EUROPEAN (CRIMINAL) LAW V. NATIONAL (CRIMINAL) LAW – A TWO WAY STREET*

Norel NEAGU**

Abstract

European criminal law is an emerging field, both influencing and being influenced by national criminal law. European (criminal) law draws its roots from constitutional principles stemming from common traditions of the Member States. Also, European Union instruments are highly influential over national criminal law, through policy making, legislative instruments and interpreting case law. One can imagine European versus national criminal law as a two way street, where each turn of one of the traffic participants shall necessarily influence the other one.

Key words: European law, criminal law, principles of criminal law, guilt, crime, cooperation between EU member states.

1. Historical Perspective of European Union’s jurisdiction in the field on criminal law – from non-existent to minimal influence

European Union institutions’ jurisdiction in imposing provisions in the field of criminal law has represented until recently a controversial issue.

Starting with the Rome Treaty and until the beginning of the ‘70s, the European Union institutions did not have jurisdiction in the field of criminal law. This field was considered as part of national sovereignty of Member States. Consequently, at the beginning of the European Union integration process, this subject was ‘taboo’ in respect to European intervention in this field.

The Schengen Agreements¹ have touched upon this subject, only to specifically

---

* The paper is part of a broader research supported by the Romanian National Authority for Scientific Research, CNCS - UEFISCDI, project number PN-III-RU-TE-2012-3-0412.
** Associate Professor, “Acad. Andrei Rădulescu” Legal Research Institute of Romanian Academy; E.mail: norel.neagu@gmail.com.
¹ Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, Official Journal L 239, 22/09/2000, p. 0019 - 0062. The Schengen area and cooperation are founded on the Schengen Agreement of 1985. The Schengen area represents a territory where the free movement of persons is guaranteed. The signatory states to the agreement have abolished all internal borders in lieu of a single external border. Here common rules and procedures are applied with regard to visas for short stays, asylum requests and border controls. Simultaneously, to guarantee security within the Schengen area, cooperation and coordination between police services and judicial authorities have been stepped up. Schengen
exclude direct intervention of European Union institutions in criminal law.\textsuperscript{2}

Criminal law field comes into European Union jurisdiction starting with the adoption of the European Union Treaty,\textsuperscript{3} which instituted judicial cooperation in criminal matters as a problem of common interest (art. K1 of the Maastricht Treaty, corresponding to art. 29 in the Treaty of Amsterdam).\textsuperscript{4}

Two reasons have determined the change in optic of the Member States in respect to European Union intervention in the field of criminal law. The first one consisted of the scope of the reform of the Treaties. Thus, several new policies were added in the European Union’s jurisdiction, and also several changes were necessary due to the implementation of the four freedoms: free movement of persons, goods, services, capital. In the interval of less than a decade the European Union’s legislative framework and its implementation has taken a huge step forward. More integration and less border control have logically conducted to a raise in transnational criminal activities. European Union coordinated action in the field of criminal law was suddenly needed.

The second reason for the change in optic was that European Union intervention in this field was minimal.\textsuperscript{5} The legislative instruments available were conventions\textsuperscript{6} between Member States, joint actions,\textsuperscript{7} common posi-

---

\textsuperscript{2} H. Labayle, \textit{L’application du titre VI du Traité sur L’Union européenne}, RSC, January-March 1995, p. 34.


\textsuperscript{4} According to article K1, for the purposes of achieving the objectives of the Union, in particular the free movement of persons, and without prejudice to the powers of the European Community, Member States shall regard the following areas as matters of common interest: asylum policy; rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon; immigration policy and policy regarding nationals of third countries; combating drug addiction; combating fraud on an international scale; judicial cooperation in civil matters; judicial cooperation in criminal matters; customs cooperation; police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime, including if necessary certain aspects of customs cooperation, in connection with the organization of a Union-wide system for exchanging information within a European Police Office (Europol).

\textsuperscript{5} The inclusion of criminal law by the Treaties of Maastricht, Amsterdam and Nice in the field of intergovernmental cooperation has had deep implications for the adoption and implementation of legal instruments in this field. Both national criminal law influence over EU law and EU law influence over national criminal law were negligent though.


