1 EU Law and Criminal Law

The Legal Basis

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1.1 Introduction

The European Union started as a common market, and following the Maastricht Treaty in 1993, it evolved into an economic union. As an economic union, one would not expect that the legal basis ventures into other fields besides the economic field. However, the Maastricht Treaty went beyond the economic concepts that were originally found in the European Economic Community (EEC) Treaty. In fact, the Treaty on European Union (TEU) encompassed a three-pillar structure with different modes of governance. While the traditional community pillar was supranational in nature, the second pillar, the common and foreign security policy (CFSP) and the third pillar, justice and home affairs (JHA), were mainly intergovernmental, varying in different degrees from each other. European criminal law can mainly trace its modern origins to the third pillar.

The evolution of the institutional framework of EU criminal law has been a gradual process. Although the major legislative developments have taken place in the last two decades and through the case law of the CJEU, steps for enhancing cooperation between the Member States in criminal matters outside the Treaty framework appeared in the early 1970s. One can mention, for example, the TREVI framework. This cooperation was a network of law enforcement officials meeting on an informal basis to discuss action on counterterrorism issues. TREVI was an informal structure with no clear legal framework, and it operated outside the then community law. In the 1980s, this was expanded to include new areas of cooperation such as drugs and organized crime, which are areas of common interest to the Member States.

With the development of the EU's Internal Market, it had become evident in cases brought before the CJEU in Luxembourg that the focus of the EU on economic matters did not stop EU's actions from having criminal law implications or from being associated with criminal choices in the Member States. The cause for the abolition of internal frontiers in the Internal Market, which became a major objective in the 1980s and the early 1990s, can be taken as a step forward in creating a spillover effect of law and policy to broader issues in the market, including criminal law. For example, one can mention the spillover effect that resulted from the abolition of internal frontiers and the goal of the free movement of persons. The birth of the Schengen Agreement, which then evolved into a Schengen Convention and eventually into the Schengen acquis, created the need

for further cooperation in EU criminal matters. The Palma Document,[1] whose conclusions were endorsed by the Madrid European Council in 1989 following the publication in 1985 of the white paper on the completion by the Internal Market, led to a new impetus in the evolution of criminal law. The Palma Document leads to the achievement of an area without frontiers that involve, as necessary, the approximation of laws. Adding that the abolition of the internal borders affects a whole range of matters, including combating terrorism, the trafficking enforcement cooperation and judicial cooperation, this background led to the eventual creation of the third pillar.

1.2 European Criminal Law Pre-Lisbon

As it been explained in the previous section, the first significant step in the evolution of European criminal law happened with the Maastricht amendments. In Maastricht, the provisions relating to EU criminal law were included in Title VI of the EU Treaty entitled 'Provisions on cooperation in the fields of justice and home affairs'. This marked the first time the union established competence in the field of JHA including judicial cooperation in criminal matters, customs cooperation, and police cooperation to prevent and combat terrorism, unlawful drug trafficking and other serious forms of international crimes. This was complemented by the establishment of the European Police Office (Europol).

However, the third pillar remained mainly intergovernmental in nature, and this meant that the traditional community method, where the European Commission representing the Union has the sole right to initiate policy and both the Council of Ministers representing the Member States as well as the European Parliament representing the peoples of Europe could not apply to these new competencies. As a result, very little, except cooperation where the Member States wanted, could be achieved. The operation of the third pillar demonstrated the weaknesses and limits of the compromise reached in Maastricht by the Member States. Legislative production was scarce and mainly took the form of conventions, which are all extremely cumbersome to ratify. Several joint actions were adopted, some of them providing definitions of key concepts of EU criminal law such as organized crime, but the legal status was unclear, and their implementation prospects were questionable.

