminal law, direct enforcement by the bodies of EU – EPPO, EUROPOL, EUROJUST = exclusive power of EU).

Substantive European criminal law

The grounds of European substantive criminal law are incorporated in Art. 83 TFEU. The EU does not create independent substantive criminal law with its own crimes at the EU level, but only “indicate” to the MS, what should be punished at the national level. It means, that criminal law still remains the sovereign part of the national legal orders and the EU only instruct the MS, what they should punish at the national level. It means, that the primary idea is only to “harmonise” national legislation and not to create independent EU substantive criminal law. The criminal responsibility in different MS

³⁸ See: Judgment from January 7, 2004, CJEU, Criminal Proceedings against X, C-60/02, ECLI: EU:C:2004:10, par. 62, <https://curia.europa.eu/juris/showPdf.jsf?text=&docid=48833&page-Index=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=6896073>.

³⁹ S. Miettinen, *op. cit.*, p. 2.

could differ in some features from state to state and also the range of crimes that should be punished upon request of EU⁴⁰. “Whilst EU law calls for criminal sanctions and approximate procedures, its effectiveness is dependent on the national measures which implement EU rules”⁴¹.

The principle of the ruling of certain crimes from the EU position is based on three criteria:

- the crimes belong to the most serious,
- the crimes have cross-border dimension,
- their specific nature needs to combat them on a common basis.

Some of these crimes are directly mentioned in the Art. 83 TFEU. But these crimes could be spread by the decision of the Council of EU with the consent of the European Parliament. However, the crimes are not defined by the EU. There are only “certain features” of these crimes that are part of the EU law. And the exact crime is only defined on the national level. It is called as “minimum threshold of punishment”⁴². “Typically the instruments require the MS to establish jurisdiction over offences. (...) These jurisdiction rules can often result in multiple MS establishing jurisdiction, thus reducing the likelihood of non-prosecution and non-investigation”⁴³.

The same rule of “minimum threshold” is valid also for sanctions – the EU rules only “minimum” rules for sanctioning, which means that the sanctions could differ in some ways in certain MS, but at least the MS must introduce the sanctions at the “minimum level” that is given in a specific legal act⁴⁴. “The approximation of penalties in the EU generally applies only for maximum penalties. The EU instruments typically require MS to establish effective, dissuasive and proportionate criminal penalties, but also call for specified penalties within a range”⁴⁵.

The last specific part of the substantive criminal law at the EU level are the rules concerning the criminal responsibility of the legal persons which is also the obligatory prescription for the MS.

Actually, the main legal sources of European criminal substantive law are as following:

- crimes against competition, frauds and payments (introduced in national legal orders of MS by the virtue of Art. 101 and 102 TFEU and thanks to Directive 2019/713 on combating fraud and counterfeiting of non-cash means of payment)⁴⁶,

⁴⁰ A. Klip, *op. cit.*, pp. 165–177.

⁴¹ S. Miettinen, *op. cit.*, p. 1.

⁴² A. Klip, *op. cit.*, pp. 165–177.

⁴³ S. Miettinen, *op. cit.*, p. 137.

⁴⁴ A. Klip, *op. cit.*, pp. 316–323.

⁴⁵ S. Miettinen, *op. cit.*, p. 137.

⁴⁶ M. Kordík, M. Gorylová, V. Turáková, *European criminal law*, Bratislava 2016, pp. 7–9.

- corruption crimes (Council Framework Decision 2003/568/JHA on combating corruption in the private sector)⁴⁷,
- unauthorised entry and residence (Council Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence, Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals)⁴⁸,
- money laundering (Directive 2018/1673 on combating money laundering by criminal law),
 - insider dealing (Regulation 596/2014 on market abuse),
 - Euro crimes (Directive 2014/62 on the protection of the euro and other currencies against counterfeiting by criminal law)⁴⁹,
 - protection of financial interests (Regulation 2988/95 on the protection of the European Communities financial interests),
 - crimes against human dignity – racism, xenophobia (Council Framework Decision 2008/913 on combating certain forms and expressions of racism and xenophobia by means of criminal law)⁵⁰,
 - trafficking of human beings (Directive 2011/36 on preventing and combating trafficking in human beings and protecting its victims)⁵¹,
 - child pornography (Directive 2011/93 on combating the sexual abuse and sexual exploitation of children and child pornography)⁵²,
 - organised crime (Council Framework Decision 2008/841 on the fight against organised crime)⁵³,
 - terrorism (Directive 2017/541 on combating terrorism)⁵⁴,
 - information security (Directive 2013/40 on attacks against information systems)⁵⁵,
 - drug trafficking (Council Framework Decision 2004/757 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking)⁵⁶, environmental crimes (Directive 2008/99 on the protection of the environment through criminal law).