\textsuperscript{7} According to Article K2 of the Maastricht Treaty, the Council may adopt joint action in so far as the objectives of the Union can be attained better by joint action than by the Member States acting...
tions and later on, framework decisions. Drawbacks existed regarding the non-compliance penalty on the implementation of the provisions these legislative instruments provided, which was inexistent. Also, decision making process required unanimity for adoption of these legislative instruments, which was difficult to achieve. Thus, with minimal cooperation instruments, in order to


There were three main aspects that distinguished first pillar from the third pillar instruments: the legislative procedure, the legal effect and the control of implementation. As regards the legislative procedure, framework decisions were proposed either by a Member State or by the Commission and adopted unanimously by the Council after consulting the European Parliament. Directives, however, can only be proposed by the Commission and, in most cases, are adopted by a qualified majority via the co-decision procedure. The legal effect of third pillar instruments differed from that of Community law instruments. Under Article 34(2)(b) TEU, framework decisions were binding on the Member States as to the result to be achieved, but they did not entail direct effect. In the context of the first pillar, on the other hand, there is no doubt that directives can have direct effect, as the ECJ has consistently held in its case-law (see in respect to this P. Craig and G. Burca, ‘EU Law: Text, Cases and Materials, Oxford University Press, 2003, p. 178–229). As regards the possibility of verifying the implementation of policies by national authorities, in the third pillar the Court could review the legality of framework and other decisions. However, there was no infringement procedure as in the first pillar. See also for reference N. Neagu, Entrapment between Two Pillars: The European Court of Justice Rulings in Criminal Law, European Law Journal, Vol. 15, No. 4, July 2009, pp. 538-539.
achieve effectiveness in tackling cross-border crime, sectorial cooperation was needed. This was realised, until the Lisbon Treaty, through several framework decisions in the field of criminal law, both substantial and procedural. The evolution of legislative instruments in the field of criminal law was slow, but irreversible in the European Union.

Progressively, discussions on renouncing at the pillars structure in European Union legislation were gaining support. The impetus in the field of criminal law was given by two constitutional decisions of the European Court of Justice, which established, without being provided for in the Treaties, that criminal law measures may by adopted by means of a Directive as a legislative instrument (thus a first pillar instrument), when implementing measures are necessary in the field of an already harmonised policy subject to European Union jurisdiction.

Consequently, the time was ripe for a shared competence between the European Union and the Member States in the field of criminal law. And this was achieved by the Lisbon Treaty, after the failed Constitutional Treaty.

2. Today’s perspective – shared competence in the field of criminal law

Criminal law measures have constantly developed throughout European integration process, thus contributing to the higher level of security within the Union. Contemporary security challenges, risks and threats, like international terrorism, organized crime and migrations, have influenced eve-closer cooperation

---


13 European Union policies which may give rise to harmonisation measures are the internal market, free movement of goods, agriculture and fisheries, free movement of persons, services and capital, transport, competition and taxation, the economic and monetary policy, employment, social policy, educational, vocational training, youth and sport, culture, public health, consumer protection, trans-European networks, industry, economic, social and territorial cohesion, research, technological development and space, environment, energy, tourism, civil protection, administrative cooperation.

14 The Treaty establishing a Constitution for Europe (TCE), (commonly referred to as the European Constitution or as the Constitutional Treaty), was an unratified international treaty intended to create a consolidated constitution for the European Union. It would have replaced the existing European Union treaties with a single text, given legal force to the Charter of Fundamental Rights, and expanded Qualified Majority Voting into policy areas which had previously been decided by unanimity among member states. The Treaty was signed on 29 October 2004 by representatives of the then 25 member states of the European Union. It was later ratified by 18 member states, which included referendums endorsing it in Spain and Luxembourg. However the rejection of the document by French and Dutch voters in May and June 2005 brought the ratification process to an end. Following a period of reflection, the Treaty of Lisbon was created to replace the Constitutional Treaty. This contained many of the changes that were originally placed in the Constitutional Treaty but was formulated as amendments to the existing treaties. Signed on 13 December 2007, the Lisbon Treaty entered into force on 1 December 2009.
of Member states in this area. At the same time, there was a persistent need to achieve balance between ensuring higher level of security as an answer to the more complex security challenges, risks and threats, and human rights and freedom protection at the European level on the other side.\(^{15}\)

A crucial event in the development of both substantial and procedural criminal law within the EU was the entering into force of the Lisbon Treaty in December 2009.\(^{16}\) It provided for a shared competence in the field of criminal law between the EU and the Member States, the latter being able to exercise their competence as long and insofar as the EU has decided not to exercise its own.\(^{17}\)