As a result, a mere half a decade after the entry into force of the Maastricht Treaty, the Member States came up with the adoption of the Amsterdam Treaty. The deficiencies of the third pillar were discussed in the intergovernmental conference leading to the adoption of the Amsterdam Treaty. The indifferent national approaches to these matters did not stop the adoption of considerable changes to the third pillar in

1 P. A. Weber-Panariello, *The Integration of Matters of Justice and Home Affairs into Title VI of the Treaty on European Union. A Step Towards More Democracy?* EUI Working Paper RSC No. 92/32, Florence EUO up, 1995, p. 5.

Amsterdam. The Maastricht third pillar areas of immigration, asylum, borders and civil law were 'communitarized', forming part of Title IV of the EC Treaty, and the third pillar was now renamed 'Provisions on the police and judicial cooperation in criminal matters'. This was revamped and strengthened. The Amsterdam amendments, subject to some limited changes by the Treaty of Nice, in particular regarding the role of Eurojust and enhanced cooperation, form the basis of the institutional framework of the third pillar pre-Lisbon.

Another important development following the Amsterdam Treaty was the incorporation of the Schengen acquis into the then European Community Treaty. The institutional developments in the third pillar brought about in Amsterdam must be taken in the context of the express reference to the development of the Union as an AFSJ as a Union objective. The inclusion of this objective, which is also visible in both Title IV of the EC Treaty and Title VI of the EU Treaty (the remaining third pillar dealing with criminal matters), is significant in that it forms the framework within which EU action on justice and home affairs, including criminal law, are interpreted. Intergovernmental elements in the third pillar remained in Amsterdam, although the role of the Union institutions was, in general, enhanced in comparison with Maastricht. With regards to decision making, unanimity in the Council remains for the vast majority of third pillar law. The European Parliament, while in an enhanced position in comparison with Maastricht, continues to have an extremely limited role. The European Parliament is merely consulted in the adoption of framework decisions, decisions and conventions. This means that the Member States retain considerable leverage in this area and hence the Member States are firmly in control of the evolution of European criminal law.

To the above discussion, one can add that the Amsterdam Treaty also included a passerelle provision,[2] reformulated so that the Council may decide unanimously after consulting the European Parliament to transfer action in the areas mentioned in Article 29 TEU to Title IV of the EC Treaty. The Commission, which has also embarked on a series of court challenges contesting the legality of the choice of third pillar legal basis for EU criminal law harmonization instruments, proposed the use of this provision after the rejection of the Constitutional Treaty. The Constitutional Treaty had largely abolished the third pillar and had hence communitarized criminal matters. This concept was then taken up by the Lisbon amendments.

1.3 EUROPEAN CRIMINAL LAW AFTER THE LISBON TREATY

The Lisbon amendments that entered into force in December 2009 finally brought about the communitarization of the remaining third pillar by abolishing the pillar structure in the amended European Community Treaty, now renamed Treaty on the Functioning of

2 *See* Article K9 of the Maastricht Treaty.

the European Union (TFEU). This is what governs European criminal law today. Article 67 TFEU – which is the article which opens Title V – establishes the main goals of the Union regarding the area of freedom, security and justice. This article establishes that the Union shall be an area of freedom, security and justice to ensure a high level of security by combating and preventing crime. In attempting to reach such an aim, the Union shall implement measures for cooperation between police and judicial authorities as well as adopt the principle of mutual recognition for criminal judgments.

The main legal base is Article 82 TFEU, which deals with criminal procedure. Under this article, a distinction can be drawn between paragraphs 1 and 2. Under Article 82 paragraph (1), the legislator establishes that cooperation in the criminal law field shall take place using mutual recognition between judges[3] and through the approximation of laws of the Member States. It shall be ensured that judgments are recognized throughout the Union and that jurisdictional conflicts between the Member States are circumvented. Under the second paragraph, the Treaty speaks about particular procedures which take place during a specific trial and the Union is given the competence to adopt minimum rules[4] on the rights of the individual during the criminal procedure, the rights of victims and the admissibility of evidence.