⁴⁷ *Ibidem*, pp. 13–14.

⁴⁸ *Ibidem*, pp. 23–25.

⁴⁹ *Ibidem*, pp. 40–42.

⁵⁰ *Ibidem*, pp. 17–19.

⁵¹ *Ibidem*, pp. 32–39.

⁵² *Ibidem*, pp. 26–31.

⁵³ *Ibidem*, pp. 20–22.

⁵⁴ *Ibidem*, pp. 9–12.

⁵⁵ *Ibidem*, pp. 43–46.

⁵⁶ *Ibidem*, pp. 15–16.

Procedural European criminal law

The grounds of European procedure criminal law are incorporated in Art. 82 TFEU. There are mainly the following scopes of procedural aspects, that should be ruled by the EU: mutual recognition of evidence, right of the accused to the information, right of the accused to counsel, minimum standards of accused rights, victim rights and other specific areas of criminal procedure which the Council has identified by a decision⁵⁷.

“Criminal procedure in the EU MS has been subject to approximating measures under various different systems outside or prior to the EU. The story of effective EU criminal procedural rules begins only after the entry into force of Amsterdam Treaty. (...) Now concern many areas of criminal procedure, they cover pre-trial and post-trial measures”⁵⁸.

Actually, the main legal sources of European criminal procedure law are as following:

- Directive 2010/64 on the right to interpretation and translation in criminal proceedings,
- Directive 2012/13 on the right to information in criminal proceedings,
- Directive 2012/29 establishing minimum standards on the rights, support and protection of victims of crime⁵⁹,
- Directive 2013/48 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty,
- Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings,
- Directive 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings,
- Directive 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.

“Whilst the defence rights form part of the Union’s fundamental rights tradition, the EU has struggled to develop legislation on that subject”⁶⁰.

⁵⁷ Art. 82 par. 2 TFEU.

⁵⁸ S. Miettinen, *op. cit.*, p. 176.

⁵⁹ M. Kordík, M. Gorylová, V. Turáková, *op. cit.*, pp. 55–74.

⁶⁰ S. Miettinen, *op. cit.*, p. 5.

Other scopes of European cooperation in criminal matters

This scope of EU criminal law is mainly labelled as “Judicial and police cooperation in criminal matters” (Art. 85–89 TFEU). This cooperation is generally based on the mutual recognition. “The Hague Programme 2004 reiterated the mutual recognition as the cornerstone of judicial cooperation in criminal matters. The Lisbon Treaty confirmed mutual recognition in criminal matters as constitutional principle”⁶¹.

There are some specific tools, that should facilitate the cross-border cooperation of judicial and police bodies (European arrest warrant, European investigation order, European freezing order, recognition and execution of the non-conditional sanctions, recognition and execution of the conditional/probation/sanctions and protective measures, recognition and execution of the financial sanctions)⁶². “Even where the EU does not provide for substantive rules of criminal law, it may enable the MS to cooperate in the enforcement of their own criminal law (...) thus, to trigger the use of procedures that have been developed in EU-level judicial cooperation instruments”⁶³. These tools “tend to limit the extent to which an issuing MS can require double criminality. They also seek to limit other grounds for refusal which may be invoked”⁶⁴.

And also there are some specific institutions (European Public Prosecutor’s Office, EPPO, Eurojust, Europol/Frontex, CEPOL) that are helping in certain cross-border cases to assist national judicial and police bodies⁶⁵. “In 2017, the Member States established (by means of enhanced cooperation) an unprecedented »federal« EU-level prosecution agency, the European Public Prosecutor’s Office, with powers to independently prosecute crimes against the EU’s financial interests”⁶⁶.

There are many other legal tools following these directives for effective combat against organised crime, e.g. Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime. “Law enforcement services must have the necessary skills and information for the documentation of such crimes if they are to be successfully traced and investigated. To combat organised crime effectively, information that can lead to the tracing, identification and seizure of proceeds from crime and other property belonging to criminals has to be

⁶¹ *Ibidem*, p. 180.

⁶² M. Kordík, M. Gorylová, V. Turáková, *op. cit.*, pp. 95–145.

⁶³ S. Miettinen, *op. cit.*, p. 4.

⁶⁴ *Ibidem*, p. 182.

⁶⁵ M. Kordík, M. Gorylová, V. Turáková, *op. cit.*, pp. 146–184.