After the adoption and coming into force of the Lisbon Treaty, the institutional pillar system was abandoned and ordinary legislative procedure was introduced, with qualified majority required for making decisions, also in the area of criminal law. Democratic control was improved by enhancing European Parliament’s jurisdiction and national parliaments’ role as well. Jurisdiction of the Court of Justice of the EU was widened and the European Convention of the Human Rights gained access to the EU as a legal person.\(^{18}\)

Having jurisdiction over several harmonized policies, the European Union needs to ensure consistency between the said policies and its activities, taking all of its objectives into account and in accordance with the principle of conferral of powers. The competence conferred on the Union could be exclusive, shared, to coordinate, define or implement policies, to carry out actions to support, coordinate or supplement the actions of the Member States.\(^{19}\)

The shared competence is defined in Article 2(2) TFEU. That is, when the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

Article 4(2)(j) TFEU states that shared competence between the Union and the Member States applies in the area of freedom, security and justice. This is an innovative step in the Treaty of Lisbon, since before that criminal law measures were to be found in the so-called „third pillar”, in the form of inter-governmental co-operation.


\(^{16}\) Consolidated version of the Treaty on the Functioning of the European Union (TFEU), OJ C 83, 30.03.2010, pp. 47-201.


\(^{19}\) Article 7 of the consolidated Version of the Treaty on the Functioning of the European Union.
There are two specific competences for criminalizing conduct provided for in the TFEU.

First of all, measures can be adopted under Article 83(1) TFEU concerning a list of explicitly listed ten offences\(^{20}\) (the so-called “Eurocrimes”) which refers to terrorism, trafficking in human beings, sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime. These are crimes that merit, by definition, an EU approach due to their particularly serious nature and their cross-border dimension, according to the Treaty itself. Most of the crime areas are already covered by pre-Lisbon legislation, which has been or is in the process of being updated. Additional “Euro crimes” can only be defined by the Council acting unanimously, with the consent of the European Parliament.\(^{21}\) There are also limits imposed to Union’s competence in this field. Thus, the Union is limited to establishing **minimum rules concerning the definition of criminal offences and sanctions** (emphasis added) in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

Same limits seem to be imposed to the second specific competence of the Union in the field of criminal law. Article 83(2) TFEU allows the European Parliament and the Council, on a proposal from the Commission, to establish ‘[...] minimum rules with regard to the definition of criminal offences and sanctions 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 a harmonisation measure.’

In this field there are not specific crimes listed, but fulfilment of certain legal criteria is made a precondition for the adoption of criminal law measures at EU level, with emphasize on ensuring effectiveness of EU policies.

A complementary legal basis to Article 83 (2) can be found in Article 325 (4) TFEU, which provides for the specific possibility to take measures in the field of the **prevention of and fight against fraud affecting the financial interests of the Union** (emphasis added), a field where some pre-Lisbon legislation already exists.\(^{22}\) It is an area of great importance for both EU and taxpayers, who are

---

\(^{20}\) According to Article 83[1] par. 3, on the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph (areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis). It shall act unanimously after obtaining the consent of the European Parliament.

\(^{21}\) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, COM(2011) 573 final.

funding the EU budget and who legitimately expect effective measures against illegal activities targeting EU public money (e.g. in the context of the EU's agricultural and regional funds or development aid), but also for European institutions, especially the Commission.23

On a superficial analysis of the provisions of the Lisbon Treaty (especially the provisions related to the shared competence), one can conclude that the European Union as a body can force the Member States, by exercising its right to legislate in the field of criminal law, to adopt certain legislation in this sector and impose over the Member State the obligation to refrain from adopting diverging legislation in the same sector. However, it should be kept in mind that European Union co-legislator in this field is the Council of the European Union, body composed of the representatives of the Member States. Legislation in the field of criminal law can be conceived at European Union level and implemented in the Member States, but only as a result of a broad political consensus of the Member States’ representatives.24

3. National (Criminal) Law Influence over European (Criminal) Law

European criminal law is highly influenced by national criminal law, starting from general principles, up to definition of criminal law institutions (such as guilt, aiding and abetting etc.). Usually national criminal law notions are imported into European law when common to several different traditions. It is said that national law influences European law through principles stemming from common tradition.

In the EU context, there are certain principles which permeate the system as a whole and with which any individual piece of legislation needs to be in conformity. Some of these principles are formally higher law in that they are explicit in the treaties (such as the principle of non-discrimination on grounds of nationality). Others can only indirectly be linked to the treaties and are rather explicable on the grounds that no European judge could imagine giving effect to a legal system which does not respect them (the so called ‘general principles of EU law’).25

23 See Communication on the protection of the financial interests of the European Union by criminal law and by administrative investigations – An integrated policy to safeguard taxpayers' money, COM (2011) 293.