In an attempt to make clear what 'minimum rules' are, the third subparagraph of paragraph 2 talks about the fact that the Member States are prohibited from adopting legislation which affords less protection to the individuals than that prescribed in the minimum rules themselves. However, this does not impede the Member States from imposing standards which go beyond the minimum established by the Union. In adopting these minimum rules, national legal traditions and systems are to be taken into consideration. The most stringent requirement of them all is that the minimum rule is to be undertaken only "to the extent necessary to facilitate mutual recognition of judgments and judicial decisions ... with a cross border dimension",[5] as much research would have to be conducted in satisfaction of the fact that it truly is essential to promote the mutual recognition of judgments.

Article 82(2) TFEU is subject to what is commonly called 'the emergency brake procedure';[6] nevertheless, if there are at least nine Member States which still want to push the draft directive to success, this can be done using enhanced cooperation.[7] Given that matters which fall within the scope of paragraph 2 of Article 82 TFEU are

3 Article 82 TFEU is to be contrasted with Article 74 TFEU which regards cooperation between civil servants rather than between judges.

4 The 'minimum rules' are the main elements which are to be adopted by the European Parliament and the Council by means of the ordinary legislative procedure.

5 Article 82(2) TFEU.

6 The 'emergency brake' illustrates a practical example where the Union strikes a balance between wanting to work efficiently yet it also leaves room for the interests of the Member States. In this case, the 'emergency brake' can be made use of when the draft directive according to Article 82(2) goes against the Member State's criminal justice system.

7 Enhanced cooperation is found in Articles 20(2) and 329(1)TFEU.

subject to the emergency brake, it is to be distinguished from paragraph 1 of this same article which does not allow for the emergency brake procedure. The first thing to point out is that paragraph 1 speaks of *'measures'* while paragraph 2 mentions *'directives'* to be adopted to facilitate judicial cooperation in criminal matters. Paragraph 1 establishes that the principle of mutual recognition is the basic principle for judicial cooperation in criminal matters. On the other hand, paragraph 2 provides the procedure as to how mutual recognition of judgments is to be made easier, i.e., through the adoption of minimum rules. Also, measures adopted under paragraph 1 to facilitate cooperation between judicial authorities of the Member States do not deal with the substantive aspect of the procedural laws as this falls under paragraph 2. Paragraph 1 is the legal basis upon which the European Evidence Warrant (EEW)[8] has been adopted, because the EEW speaks of the transfer of evidence and not the admissibility of evidence. The same line of thought follows for the European Arrest Warrant (EAW)[9] which speeds up the process of arresting the person in the executing Member State and surrendering him to the issuing state; freezing orders;[10] the mutual recognition of financial penalties and confiscation orders;[11] the transfer of prisoners; the mutual recognition of criminal sentences; prior convictions and probation and pre-trial orders; mutual assistance and the transfer of information relating to criminal records.

Article 83 TFEU deals with substantive criminal law where European Union intervention is unrelated to mutual recognition. Instead, this article creates two legal bases by providing a division between core and traditional criminal law and furthermore, it gives reasons why the approximation of criminal laws is essential at the Union level, namely due to having a cross-border dimension, the nature or impact of such offences and the particular need to combat crimes on a frequent basis.[12]

Under Article 83(1) TFEU, harmonization will take place to adopt minimum rules[13] – through the ordinary legislative procedure – concerning the definition of certain

8 Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters [2008] OJ L350/72.

9 European Arrest Warrant Decision.

10 Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence [2003] OJ L196/45.

11 Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties [2005] OJ L76/16.