⁶⁶ J. Öberg, V. Mitsilegas, K. Caunes, *op. cit.*, p. 351.

exchanged between the Member States of the European Union with no delay”⁶⁷. In response, the European Union adopted Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union. “The authorities’ actions are intended to deter crime and to prevent further laundering of the proceeds of crime, the commission of further crime and the use of proceeds of crime for terrorist financing. The severity of such crimes is highlighted by the fact that the perpetrators are misusing the free movement of capital and the free provision of financial services, which are pillars of the European Union’s single financial market. The harmonisation of procedural criminal law in EU Member States is intended to suppress such criminal activity”⁶⁸.

Impact of the EU criminal law on the national criminal law

When we talk about European criminal law, many citizens of the EU don’t feel its existence. “Rules that are emerging as EU criminal law is not yet criminal law in the traditional sense employed by many domestic legal systems. (...) The system currently in place at the EU level is for the most part a series of obligations on MS rather than on individuals”⁶⁹. As mentioned above, in the scope of criminal law, there are mainly non-directly applicable legal provisions and legal acts, but mainly directives or framework decisions that need national legislation to be implemented into national legal order. These acts bind Member States thus the MS are responsible for these provisions to be adopted into the national legislation.

Many of the above-mentioned acts are already part of the legal orders of all MS of the EU. The citizens usually do not feel the presence of the EU in their national criminal law, because in their imagination, their own states created these norms and not the EU. People usually don’t follow the legislative work at the EU level. They usually follow only the outcome of the legislative process in their own state and they only learn their rights and obligations sourcing from national legal acts. They don’t investigate who is the primary creator of these rules. In this hidden form the EU influences the everyday life of individuals and also the scope of criminal law. Usually, we can find the references to the EU legal acts at the end of the national legislation with the label: “list of the transposed EU legal acts”.

⁶⁷ J. Šimonová, J. Čentěš, A. Beleš, *Financial analysis of innovative forms of money*, „Entrepreneurship and Sustainability” 2019, Vol. 7, Issue 1, p. 71.

⁶⁸ *Ibidem*, p. 77.

⁶⁹ S. Miettinen, *op. cit.*, p. 221.

The harmonisation of criminal substantive law

On one side, it is a positive aspect that in the EU substantive law there should be overall criminal responsibility in all EU MS for certain most serious crimes. The citizens could rely on, that the most serious and most dangerous acts will be punished in all MS, so with such an attitude EU help to create a common space of justice and security. Thus, the goal to reach the protection of all EU citizens in all MS against the most serious and most dangerous acts is achieved. The same is valid for the specific crimes violating the interests of the EU itself. People are usually more sensitive to those criminal acts that affect directly their individual rights and interests, but less sensitive to those, which affect “the others”. Thus, the EU creates legal provisions also in those scopes, where because of lack of national or individual interests would lack the national motivation to prosecute those “EU crimes”.

On the another side, with the harmonisation of sanctions, the perpetrators could rely on, that in all MS they will be punished similarly and thus it would be not so big difference if the individual is prosecuted in Slovakia or in Poland. The range of punishment should be approximately similar.

The harmonisation of criminal procedural law

In the scope of procedural rights, there is mainly concern about the accused persons’ rights and victims’ rights. Again, these provisions should be the guarantee for all defendants that not only in the scope of the conditions for criminality will be similarity in all MS but also the procedural rights should be at a certain similar level. This should be in accordance with the overall goal of European integration and should secure the free movement of citizens. “If a rule of national criminal law is found to restrict EU free movement rights, it can nevertheless be justified. (...) Whether a criminal measure is within the scope of EU law is the question whether it is liable to hinder or make less attractive an EU freedom”⁷⁰. It means, that also criminal law should not hinder the free movement and that the people should be sure, that the state bodies would handle them in each state similarly and they don’t need to be afraid to enter any of the MS, because they know, that the conditions of procedural rights would be approximately the same as in their home country.

In the last years, there was also more focus on the victim’s rights. Victims could now go to each MS to file the criminal complaint and a particular MS has the obligation to deal with such criminal complaint, even when according to previous national provisions this MS would not be entitled to handle those

⁷⁰ *Ibidem*, pp. 125, 128.

complaints. The victims are now free in their choice of where and how to handle the criminal complaints and they could be sure, that each MS will deal with them.

The harmonisation of cooperation in criminal matters

The positive aspects of criminal law harmonisation are achieved also in the sphere of cooperation in criminal matters in a ‘broader way’, e.g., Art. 85–89 TFEU.