24 Usually, though, in the field of criminal law, legislative action is taken only when consensus is reached through unanimity. Some actions may be imposed upon qualified majority, as is a recent example in the field of migration: no unanimous consensus was reached at the European Council from September 2015, but upon qualified majority migration quotas were ascribed to Member States to prevent and solve the migration crisis flow from Syria to certain Member States of the European Union.

Several traditional national principles in the field of (criminal) law, imported into European Treaties and European secondary law are going to be briefly analysed in the following lines. I will start with several fundamental principles which constitute the basis for the whole European law (hence also criminal law), than focus on principles specific to substantial criminal law (e.g., legality, equality, guilt, *mitior lex*) and procedural criminal law (e.g. mutual recognition, mutual trust, *ne bis in idem*, speciality).

3.1. Constitutional principles

Several guiding principles (especially in the field of drafting legislation and the limits imposed therein upon the European legislator) are provided for in the Treaty on the European Union. The European law drafter is subject to respecting the principles of conferral of powers, subsidiarity, proportionality and non-discrimination, which are, in fact, constitutional principles known to every national legislator.

Legislative action at EU level is governed by the principle of *conferral of powers*. This principle is defined in Articles 1(1), 4(1) 5(1) and 5(2) TEU.26 According to the said articles, the High Contracting Parties establish among themselves a European Union, on which the Member States confer competences to attain objectives they have in common. The limits of Union competences are governed by the principle of conferral. Under this principle,

‘The Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.’

Exercising competence by the Union is governed also by the principles of subsidiarity and proportionality. Under the principle of *subsidiarity*, according to [Article 5(3) TEU],

‘In areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.’

Under the principle of *proportionality*, according to [Article 5(4) TEU],

‘The content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.’

The principle of proportionality, in simple terms, means that the mean has to be suitable and necessary in order to reach the goal. In other words, to state the obvious, according to the principle, arguments that would be supportive of a mean that is unsuitable and/or unnecessary to reach a goal would not be in accordance

---

with the principle.\textsuperscript{27} Thus, applying criminal law to tackle behaviour which can be effectively dealt with by other means (e.g. civil or administrative measures) is unnecessary, and breaching the proportionality principle. In this understanding of the proportionality principle, it seems to have the same content as one of the principles of criminal law (\textit{ultima ratio} principle).\textsuperscript{28}

The principle of non-discrimination is set forth in Articles 10 and 18 of the Treaty on the Functioning of the European Union (TFEU)\textsuperscript{29} and, also, in Article 21 of the Charter of Fundamental Rights of the European Union.\textsuperscript{30}

According to the case law of the ECJ:

"the principle of equality and non-discrimination requires that comparable situations must not be treated differently unless such treatment is objectively justified."\textsuperscript{31}

\textbf{3.2. Substantial Criminal Law Principles}

Under this heading I will briefly present several principles which stem from the common traditions of the Member States and which can be found or mentioned in several legislative instruments adopted at European Union level (the legality principle, the harm principle, the guilt principle, the \textit{mitior lex} principle).

The principle of the legality of criminal offences and penalties (\textit{nullum crimen, nulla poena sine lege}), which is one of the general legal principles underlying the constitutional traditions common to the Member States, has also been enshrined in various international treaties, in particular in Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms,\textsuperscript{32} and Article 49(1) of the Charter of Fundamental Rights of the European Union.\textsuperscript{33}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{27} Tor-Inge Harbo, \textit{The Function of the Proportionality Principle in EU Law}, 16 EUROPEAN LAW JOURNAL (2010), p. 161.

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

\item \textsuperscript{31} Case C-303/05 \textit{Advocaten voor de Wereld} [2007] ECR I-3633, para. 45.
\item \textsuperscript{32} See in this regard, inter alia, Joined Cases C-74/95 and C-129/95 \textit{X} [1996] ECR I-6609, paragraph 25, and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P \textit{Dansk Rørindustri and Others v Commission} [2005] ECR I-5425, paragraphs 215 to 219.
\item \textsuperscript{33} According to article 49(1) of the Charter, entitled 'Principles of legality and proportionality of criminal offences and penalties':

'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was
According to the legality principle, no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed (nullum crimen sine lege). Also, no penalty shall be imposed which was not provided for by the law that was applicable at the time the criminal offence was committed (nulla poena sine lege).