12 Article 83 TFEU.

13 Hans G. Nilsson, 'How to Combine Minimum Rules with Maximum Legal Certainty?' (2011) 14 *Europarättslig Tidskrift* 665, 669 'minimum rules' are described as a decision *'on the constituent elements of a criminal conduct'* which shall have a harmonizing and unifying effect.

offences and sanctions[14] "of particularly serious crimes". The rationale for providing an exhaustive list of these crimes is that the latter have a cross-border element and are severe enough that require the intervention of the Union to be combated against on common ground. Such crimes are money laundering, corruption, computer crime, organized crime, terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drugs trafficking and illegal arms trafficking.[15]

By Article 83(2) TFEU,[16] if it is proved that the approximation of national criminal laws is essential for there to be the effective implementation of Union policy, then directives establishing minimum rules as to the definition and sanctions of crimes which do not fall under paragraph 1 shall be adopted. Thus, a separate legal basis is provided for the adoption of traditional criminal law under Article 83(2) TFEU. For there to be the adoption of a directive under Article 83(2) TFEU, three requirements need to be satisfied, namely two procedural and a substantive one. For the procedural requirements to be satisfied, there has to be the previous harmonization in the policy field within which the Union intends to criminalize, and the directives have to be adopted using ordinary or extraordinary legislative procedure.

A difference that can be pointed out between these two subparagraphs is that paragraph 1 gives a list of the crimes which fall within its scope and therefore, it can be argued *a contrario sensu*, that subparagraph 2 of Article 83 TFEU is not limited in scope to some crimes, as if this were to be the case, then once again the legislator would have provided a list. The relationship between these two paragraphs is that each paragraph is to be regarded as a *lex specialis* concerning the other paragraph, meaning that the scope of paragraph 1 could not be extended to cover those offences which fall within the scope of paragraph 2 of Article 83 TFEU and vice versa.[17] One thing in common is that both paragraphs envisage the adoption of minimum rules defining the sanctions that are to be applied to the crimes which fall within the scope of each paragraph.

The emergency brake is a procedure introduced by the Lisbon Treaty with the aim of keeping the interests of the Member States in the big picture and therefore, allowing the States to intervene and pull this brake if the measures adopted under Article 82(2) and Article 83(1)&(2) affect "fundamental aspects of its criminal justice system".[18] After pulling the brake, the draft directive is to be referred to the European Council, and in

14 The definitions of '*criminal offence*' and '*sanction*' are to be described in the particular directive adopted under Article 83(1) TFEU. When it comes to the definition of '*sanction*', the legislative capacity of the Union here is very wide as it can include a detailed article regarding the penalty imposed, dealing with – just to mention a few – imprisonment, the least number of years of imprisonment that a national court could impose, fines, community service, *etc.*

15 In giving an exhaustive list of crimes which need to fulfil certain requirements, the competence under the Lisbon Treaty is more restrictive when compared to the situation under the former third pillar. In fact, according to the TFEU, only these ten crimes are considered as being '*serious*'.

16 Article 83(2) TFEU is a new provision which was not to be found in previous treaties.

17 Steve Peers, 'EU Criminal Law and the Treaty of Lisbon' (2008) *European Law Review* 507.

18 Article 82(3) TFEU & Article 83(3) TFEU.

consequence, the ordinary legislative procedure would be frozen for a maximum of four months. Within four months of the draft directive having been referred to the European Council, the latter shall discuss the draft itself and the objection which pushed the Member States to actually pull the brake. It shall then either "terminate the suspension of the ordinary legislative procedure"[19] if consensus is reached with the consequence that the ordinary legislative procedure would carry on. However, it might be the case that there is disagreement in the Council and there are not at least nine Member States which wish to further the draft proposal using enhanced cooperation, which would result in the draft proposal being suspended indefinitely. If on the other hand, there is disagreement, but there is a minimum of nine Member States which wish to carry on with the draft directive using enhanced cooperation,[20] the Member States concerned shall inform the European Parliament, the Commission and the Council. This does not mean that the latter nine or more Member States are free to adopt any measure, meaning they cannot cooperate beyond the scope of the draft Directive because the Treaty does not give a free hand. Moreover, the Member States which wish to join the enhanced cooperation at a later date are allowed to do so, as long as the measures adopted are the ones which would have been taken up within the framework of enhanced cooperation.

