Chapter 10

The Emergence of European Criminal Law in Relation to the European Union Development

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Abstract

EU law has expanded beyond the economic issues related to the internal market's establishment and functioning. With successive treaty reforms, it now covers rules that were once reserved for national states, such as criminal law. Additionally, mechanisms aimed at strengthening the uniform application of EU law at the level of the Member States, where political consensus is difficult to attain, have been applied. The EU's involvement in criminal law has posed significant challenges and tensions over time. However, the creation of criminal laws is the most significant evidence of EU autonomy. Progressively, both at a political and a regulatory level, and with the consistent involvement of the European Court of Justice, a convergence has been achieved, adding new elements for the unification of criminal law in the EU. General principles like mutual trust, supported by an enhanced activism of the ECJ in the promotion and protection of the values that establish the constitutional core of the EU, is seen as the strongest engines of development in recent years. This has led to extensive amendments in the criminal regulations in the MS. After discussing the milestones of the evolution of European criminal law (history, regulation, institutions), the analysis focuses on the principles of mutual recognition, mutual trust, sincere cooperation, the effectiveness of EU law in protecting the Union's financial interests, and their roles in the construction of the EU's legal order. Distinct references will be made to the latest developments determined by preliminary referrals of the Romanian Courts.

Keywords: European criminal law, European Union, mutual trust, mutual recognition, Cooperation and Verification Mechanism

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1. Introduction

Legal integration, as a complex dimension of the European Union (EU) development, largely depends on the nature and scope of legal norms. Some areas of regulation, such as criminal ones, raise more sensitive issues by approaching or even identifying with the core of national sovereignty. Moreover, developments in these areas are significant for the future of the EU as a structure of states. From this perspective, the branch of criminal law and the emergence of European criminal law deserve to be carefully pursued, since, as it was shown, 'it represents high constitutional significance for the EU, and it can potentially act as an intriguing laboratory for EU constitutionalism'.[1] That is why we choose this dimension of analysis, focused not so much on the development of criminal law institutions themselves, but on the constitutional significance of the emergence of European criminal law.

Over time, EU's involvement in criminal law has led to significant challenges and tensions: 'the emergence of European criminal law is a product of debate and crisis. Its creation is a reaction to perceived security risks, rather than anything else – provision of security having been the driver in the creation of European criminal law'.[2] In fact, when the convergent interpretation of criminal law institutions at the European level was sustained, the citizen and his need to be defended against such crises, as well as cross-border crime, was brought up as an argument. According to the European Commission, the increasingly uniform treatment at EU level thus appears justified by the fact that it

> can tackle gaps and shortcomings wherever EU action adds value. In view of the cross-border dimension of many crimes, the adoption of EU criminal law measures can help ensuring that criminals can neither hide behind borders nor abuse differences between national legal systems for criminal purposes.[3]

As a result, the context of the evolution of European criminal law was often turbulent, against the background of events that marked humanity not only regionally but also globally, such as terrorist attacks. A recent example is the war in Ukraine, which led to the expansion of the Eurojust's mandate, motivated by the need to strengthen its cooperation with the courts and criminal mechanisms, established in order to settle situations where international law is violated.[4]

The evolution of European criminal law is complicated by the sensitive issue of the relationship between the European Court of Justice (ECJ) and national constitutional courts (CCs). The national courts are hesitant to accept the new reconsiderations of national sovereignty that a supranational criminal law implies. In addition,

1 Wieczorek and Vavoula, 2015, pp. 5–7.
2 Fichera and Kremer 2013, cited in Nuotio, 2014, p. 1121.
3 European Commission, COM/2011/0573.
4 See EU Regulation 2022/838, pp. 1–5.

the intrusive nature of criminal law norms raises concerns about guaranteeing fundamental rights and freedoms, as well as the interaction between the multiple spheres of protection and the courts at different levels. For the development of the EU, it would be a significant step to harmonise criminal legislation, which would eliminate or at least reduce the disputes that still exist concerning the differences in standards of protection of fundamental rights at national, supranational, and international levels.

This field's complexity is reflected in its definition and normative framework set by both the EU and Council of Europe. Thus, European criminal law was suggestively characterised[5] as

> a kind of umbrella concept covering all those norms and practices of criminal law and criminal procedural law based on the provisions and actions of the EU (European law in the narrow sense) and of the Council of Europe (European law in a broad sense), and leading (or intending to lead) to the extensive harmonisation of national criminal (and criminal procedural) law.

It is a specific configuration, a veritable "amalgam" of criminal rules, complicated and sometimes "convulsive" in terms of how each of the EU Member States (MS) accepts European law in a broad sense. There is still no codification of criminal law on the model of the MS, but a sphere of specific legal rules, both substantive and procedural, in a continuous process of reconfiguration, with the particularity given by the interference of different law systems and legal orders. This process of "normative Europeanisation" goes "hand-in-hand" with institutionalisation, namely the establishment of specialised European institutions in the field. It follows that, at this moment, we can identify a European criminal law that includes norms of substantive, procedural, institutional and international cooperation law, on two levels, corresponding to a "broad approach" (in the meaning of substantiation on "the provisions and actions of the EU and of the Council of Europe") and a "narrow approach" (only the "provisions and actions of the EU").