A basic principle for criminalisation in the Anglo-American legal theory is the ‘harm’ principle. According to Mill, “[…] the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others”. Studying the preamble and the impact assessment of legislative acts in the field of criminal law may offer valuable information on the reasons of the law maker for criminalizing conduct. An important reason for criminalising conduct relates to the serious violation caused to individuals or groups of persons and the significance of crime (‘harm’ principle). The ‘harm’ principle is also mentioned in the criminal law policies of European institutions.

European legislation requiring Member States to criminalise certain acts must be based, without exception, on the principle of individual guilt (nulla poena sine culpa). This requirement captures not only the fact that criminalisation should be used solely against conduct which is seriously prejudicial to society, but that it should also be regarded as a guarantee that human dignity will be respected by criminal law. Furthermore, the requirement of individual guilt is inferred from the


36 Draft Council conclusions on model provisions, guiding the Council’s criminal law deliberations, 16542/2/09 REV 2 JAI 868 DROIPEN 160; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, COM(2011) 573 final; European Parliament, Report on an EU approach on criminal law (2010/2310(INI), A7-0144/2012, Committee on Civil Liberties, Justice and Home Affairs.
presumption of innocence provided for in Article 48(1) of the EU Charter of Fundamental Rights.\textsuperscript{37}

Generally speaking, the legal instruments of the EU criminalizing conduct refer to ‘intentional conduct’,\textsuperscript{38} or to acts that have been ‘intentionally’ committed.\textsuperscript{39} The ECJ distinguishes between two main categories of offences: intentional (the general rule) and non-intentional (the exception). The second category is subdivided into lack of care (recklessness), (serious) negligence and objective responsibility.\textsuperscript{40}

The principle by which a person is to benefit from the lighter penalty where there has been a change in the law is known by the Latin phrase \textit{lex mitior}.\textsuperscript{41}

The \textit{mitior lex} principle is provided for in international and EU instruments. Article 15 of the International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations in Resolution 2200 A (XXI) of 16 December 1966, which entered into force on 23 March 1976, is worded basically in the same terms as Article 49(1) of the EU Charter of Fundamental Rights.

According to article 49(1) of the Charter, entitled ‘Principles of legality and proportionality of criminal offences and penalties’:
‘No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable’.


\textsuperscript{40} Case C-157/80 Criminal proceedings against Siegfried Ewald Rinkau [1981] ECR 1395, par. 14-15:
‘The national laws of most of the contracting States distinguish in one way or another between offences committed intentionally and those not so committed. […] Whereas offences which were intentionally committed, if they are to be punishable, require an intent to commit them on the part of the person concerned, offences which were not intentionally committed may result from carelessness, negligence or even the mere objective breach of a legal provision.’

\textsuperscript{41} W.A. Schabas, \textit{Lex mitior}, http://humanrightsdoctorate.blogspot.ro/2010/08/lex-mitior.html.
The *mitior lex* principle has also been asserted as a fundamental principle of criminal law in the case law of ECJ and ECHR. Thus, the ECJ decided that:

'According to settled case-law, fundamental rights form an integral part of the general principles of law, the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories.42 [...] The principle of the retroactive application of the more lenient penalty forms part of the constitutional traditions common to the Member States. It follows that this principle must be regarded as forming part of the general principles of Community law which national courts must respect when applying the national legislation adopted for the purpose of implementing Community law.'43

3.3. Procedural Criminal Law Principles

Several guiding procedural criminal law principles, not only recognized in all Member States of the European Union, but also enshrined in international instruments and treaties, are going to be briefly mentioned in the following section, to emphasise the importance of common traditions in European legislative development. I decided to group the procedural criminal law principles as they are mentioned in the Charter of Fundamental Rights of the European Union.

The **presumption of innocence** is a fundamental right, laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights of the European Union. Article 6(3) of the Treaty on European Union (TEU) provides that the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to Member States.

The **right of defence** includes, inter alia, the right to have someone informed of the detention, the right to legal advice and assistance, the right to a competent, qualified (or certified) interpreter and/or translator, the right to bail (provisional release) where appropriate, the right against self-incrimination, the right to consular assistance (if not a national of the State of prosecution), fairness in obtaining and handling evidence (including the prosecution’s duty of disclosure), the right to review of decisions and/or appeal proceedings, specific guarantees covering detention, either pre- or post-sentence.44

---

42 See, inter alia, Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 71 and the case-law there cited, and Joined Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood* [2003] ECR I-7411, paragraph 65 and the case-law there cited.