The emergency brake needs to be differentiated from those instances in Article 86 TFEU and Article 87(2) TFEU where enhanced cooperation can still be taken up by at least nine Member States following that unanimity is not reached in the Council. In the last two articles, it is not stated as to why the representatives of the Member States in the Council would have vetoed the measures in question. To this extent, it can be stated that a veto can be availed of by the Member States without any particular reason. On the other hand, the emergency brake as mentioned under Articles 82(3) and 83(3) TFEU can only be employed if the draft directive necessarily affects the criminal justice system of that particular state.

The emergency brake should be used with caution in the sense that the Member States should take into account not just their national criminal justice systems but also that such a procedure will ultimately lead to a fragmentation of the criminal justice policy at the Union level,[21] resulting in two parallel realities, because the draft adopted following enhanced cooperation would be applicable to those Member States which have actually taken the draft further, yet at the same time the European Union legal regime would be applicable to all of the Member States including those who adopted the draft via enhanced cooperation. This shows further the importance that the phrase "fundamental

19 *Ibid.*

20 For further information on 'enhanced cooperation' refer to Articles 329, 330, 331 TFEU.

21 Maria Fletcher and Robin Lööf with Bill Gilmore, *EU Criminal Law and Justice*, Edward Elgar, Cheltenham, 2008, p. 42.

aspects of its criminal justice system"[22] is not interpreted too widely because this could stifle progress.

Crime prevention has been taken to a different level with the coming into force of the Lisbon Treaty due to a new legal basis – Article 84 TFEU – which exclusively deals with the prevention of crime to the exclusion of harmonization of laws of the Member States. Such an article aims to combat crime even before it takes place as this proves to be more effective. By Article 84 TFEU,

> The European Council invites the Member States and the Commission to actively promote and support crime prevention measures focussing on prevention of mass criminality and cross border crime affecting the daily life of our citizens.[23]

Moreover, the European Council invites for there to be a proposal for the setting up of the Observatory for the Prevention of Crime whose tasks would be to

> collect, analyse and disseminate knowledge on crime, including organised crime (including statistics) and crime prevention, to support and promote Member States and Union institutions when they take preventive measures and to exchange best practice.[24]

The work carried out within the European Crime Prevention Network should be used by the Observatory for the Prevention of Crime.

The Lisbon Treaty provides for the first time a legal basis – Article 86 TFEU – upon which the European Union can set up the European Public Prosecutor's Office (EPPO) using regulations to combat "crimes affecting the financial interests of the Union".[25] Thus, it can be stated from the outset that the European Public Prosecutor will deal with crimes *against* the Union and not necessarily any crime which is committed *within* the Union. The regulations that shall be adopted shall determine

> the general rules applicable to the European Public Prosecutor's Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of

22 Articles 82(3) TFEU & Article 83(3) TFEU.

23 The Stockholm Programme – https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010XG0504(01)&from=EN, accessed 15 July 2019.

24 *Ibid.*

25 Article 86(1) TFEU.

> evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions.[26]

However, no clue is given as to how these issues will be regulated. The creation of the Office of the European Public Prosecutor shall take place using the special legislative procedure,[27] i.e., in this field, the Union has retained unanimity. However, in the case that consensus is not reached, a possibility is provided for the adoption of the Office through enhanced cooperation if at least nine Member States agree to the latter's establishment.

Following the Lisbon amendments, Article 86 TFEU, the competences of the European Public Prosecutor shall be to investigate, prosecute[28] and bring to justice the perpetrators of, and accomplices in, offences against the Union's financial interests. Also, paragraph 2 gives the power to the European Public Prosecutor to choose the forum where the proceedings will take place. This choice of forum has to be a competent court of the Member States. Paragraph 4 of Article 86 TFEU provides for the possibility of an extended jurisdiction of the European Public Prosecutor – to be arrived at unanimously – to cover not only "crimes affecting the financial interests of the Union", but also "serious crime having a cross-border dimension". It follows therefore, that the mandate of the European Public Prosecutor is broad; however, this, in turn, raises some questions as to whether this extension of jurisdiction can take place when the Office of the European Public Prosecutor would have been established by all of the Member States, yet only a small group of the Member States wish to extend the powers of the office in question. This would result in a two-speed office. Secondly, could such extension take place when the European Public Prosecutor would have been established using enhanced cooperation?