Mutual recognition of decisions in criminal matters and also the European arrest warrant (hereinafter “EAW”) are significant tools towards the common space of justice and security. With EAW the perpetrators could not hide before “justice” in their home country and the police and judicial bodies should have an easier way to catch the perpetrator throughout the whole territory of the EU, then impose the punishment and finally execute it. There should be no importance in which state the perpetrator is present because upon EAW each MS is obliged to extradite the perpetrator to the state which wishes to punish the perpetrator for a criminal act. On the other side, the perpetrator could have the chance to serve his sentence from the other MS in his/her own state (mutual recognition of decisions). We can mention also the European Investigation Order (hereinafter “EIO”), which should help the state to collect the evidence gathered in the criminal proceedings.

Finally, the EU legislation in the scope of judicial and police cooperation in criminal matters should help to punish perpetrators easier and thus protect the “proper citizens” against criminality more effectively, e.g., “Article 5 of Directive 2014/42/EU on extended confiscation of the property allows a convicted person to be deprived not only of the property acquired through the crime in question but also of other property that probably derives from criminal activity. Such provisions are needed in law and practice to prevent additional crimes from being committed”⁷¹.

Perspectives of future development

When we assess the status of EU criminal law harmonisation, there has already been done much of the work and there have been already reached substantial achievements. However, the development of the EU criminal law was not the process of one day. It started in 1992 and after 30 years we can see certain outcomes of these activities and strivings. “Striking developments

⁷¹ J. Šimonová, J. Čentěš, A. Beleš, op. cit., p. 77.

in EU criminal law over the last 30 years suggest that it can no longer be considered as a marginal part of European integration through law but on the contrary definitely participates in its shaping”⁷². What started as the side policy in 3rd pillar has developed to the core part of the EU law – “abolition of EU pillar structure is significant constitutional event”⁷³.

However, we cannot say the process has already finished. The EU criminal law is one of the youngest scopes of EU law and we can still await that there will come deeper harmonisation and more aspects will be influenced by the EU legislation. Until now, the states have fought hard against the involvement of the EU in the scope of national criminal law. The criminal law with “its relevance to the core fundamental rights and traditionally high degree of judicial control, has (originally) not been formally transformed into a community competency”⁷⁴. But as we see from the above-mentioned analysis, the EU integration in criminal law has mainly positive aspects for all participants – for EU Member States, for perpetrators, for victims and also regular citizens.

Thus, we can await further regulation in many other scopes of substantive and procedural criminal law rules. For example we can await the extension of the list of so called EU crimes: “Discussions are currently being held on proposals to add gender-based violence⁷⁵ and hate speech⁷⁶ to the list of crimes to be harmonised at the EU level whereas violation of Union restrictive measures⁷⁷ will, subsequent to unanimous Member State agreement, be the first crime to be added to the list of Eurocrimes in Article 83(1) TFEU”⁷⁸.

The current EU legislation is not so visible for regular citizens and its introduction into the national legal order is much easier than before decades. “The EU currently lacks instruments capable of giving rise to criminal law obligations which could, without further implementation, be binding upon individuals”⁷⁹. Thus, the recipients of this future legislation would not fight so hard against the new provisions, the introduction of new legislation would be quicker. Some of the legal acts are for sure only hard to be implemented and it will be also the case of certain legal tools in the future. As it was for example with EIO. However, even when this regulation was opposed by many EU

⁷² J. Öberg, V. Mitsilegas, K. Caunes, *op. cit.*, p. 351.

⁷³ S. Miettinen, *op. cit.*, p. 223.

⁷⁴ C. Lebeck, *op. cit.*, p. 504.

⁷⁵ Commission, ‘Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence’, COM(2022) 105 final.

⁷⁶ Commission, Communication to the European Parliament and of the Council, ‘A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime’, COM(2021) 777 final.

⁷⁷ Council Doc 10,287/22; Commission, Proposal for a Directive of the European Parliament and of the Council, COM(2022) 684 final on the definition of criminal offences and penalties for the violation of Union restrictive measures.

⁷⁸ J. Öberg, V. Mitsilegas, K. Caunes, *op. cit.*, p. 351.

⁷⁹ S. Miettinen, *op. cit.*, p. 222.

Member States, these days there are only a few of them which does not apply this legislation (Denmark and Ireland)⁸⁰. What we can see on this example is the fact, that also the opposed legislation is slowly introducing to legislation of all Member States and became the natural part of each national legal order. The states currently use the EIO on an everyday basis and today hardly someone would think about the struggle that was connected with this tool at the beginning. So we can await also other tools enhancing the scope of mutual cross-border cooperation in criminal matters.

There are still many questions open for further discussion – e.g. the possible creation of direct criminal liability at the EU level, and the possibility of the creation of criminal responsibility by means of regulations rather than directives. The question is, whether all MS accept the possibility of a complete criminal law system at the EU level, which requires no national implementing measures. On the other hand, we can see that there are already successful strivings to punish some offences directly by the EU rather than to punish them at the national level. With the introduction and creation of EPPO this should be possible. On this development, we can see that the harmonisation is going still forward and we face the tendency to move more powers to the EU also in the scope of criminal law.

