

SUPRANATIONALITY VERSUS NATIONAL SOVEREIGNTY – LINKING POINTS BETWEEN EU LAW AND NATIONAL CRIMINAL LAW

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1. INTRODUCTION

For a long time, criminal law was regarded as the symbol and last rampart of national sovereignty, which the Member States were extremely reluctant to give up. Therefore the European Communities originally did not have the legal competence in criminal matters and the founding treaties did not contain any express provision in connection with criminal law. However it cannot be said that Community/EU law and national criminal law were totally independent of each other. This paper aims to present three methods by which national criminal law is heavily influenced by the EU law. These are the following: the assimilation principle, the legal harmonization and the supranational criminal legislation.

2. ASSIMILATION PRINCIPLE

The assimilation principle requires the Member States to treat the infringements of EU law in a matter analogous to the manner that breaches of same or similar domestic law. [1] This obligation derives from the *principle of sincere cooperation*. The principle of sincere cooperation or loyalty creates the Member States a positive duty to carry out all obligations, as well as a duty to refrain from doing anything that might be contrary to the objectives of the Union. [2] Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives. [3]

Using this principle, the European Court of Justice has identified an obligation to sanction those who breach EU law. [4] In the famous *Greek Maize Case*, the Court observed that the principle of sincere cooperation requires the Member States to penalize any persons who infringe Community law in the same way as they penalize those who infringe national law. Although the choice of penalties remains within the discretion of the Member States, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive. Moreover, the national authorities

must proceed, with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws. [5]

The judgement of the European Court of Justice made it clear that, when the EU legislation provides no specific sanction for an infringement of EU rules, Member States are not only competent, but because of the principle of sincere cooperation, are obliged to take all measures necessary to ensure the application and effectiveness of EU law. [6] It may be noted, however, that the judgement at no point directly imposed a substantive form of criminal proceeding or penalty. Rather, a procedural obligation of similar treatment is clearly imposed on Member States, who must ensure that breaches of EU law are punished on substantive and procedural conditions similar to those applying to breaches of national law and must proceed with the same diligence as they use in implementing the corresponding national legislation. [7] It means that the Member States have freedom in the choice of the type of (effective, proportionate and dissuasive) sanctions; however, if the national law provides criminal sanctions for the violation of the national law, Member States are obliged to use criminal law measures for the violation of EU law as well. [8]

3. LEGAL HARMONIZATION

Legal harmonization or approximation can be described as the reduction of the disparities between the criminal justice systems of different Member States.

Before the Treaty of Lisbon it was highly debated whether the European Community obtained a legal harmonization competence. According to the common point of view, because there is no legal base in the EC-Treaty which contained an express reference to criminal law, the Community did not have a competence for approximating the national criminal laws of the Member States. [9] This standpoint was based on the *principle of conferral*, one of the basic maxims of the functioning of the EU. Under the principle of conferral, 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. [10] The European Court of Justice also confirmed several times that criminal legislation and the rules on criminal procedure are matters for which the Member States are responsible. [11]

Although the Community lacked criminal competence, it had the power to impose obligations on the Member States to carry out their mandate to enforce Community law. The Community adopted several regulations [12] and directives [13] which obliged the Member States to provide for adequate sanctions to guarantee the compliance with them. [14] However, these acts did not define the type of the sanctions; therefore the Member States were free to decide whether they introduce administrative or criminal sanctions in order to punish the defined conduct.

Because of the lack of the express criminal provisions of the EC-Treaty, legal harmonization in criminal matters was mainly restricted to the third pillar of the European Union created by the Treaty of Maastricht and modified by the Treaty of Amsterdam.

According to Article 29 TEU one of the main objectives of the European Union is the creation of an *area of freedom, security and justice*. This aim has to be achieved – among others – *through approximation of rules on criminal matters in the Member States if necessary*. The Treaty of Amsterdam empowered the legislator of the European Union with an express legal harmonization competence, when allowed the EU to *adopt measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking*. [15] The main instrument of the legal harmonization were *framework decisions*, which were binding upon the Member States as to the result to be achieved but left to the national authorities the choice of form and methods. [16]

The Treaty of Lisbon entered into force on the 1st December 2009 integrated the three pillars of the European Union and transformed the cooperation in criminal matters into the Community legal order. The Treaty empowered the EU legislator with a broad legal harmonization competence in the field of criminal law, which is regulated by Article 83 TFEU.

According to Article 83(1) TFEU the European Parliament and the Council may, by means of *directives* adopted in accordance with the ordinary legislative procedure, *establish minimum rules concerning the definition of criminal offences and sanctions 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*.

For the use of the Union's legal harmonization competence under Article 83(1) TFEU two cumulative criteria are required to be met. The first requirement is the *particular seriousness* of the crime, which means that a certain level of graveness needs to be reached in order to justify EU's legislative competence. The second requirement is the *cross-border dimension* of the crime, which is defined by three alternative criteria: nature, impact or special need to combat the areas of crime on a common basis. [17] The Treaty lists ten so-called *eurocrimes*, which meet the aforementioned criteria, therefore can be subject to harmonization. These are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. However the Treaty does not provide an exhaustive list, because on the basis of developments in crime additional areas of crime can be adopted by the Council acting unanimously, with the consent of the European Parliament. The new criminal offences also have to meet the criteria specified by Article 83(1) TFEU.