Finally, one can also make reference to Article 325 TFEU which does not fall under the chapter on judicial cooperation in criminal matters, account of which is still to be taken because through such an article, the Union is given an unprecedented legal basis to adopt measures to deter and counter fraud and any other illegal activities which affect the Union's financial interests. Through the use of the words "act as a deterrent",[29] "prevention of and fight against fraud"[30] and "effective and equivalent protection" it can be realized that the inclination of this article tends towards criminal law, for these

26 Article 86(3) TFEU.
27 Article 86(1) TFEU.
28 It is indicative that the European Public Prosecutor has the final decision as to whether to prosecute the offence or not.
29 Article 325(1) TFEU.
30 Article 325(4) TFEU.

concepts are used in the latter's field. Thus, the main aim of this article is the protection of the Union's money through the adoption of criminal law.[31]

It seems that the legislator here has enacted a dovetailed action because, at a national level, Member States are to fight fraud against the Union's financial interests in the same way as they would fight it if it were affecting their national financial interests. This is called the 'assimilation principle'. Secondly, the European Parliament and Council shall legislate against fraud to prevent and combat it. Thus, it can be stated that Article 325 TFEU is a legal basis for the harmonization of criminal law both of the national and European level as long as the measures adopted prevent and fight fraud that affects the financial interests of the Union.

The fact that Article 325 TFEU is constituted as the provision which deals with the financial interests of the Union automatically makes it distinct from Article 83 TFEU because there need not be the conditions that the crime has to be serious with a cross-border element. Also, it slips from the emergency brake procedure, thus allowing for a greater success of the adoption of the measure. In conclusion, the potential of such an article is very beneficial for the fight against European Union fraud, especially because if it is combined with Article 86 TFEU, it would enhance the European Public Prosecutor's scope.

1.4 The Role of the CJEU

As the legal basis of the third pillar is mainly intergovernmental, the EU's institutions, in general, play a limited role in the evolution of European criminal law. One of the most significant limitations is the Commission's power to institute infringement proceedings against the Member States. The role of the CJEU has been strengthened in comparison with Amsterdam but remains subject to significant limitations. The Court's third pillar jurisdiction is delineated by Articles 46(b) and 35 TFEU.[32] The Court does have jurisdiction to give preliminary rulings on the validity and interpretation of framework decisions and decisions on the interpretation of conventions and on the validity and interpretation of the measures implementing them. However, such jurisdiction is subject to acceptance by the Member States and not all Member States have declared acceptance so far. Before Lisbon, there were also limitations in cases of preliminary reference; however, now Article 267 TFEU also applies to these legal bases discussed earlier on in this paper. The court has jurisdiction to review the legality of union law on the grounds of lack of competence, infringement of an essential procedural

31 In fact, Article 325 TFEU serves as a legal basis for the Commission, 'On the fight against fraud to the Union's financial interests by means of criminal law' (Proposal) COM (2012) 363/2 final.

32 A. Arnull, 'Taming the Beast? The Treaty of Amsterdam and the Court of Justice', in O'Keeffe and Twomey (eds.), *Legal Issues After Amsterdam Treaty*, OUP, Oxford, pp. 109-122.

requirement, infringement of the Treaty or any rule of law relating to its application or misuse of powers. The standing is however limited to the Member States, the European Commission, the Council of Ministers and the European Parliament under Article 263 TFEU.