43 Joined cases C-387/02, C-391/02 and C-403/02, *Criminal proceedings against Silvio Berlusconi, Sergio Adelchi and Marcello Dell’Utri and Others* [2005] ECR I-03565, par. 66-69.

To enhance the right of defence, harmonization of at least some fundamental aspects of a criminal trial, starting from the European Convention of Human Rights and ECHR case law as the common lowest denominator, was decided at EU level. Hence, an ambitious roadmap for procedural rights in criminal trials has been established in the EU.\textsuperscript{45} It included measures related to translation and interpretation,\textsuperscript{46} information on rights and information about charges,\textsuperscript{47} the right to legal advice and legal aid,\textsuperscript{48} the right to communication with relatives, employers and consular authorities, and special safeguards for suspects or accused persons who are vulnerable.

According to Article 47 CFREU,

‘Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.’

Access to justice is considered a constitutional right in EU law. Thus the principle of the rule of law requiring judicial review of an act interfering with a right of an individual and the corresponding need for grant of an effective remedy, in cases of unjustified infringement is guaranteed by the Charter. This principle is required by the notion of respect of effective rights of individuals and constitutes an essential aspect of democratic accountability.\textsuperscript{49} The ECJ has attributed special importance to the principle guaranteed by Article 47 from an early stage, in demanding that individuals should enjoy the opportunity to assert their rights through the courts as indeed required by the notion of judicial control of the executive that underlies the constitutional traditions common to the Member States.

\textsuperscript{48} The first part of the measure (right to legal advice) is already adopted (Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal 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, OJ L 294, 06.11.2013, p. 1-12). The second part (right to legal aid) implies delicate negotiations, due to the impact on national budget of the Member States.

European (criminal) law v. national (criminal) law – a two way street

States,50 "Individuals are entitled to effective judicial protection of the rights they derive from the Community legal order, and the right to such protection is one of the general principles of law.51

The second paragraph of Article 47 guarantees the right to a fair trial (a fair hearing in all proceedings of criminal, civil and administrative nature). It provides that all its guarantees are to be respected upon the violation of rights and freedoms conferred by EU law.52 The principles of ‘the rule of law’ and ‘due process’ are at the core of the substantive protection of the individual against state power and as such form an ancient achievement of the law. They are found in the Magna Carta of 1215 and have been ever since widely included in different constitutions.53

Judicial cooperation in criminal matters is based on the implementation by the Member States of the principle of mutual recognition.54 This principle was recognized by the Tampere European Council as the “cornerstone of judicial cooperation in both civil and criminal matters”. It entails quasi-automatic recognition and execution of judicial decisions among Member States, as if the executing judicial authority was implementing a national judicial order.

Mutual recognition principle alone is difficult to impose to Member States of the EU without another principle, which can make mutual recognition possible: mutual trust. Mutual recognition of judicial decisions involves criminal justice systems at all levels. It only operates effectively if there is trust in other justice systems, if each person coming into contact with a foreign judicial decision is confident that it has been taken fairly. An area of freedom, security and justice means that European citizens should be able to expect safeguards of an equivalent standard55 throughout the EU. More effective prosecution achieved by mutual recognition must be reconciled with respect for rights.

These two principles have given during the years a strong impetus to judicial cooperation in criminal matters within the European Union, starting with the


55 Commission Communication, Towards an Area of Freedom, Security and Justice: “procedural rules should respond to broadly the same guarantees, ensuring that people will not be treated unevenly according to the jurisdiction dealing with their case” and “the rules may be different provided that they are equivalent”. COM(1998)459, 14 July 1998.
European Arrest Warrant legislative instrument,\textsuperscript{56} and continuing with the improved cooperation in the field of recognition of custodial and non-custodial sentences and transfer of convicted persons.\textsuperscript{57}

The specialty principle is considered an important guarantee in judicial cooperation in criminal matters, stating that a person who has been surrendered may not be prosecuted, sentenced or otherwise deprived of liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered. That rule is linked to the sovereignty of the executing Member State, which may waive the application of the specialty rule.

In the vast majority of national and international instruments, the ‘\textit{ne bis in idem}’ principle is to be understood as a rule forbidding further prosecution/judgment/conviction for the same offence/conduct/act.\textsuperscript{58} In EU law, the principle is drafted in Article 50 of the Charter of Fundamental Rights of the European Union,\textsuperscript{59} and also in Article 54 of the Convention Implementing the Schengen Agreement.\textsuperscript{60}

4. European (Criminal) Law Influence over National (Criminal) Law

European criminal law is a blending of principles stemming from common traditions of the Member States, standing at the crossroads between common law and continental law and borrowing from both. European criminal law is not only heavily influenced by the national criminal law of the Member States, but aids also to the constant evolution of the latter.