Article 83(2) TFEU regulates an *ancillary harmonization competence*, according to which, *if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned*. While Article 83(1) limits the criminal competence of the Union to certain areas of criminal offences where there is a special need to combat them on a common basis, Article 83(2) generally enables the use of criminal law if it is essential to the effective implementation of a Union policy. [18] The

introduction of this competence in the Treaty of Lisbon confirms a functionalist view of criminal law. In this case, criminal law is considered as a mean to an end which is the effective implementation of other Union policies. Criminal law is thus used as a mere tool to achieve the effectiveness of the EU law. [19]

For the application of the criminal harmonization competence under Article 83(2) TFEU two requirements have to be fulfilled. Firstly, there is a need for *previous harmonization measures* in the policy area which the Union legislator intends to criminalize. It means that the criminal harmonization under Article 83(2) TFEU presupposes that other harmonized (non-criminal) rules already exist in the area concerned. [20] Secondly, the criminal sanctions have to be *essential* for the effective implementation of the aforementioned harmonized Union policy. The essentiality requirement demands the Union legislator to prove that the current enforcement regime cannot achieve effective implementation of the policy concerned, that criminal law is more efficient than existing less restrictive measures to achieve the pursued objective and that the disadvantages caused by criminal law are not disproportionate in relation to the objective of ensuring the effective implementation of a Union policy. [21]

4. SUPRANATIONAL CRIMINAL LEGISLATION

Supranational legislation can be defined as the adoption of supranational criminal provision directly applicable in the Member States. Whilst in case of legal harmonization the criminal provisions of the EU have to be transformed into the domestic criminal law, a supranational criminal norm does not require to be implemented by the national legislator. It means that in the former case the perpetrator of a criminal offence can be held liable based on the national criminal norm which implemented the EU law, whilst in the latter case the liability is solely based on the supranational criminal norm. [22] Furthermore, because of the direct applicability and the lack of the implementation obligation, a supranational legislation results not only the reduction but the complete elimination of the differences between the national legal systems. That means that a supranational criminal legislation would lead to the unification of the criminal laws of the Member States.

Before the Treaty of Lisbon the European Union did not possess a supranational legislative competence in the field of criminal law. [23] However, the Treaty of Lisbon empowered the European Union not only with a legal harmonization competence but with a supranational legislative competence as well. It can be found in Article 325(4) TFEU which regulates the protection of the financial interests of the Union. According to this provision of the Treaty, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Court of Auditors, shall *adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union's institutions, bodies, offices and agencies.*

Contrary to Article 83 TFEU, Article 325 TFEU does not refer to the form of the legal act it only states that the Union legislator could adopt the *necessary measures*

in the field of the fight against fraud, which include criminal law measures as well. [24] Therefore the Union legislation is not restricted to directives as in Article 83 TFEU, but the Treaty enables the Union to adopt directly applicable, supranational criminal law norms in the form of *regulations* as well. [25]

While Article 83 lists several criminal offences which could be subject to harmonization, Article 325 regulates one specific category of crime: criminal offences affecting the financial interests of the Union. However, this category has to be interpreted broadly, since it encompasses not only EU-fraud in the narrow sense, but other criminal offences which could affect the financial interests of the European Union, e.g. active and passive corruption, money laundering, fraud in public procurement, misappropriation of funds etc. [26]

5. SUMMARY

As it could be seen, the national law is heavily affected by EU law. The most lenient form of this influence is the assimilation principle. This integration technique does not seek to incorporate EU norms into national criminal law, only attempts to extend the latter's applicability to the protection of the interests of the European Union. [27] In case of a legal harmonization the Member States are required to adopt common criminal norms which aim to reduce the differences of the national criminal law systems. However, the basis of the accountability remains the domestic criminal law. The most serious impact on national penal law is the supranational criminal legislation, which results not only the approximation but the unification of the criminal laws of the Member States. In this case the liability of the perpetrator of the crime is solely based on the supranational EU regulation.

The Treaty of Lisbon was an important milestone in the history of EU criminal law, because cooperation in criminal matters became an autonomous, homogeneous, supranational EU policy. [28] The Treaty empowered the Union with a broad legislative competence on the field of criminal law. Firstly, it created a secure legal basis of the harmonization of national criminal laws: Article 83(1) TFEU enables the European Union to combat specified areas of serious cross-border criminality and Article 83(2) TFEU provides the Union a mean to ensure the effective implementation of other Union policies. Secondly, the Treaty of Lisbon not only allows the European legislator to harmonize the national criminal laws, but to adopt directly applicable, supranational criminal law norms in connection with the protection of the financial interests according to Article 325(4) TFEU.

After the entry into force of the Treaty of Lisbon, an intensive criminal legislation began at the EU's level and we can expect the further increase of the Union's activity in this field, which results a more and more harmonized and unified criminal law in the Member States.

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