Although the CJEU has limited jurisdiction, there have been some landmark judgments that have helped shape European criminal law. The leading judgment is the case of *Pupino* dealing with the doctrine of direct effect in this area of law.[33] For the first time, the CJEU has confirmed that EU framework decisions can be applied in national criminal courts. On 16 June 2005, the CJEU issued a groundbreaking judgment stating that a Council framework decision concerning police and judicial cooperation in criminal matters must be respected in a national criminal court case. The case before the Court concerned an Italian nursery school teacher accused of maltreating her five-year-old charges. Under Italian law, there was no procedure allowing the young victims to give evidence in private – they would have to appear before the full court (except in sexual offence cases). However, an EU framework decision does provide for special procedures for the protection of minors in such a case.

Under the EU Treaty, framework decisions adopted under the third pillar have no direct effect, i.e., they cannot usually be directly invoked by individuals in national courts. However, the CJEU pointed out that framework decisions are 'binding' on Member States in that they have a bearing on the interpretation of national law. The CJEU went on to say that, in this case, "the Italian court is required to interpret (national law) as far as possible in a way that conforms to the wording and purpose of the framework decision". In this case, this meant allowing vulnerable victims to be protected when giving testimony.

The above shows that the CJEU, in spite of its limited jurisdiction, can still play an essential role in the evolution of European criminal law. It is also respectful of the degree of integration that states signatory to the Amsterdam treaty wished to achieve in criminal matters. Through court activism, the CJEU design dissociates the envisaged degree of integration in Amsterdam from the needs to ensure the effective achievement of Union objectives. This is an example of how the CJEU continues to play an important role in the evolution of this field.

1.5 The Concept of Mutual Recognition

The concept of mutual recognition has been primarily adopted and used in the Internal Market as an integration tool. Because it proved to be fruitful, it is now the cornerstone

33 Judgment of the Court (Grand Chamber) of 16 June 2005. Criminal proceedings against Maria Pupino. Reference for a preliminary ruling: Tribunale di Firenze – Italy. Police and judicial cooperation in criminal matters – Articles 34 EU and 35 EU – Framework Decision 2001/220/JHA – Standing of victims in criminal proceedings – Protection of vulnerable persons – Hearing of minors as witnesses – Effects of a framework decision. Case C-105/03. Reports of Cases 2005 I-05285.

principle in the area of freedom, security and justice – another area of integration. The principle of mutual recognition derives from the idea of a common area of justice encompassing the territory of the Member States of the Union, within which there would be free movement of judgments. More concretely, it signifies that when a decision has been handed down by a judicial authority which has competence under the law of the Member State in which it is situated, by the law of that State, the decision becomes fully and directly effective throughout the territory of the Union. The competent authorities in the Member States in the territory where the decision may be enforced have "to assist in the enforcement of the decision as if it were a decision handed down by a competent authority in that State".[34]

With the application of mutual recognition, judges are put at the centre stage because they are granted further enforcement capacity of judgments, orders and warrants which have been handed down by a national judicial authority other than the one in which recognition is sought, with limited grounds for refusal of enforcement. In simpler words, mutual recognition of sovereign acts implies that the requested Member State is obliged to accept another Member State's judgments as if they were delivered by the former Member State's courts and even further, enforce such judgments. This way, judgments take effect in the Member States other than the one in which they were delivered.

The European Commission recognizes that mutual recognition is to be achieved using trust[35] and approximation of national laws. Mutual trust implies that the requested state has confidence that the delivered judgment complies with the law and respects individual's rights while on the other hand, the requesting state trusts that the judgment will be executed correctly. In a remark on mutual trust between the Member States, the European Court of Justice stated that:

> the [Member] States have mutual trust in their criminal justice systems, and each of them recognises the criminal law in force in the other [Member] States even when the outcome would be different if its own criminal law were applied.[36]

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34 Council of the European Union, 'Evaluation report on the fourth round of mutual evaluations "Practical application of the European Arrest Warrant and corresponding surrender procedures between Member States" report on Belgium' No. 16454/2/06, www.asser.nl/upload/eurowarrant-webroot/documents/cms_eaw_id1358_1_CouncilDoc.16454.2.06%20Rev%202.pdf, accessed 15 July 2019.