\textsuperscript{59} According to Article 50 of the Charter of Fundamental Rights of the European Union, ‘No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.’

\textsuperscript{60} Article 54 of the Convention Implementing the Schengen Agreement of 14 June 1985 (‘the CISA’) provides as follows: ‘A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.’
European Union influence over national criminal law can be summarized in three directions: policy making, legislation drafting and judicial interpretation through mandatory case law.

4.1. Policy making

Policy making is not to be underestimated as regards its influence over criminal law. European criminal law policy was informal at the beginning of the 90’s, without any mention of it in the European legislation. Still, from the meeting of heads of states and government in the European Council have stemmed several policy programmes in the field of Justice and Home Affairs, which contain guiding rules to adopt criminal law legislation at European level according to the said programmes. Following the Lisbon Reform of the Treaties, this informal guidance was inserted in the legislation. Thus, according to Article 68 TFUE,

“The European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice.”

Also, according to Article 67 par. (1) and (3),

“1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.

(...) 
3. The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.”

Several programmes were adopted in the meetings of the European Council, giving impetus and direction in the area of freedom, security and justice, usually for a 5 years period.

The first adopted programme was at Tampere, in 1999.61 The main objective of the programme was to establish the area of freedom, security and justice in an interval of 5 years. The implementation of the programme was closely monitored by the European Commission.62 Even if there were some successes in pursuing the proposed goal, the original ambition was limited by institutional constraints, and sometimes also by a lack of sufficient political consensus. A new programme was


established in 2004, with broader ambitions, given the delicate political context offered by the terrorist attacks of 2001 and 2004.

The multiannual Hague Programme, adopted at the European Council of 4 and 5 November 2004, sets out 10 priorities for the Union with a view to strengthening the area of freedom, security and justice in the next five years.\(^\text{63}\) Although much more successful than the Tampere Programme, the Hague Programme proposed several long lasting challenges to be tackled, needing a long term action,\(^\text{64}\) and thus its main issues were not fully addressed during its implementation. A new and very ambitious programme was set in place in 2010.

The Stockholm programme, five-year strategic plan for 2010-2014, represented the most relevant cooperation framework within the EU to date.\(^\text{65}\) The Stockholm Programme sets out the European Union’s priorities for the area of justice, freedom and security for the period 2010-2014. Building on the achievements of its predecessors the Tampere and Hague programmes, it aimed to meet future challenges and further strengthen the area of justice, freedom and security with actions focusing on the interests and needs of citizens.\(^\text{66}\) This programme was so ambitious and far reaching, that it triggered discussions on its successor, the conclusion being that it is necessary to fully implement the objectives of the Stockholm programme for the period 2015-2020 and not to come up with a new programme with new objectives. The period 2010-2015 was the period with the most adopted legislative proposals in the field of criminal law and criminal procedural law.

To conclude, policy making in the form of European Council meetings at the level of heads of states and governments is a major influence over national criminal law, establishing the directions to follow, negotiating political compromise and

\(^{63}\) The priorities were: strengthening fundamental rights and citizenship; anti-terrorist measures; defining a balanced approach to migration; developing integrated management of the Union’s external borders; setting up a common asylum procedure; maximising the positive impact of immigration; striking the right balance between privacy and security while sharing information; developing a strategic concept on tackling organised crime; a genuine European area of justice; sharing responsibility and solidarity.


\(^{66}\) In order to provide a secure Europe where the fundamental rights and freedoms of citizens are respected, the Stockholm Programme focuses on the following priorities: Europe of rights; Europe of justice; Europe that protects; Access to Europe; Europe of solidarity; Europe in a globalised world. An important accent was placed on cooperation between judicial authorities and the mutual recognition of court decisions within the EU in criminal cases and also on fight against cross-border crime, such as: trafficking in human beings; sexual abuse, sexual exploitation of children and child pornography; cyber crime; economic crime, corruption, counterfeiting and piracy; drugs.
ultimately approving the legislative packages proposed. For the common citizen, though, more tangible than policy making is the European legislation already adopted (in force), which needs to be implemented in the national legislation.