On the above-mentioned analysis, we can state, that there will be sure more harmonisation also in the future in the field of criminal law and although when it would be not easy to implement such harmonisation, with continuing implementation it will suddenly become part of our legislation and everyday life without the need to make substantial changes of national practice. In the previous development, there could be seen a fear of EU legislation, however, the impact on national law is sometimes not so harsh, because many of the applied instruments already exist in the national legislation and the EU prescriptions need only slight changes in national legal orders.

And for those instruments that are still not implemented in all Member States, there is a recommendation from the scientific community: “The effective prosecution of criminals who have profited from crime requires that EU Member States fully transpose the relevant EU directives into national law”⁸¹. The prediction from the current development could be concluded as following: If there are still scopes of criminal law that are not harmonised until today, they will be for sure in the future. “The Lisbon Treaty has signalled a remarkable political evolution from the European Community viewed primarily as an economic organisation in no way destined to mould national criminal policy, to the EU conceived as a serious penal actor”⁸².

⁸⁰ https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat/EN/120 (accessed: 30.08.2022).

⁸¹ J. Šimonová, J. Čentés, A. Beleš, op. cit., p. 77.

⁸² J. Öberg, V. Mitsilegas, K. Caunes, op. cit., p. 351.

Conclusion

Today there are many rules, that harmonise the substantive criminal law and procedural rights of accused and victims and cross-border cooperation in criminal matters. The criminal law today is thanks to EU law more foreseeable for everybody in the whole EU. This offers more certainty and clarity for all people in the EU and makes their lives more comfortable when travelling throughout the EU or when performing business activities in other MS.

European criminal law makes it easier to catch and punish the perpetrators and thus the European criminal law creates the scope of justice and security against criminality in all forms. With EU criminal law, the EU balances the advantage received by the perpetrators with the free movement across the borders within the EU Member States. The EU criminal law is the natural development of the creation of space without borders. When the perpetrators and criminality could not be stopped by the borders, the criminal law should not be stopped by the borders of the MS either. In today's modern Europe, the EU criminal law is not something that cut the national interests in the scope of criminal law but is a necessity for all MS. The EU criminal law is an effective tool to fight against serious criminality and the way how to protect own citizens and state interests in each MS.

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Summary

The increasing power of the European Union in the field of criminal law and the consequences for the national law of the Member States

Keywords: criminal law, European Union, EU primary law, EU secondary law, EAW, EIO.

In the following pages, the author gives a brief explanation of what does it mean European criminal law and which parts of criminal law are actually affected by the EU. Possible future development is assessed in the last part of the article. The article aims to present a brief history of European criminal law, that helps us understand why the EU criminal law has its main features and why the specific areas are affected. The specification of rules and areas directly affected by European criminal law explains the EU's influence and its interest in involvement in particular social relations and also in criminal law which developed into the increasing importance of EU criminal law in last years. The article uncovered and explained the positive elements of EU criminal law and envisaged the future deeper harmonisation in the field of criminal law which the author thinks is a natural development of the EU integration, which started more than 70 years ago.

Streszczenie

Rosnąca potęga Unii Europejskiej w dziedzinie prawa karnego i konsekwencje dla prawa krajowego państw członkowskich

Słowa kluczowe: prawo karne, Unia Europejska, prawo pierwotne UE, prawo wtórne UE, ENA, END.

W artykule autor pokrótce wyjaśnia, co znaczy europejskie prawo karne i na które części prawa karnego faktycznie wpływa UE. W ostatniej części rozważań dokonano oceny możliwego przyszłego rozwoju. Artykuł ma na celu przedstawienie krótkiej historii europejskiego prawa karnego, która pomoże zrozumieć, dlaczego prawo karne UE ma swoje główne cechy i dlaczego dotyczy konkretnych obszarów. Wyszczególnienie zasad i obszarów, których bezpośrednio dotyczy europejskie prawo karne, wyjaśnia wpływ UE i jej zainteresowanie angażowaniem się w określone stosunki społeczne również w prawie karnym, które w ostatnich latach zyskało na znaczeniu w unijnym prawie karnym. W rozważaniach zaprezentowano i wyjaśniono pozytywne elementy unijnego prawa karnego oraz przewidziano przyszłą głębszą harmonizację w dziedzinie prawa karnego, co zdaniem autora jest naturalnym rozwojem integracji UE, która rozpoczęła się ponad 70 lat temu.