35 Commission, 'Mutual Recognition of Judicial Decisions in Criminal Matters and the Strengthening of Mutual Trust between Member States' (Communication) COM (2005) 195 final, 6.

36 Joint Cases C-187/01 and C-385/01 *Oberlandesgericht Köln (Germany) and the Rechtbank van eerste aanleg te Veurne (Belgium) v. Gözütuk and Brügge* [2003] ECR I-1378, para. 33.

From this, it follows that the most significant consequence mutual recognition has had is that legislative divergences between the Member States are not seen any longer as a form of hindrance. On the contrary, there is a common area of enforcement.

Nevertheless, it is to be pointed out that states have surrendered part of their sovereign power when dealing with the implementation of decisions within their territory. In fact, those that oppose the introduction of mutual recognition in the criminal law field argue that this principle causes problems at a constitutional level due to the well-known maxim *nullum crimen sine lege*, yet there is a list of 32 offences which does not admit the dual criminality principle[37] and thus the executing Member State still has to surrender or arrest the person even though under its national laws, no crime would have been committed. Moreover, the reason that mutual recognition should be dealt with caution is that it could lead to an opposite scenario where any judgment, decision or order which is coming from any one of the other Member States has to be accepted when it might be the case that it should not be accepted unless specific requisites comply.

Finally, mutual recognition is to be contrasted to the principle of cooperation between states. The principle of cooperation entails that a state is requested to assist another state with an aspect of the latter's criminal justice system. The requested state's decision to assist the other state depends on its justice system, although refusal for such cooperation has been limited using treaties. However, with mutual recognition, the decision taken by the issuing state is enforced in the requested state's legal system.

A form of ranking between the mutual recognition and approximation of laws was introduced in the Hague Programme,[38] where it was stated that approximation of laws is to be used to ensure mutual trust and mutual recognition of judicial decisions and judgments. The Stockholm Programme establishing that once again followed this reasoning:

> Further action is needed on the closer alignment of substantive law in relation to certain serious crimes, generally of cross-border nature, which requires common definitions and penalties. Alignment[39] here will help to extend mutual recognition and, in some cases, almost completely abolish the grounds for a refusal to recognise other Member States' judgments,[40]

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37 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States [2002] OJ L190/1 (European Arrest Warrant Decision), Article 2(2).

38 Council, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union [2005] OJ C53/1.

39 In accordance with Nadja Long, 'Harmonisation of Substantial Criminal Law in the European Union – The concepts of "serious crime" and "particularly serious crime"' (2011) 18(1) *Law and European Affairs* 159, 161; although the word 'alignment' has been used here, it is to be taken to mean 'approximation'. 'Alignment' has only been used in the Stockholm Programme.

40 Commission, 'An Area of Freedom, Security and Justice Serving the Citizen' (Communication) COM [2009] 262 final.

which in turn confirms what has been primarily established under the Tampere Programme. Thus, an approximation of laws is a tool which should facilitate the better functioning of mutual recognition.

1.6 Conclusion

Looking at EU criminal law, one is faced with a significant body of law that is surely affecting most aspects of criminal justice. A starting point for any inquiry into the nature of EU criminal law must be by looking at the existing legal framework. Even though the Member States may have failed to consider the potential theoretical and conceptual implications of their actions, this does not rule out the possibility that these actions have, in effect, resulted in the reconceptualization of criminal justice. Therefore, a question that may be asked is whether, as a result of the significant acquis of the AFSJ, we are now faced with the *de facto* reconceptualized pan-EU system of criminal justice. If the legislator fails to provide the theoretical context, such a context needs to be deduced from the legislation itself. The case studies provided later on in this work will serve as examples of how EU criminal law is being implemented in this context in the selected Member States.