4.2. Drafting legislation
The most influential legislative act over national criminal law is the Charter of Fundamental Rights of the European Union. The Charter of Fundamental Rights of the EU brings together in a single document the fundamental rights protected in the EU. The Charter is consistent with the European Convention on Human Rights adopted in the framework of the Council of Europe: when the Charter contains rights that stem from this Convention, their meaning and scope are the same. There are two differences: firstly, the Charter can be invoked during the criminal trial in a national court and a request for a preliminary ruling may be sent to the European Court of Justice for interpretation on the provisions of the Charter, while the Convention can be invoked in front of the European Court of Human Rights after all domestic available effective remedies have been used. Secondly, the Charter can be invoked only concerning national provisions transposing EU law, while the Convention can be invoked directly against national legislation.

In the period 2000-2015 several legislative acts in the field of substantial criminal law and also criminal procedure have been drafted and implemented. In the field of substantial criminal law there are two categories of legislative acts: those adopted in the field of combating transnational organized crime [according to Article 83 (1) TFEU], and those adopted for ensuring effectiveness of European Union’s policies in already harmonized fields [according to Article 83(2) TFEU].

---

68 See ECJ, C-45/14, ayant pour objet une demande de décision préjudicielle au titre de l’article 267 TFUE, introduite par la Fövárosi Itélőtábla (Hongrie), par décision du 21 janvier 2014, parvenue à la Cour le 27 janvier 2014, par. 20-25.
Also, an ambitious roadmap was developed recently in respect to criminal procedural rights for the accused or the victim,\(^{71}\) and also in respect to judicial cooperation.\(^{72}\) The legislation adopted at European Union level does not entail direct effect, but an obligation for the Member States to implement it. There is an obligation of result, leaving the means to do it to each national jurisdiction, according to its own tradition.

### 4.3. Case law

Apparently, there is no influence of the case law of the European Court of Justice over national criminal law. The European Court of Justice has no jurisdiction in criminal trials, and it is not supervising the decisions taken by national criminal courts. However, this influence exists and manifests itself in the form of judicial decision given by the court in preliminary rulings.

This is a very powerful instrument, inserted in Article 267 TFEU.\(^{73}\) The decisions of the Court are mandatory as regards the interpretation of the Treaties and of the secondary legislation throughout the whole territory of the European Union.

---


\(^{73}\) According to Article 267, The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.
Union, not only in the case pending, but also in all subsequent cases were an identical issue may arise.

Several decisions adopted by the court have significantly influenced the relationship between European law and national law, hence also criminal law. Starting from asserting fundamental principles stemming from the Treaties (which were not manifestly there at the time), such as primordiality and direct effect of European Union law, than moving criminal law jurisdiction from the third pillar to the first in 2005-2007, or asserting the same effects of a Framework Decision with a Directive, the Court has constantly given impetus to interpretation of European Law towards harmonization and effectiveness. There is also a manifest influence of the ECJ’s decisions in the field of judicial cooperation in criminal matters, starting from the interpretation of the ne bis in idem principle, moving to ensuring the effectiveness of the European arrest warrant, and also giving effect to the specialty principle.

5. Conclusions

European criminal law is an emerging field, both influencing and being influenced by national criminal law. European (criminal) law draws its roots from constitutional principles stemming from common traditions of the Member States. Also, European Union instruments are highly influential over national criminal law, through policy making, legislative instruments and interpreting case law.

The influence coming towards and from European criminal law is highly positivistic in approach. There is no dogmatic influence as such, given the diversity of traditions of the Member States in the field of criminal law. It would be a tremendous mistake to try to impose a common law approach and justification to national legislations of continental origin, or continental dogmatic to common law jurisdictions. The European Union is only setting common goals to be achieved in the field of (positivistic) criminal law, and leaving to each national jurisdiction the possibility to adapt the EU legal instruments in its national law according to its

76 Case C-105/03, Pupino, [2005] ECR I-05285.
79 Case C-192/12 PPU, Melvin West, ECLI:EU:C:2012:404; Case C-388/08 PPU, Leymann şi Pustovarov, [2008] ECR I-8993; Case C-168/13 PPU, Jeremy F., ECLI:EU:C:2013:358.
traditions. Also, only the most common principles stemming from common traditions of the Member States are taken in consideration at European Union level. The motto of the European Union, “united in diversity”, can be applied successfully also in respect to criminal law.

To conclude, one can imagine European versus national criminal law as a two way street, where each turn of one of the traffic participants shall necessarily influence the actions of the other one.

References