In our study, we will mainly refer to the narrow understanding of European criminal law (the provisions and actions of the EU), also taking into account the importance of the role of the national Courts and the European Court of Human Rights (ECtHR) in terms of guaranteeing the standards of protection of fundamental rights. From this perspective, it is relevant to discuss European rules that impose sanctions applicable in all EU Member States (MS), procedural rules, namely institutions and instruments whose purpose it is to ensure the effectiveness of prosecution and criminal sanctions in Europe, and provisions from national law that are influenced by European law (Europeanisation of criminal law). Given the tectonics of the acceptance of European criminal law by the MS and, in this light, the integrative role of the ECJ, the "core" of principles that coagulate and gradually order the autonomous

5 Ambos, 2018, p. 14.

legal order of the EU as a structure of States are highly relevant. Thus, after marking some milestones of the evolution of European criminal law (history, regulation, institutions), we will focus on the analysis of the principles of mutual recognition, mutual trust, the effectiveness of EU law in protecting the Union's financial interests, and their role in the construction of the legal order of the EU, with particular reference to the latest developments in the matter, determined by preliminary referrals of the Romanian Courts.

2. A historical and general insight

2.1. A "prehistory": European criminal law before the Treaty of Lisbon

After examining the Founding Treaties and their successive amendments, it can be observed that the creation of the first European Community (CEEC) on signing the Treaty of 18 April 1951, in Paris, and the establishment of the European Economic Community (EEC) and the European Atomic Energy Community (CEEA) on signing the Treaty of 25 March 1957, in Rome, along with the entry into force of the Single European Act (SEA) on 1 July 1987, were significant steps in establishing the general institutional framework of the EU. These steps also played a crucial role in the onset of European criminal law. During the reference period, various actions were taken to provide direction and meaning in this field, and these actions were reflected in programs, action plans, and roadmaps. These initiatives formed the basis for the subsequent amendments to the Treaties and the current framework of the European legal order.

Thus, a significant moment in the "prehistory" of European criminal law was the establishment in 1975 of the Trevi Group,[6] an intergovernmental network of representatives of the Ministries of Justice and Home Affairs, to coordinate the fight against terrorism. In 1985, its mandate was expanded to include serious international crimes such as drug trafficking, bank robbery and arms trafficking.[7] According to the doctrine,[8] which emphasises the importance of this moment, Trevi became a kind of organisational platform for the third pillar established by the Maastricht Treaty.

During that period, one of the most ambitious projects was the establishment of an internal market allowing for the free movement of people. This was made possible by the signing of two agreements – the Schengen Agreement of 14 June 1985 and the Convention for the Implementation of the Agreement, which was signed on 19 June 1990 and came into effect on 26 March 1995. To enable the free movement of

6 Terrorism, Radicalism, Extremism, Political Violence.
7 Graig and de Burca, 2017, p. 1088.
8 Harding, 2015, pp. 835–865.

people within the signatory states, common rules were adopted for visas, the right to asylum, and checks at external borders.[9] The freedom of movement thus established was accompanied by so-called "compensatory" measures, which entailed improving cooperation and coordination between the police and judicial authorities, to ensure internal security and, in particular, to fight organised crime.[10]

The Maastricht Treaty (TMs) was enforced on November 1st, 1993, and marked significant progress in the field. The treaty brought about the creation of a single structure, the European Union, based on three pillars: the European Communities (also known as the community pillar), the Common Foreign and Security Policy (CFSP), and Cooperation in the area of justice and home affairs (JHA). The original form of the Justice and Home Affairs pillar, Article K1-K9 of the Maastricht Treaty, regulated policies such as asylum, rules regarding the crossing of external borders, immigration, a policy for nationals of third countries, judicial cooperation in civil and criminal matters, combating drug addiction, customs cooperation, police cooperation to prevent and combat terrorism, drug trafficking and other serious forms of international crime. The establishment of a European Police Office (Europol) was regulated for the exchange of information. However, in terms of the decision-making process within the third pillar, it was more intergovernmental and less supranational.[11]

The Treaty of Amsterdam, entered into force on May 1st 1999, significantly modified the third pillar, paving the way for a progressive development of general criminal law and criminal procedure within the process of European integration. Thus, the third pillar of the JHA, renamed judicial and police cooperation in criminal matters, was partially transferred to Pillar I, the field of visas, asylum and citizenship, being incorporated into Title IV ECT, the rest of the provisions being subject to institutional reviews closer to those from the community pillar. Under these conditions, pillar III has become the most dynamic field of the EU. The Treaty of Amsterdam brought new effective legislative instruments leading to better coordination between national legislations, the most important of which is the framework decision (as main normative instrument in the field of criminal law before the entry into force of the Treaty of Lisbon). A significant step was the integration of the Schengen *acquis* (the Schengen Treaties, Accession Agreements, decisions and declarations of the Executive Committee), in the form of a Protocol annexed to the Treaty.

The Treaty of Nice, entered into force on February 1st 2000, made further amendments to the third pillar. A formal legal basis was created for Eurojust, which according to Article 32 (2) TEU, "is enabled to facilitate proper coordination between Member States' national prosecuting authorities". The treaty amended the enhanced cooperation with the purpose of enabling the Union to develop more rapidly into an

9 See: Schengen Area and Cooperation, 2023.
10 EC Regulation No 1987/2006.
11 Craig and Burca, 2017, p. 1089.

area of freedom, security and justice, while respecting the powers of the European Community.

The Convention for the Future of Europe had a notable contribution to the development of substantive, procedural, and institutional criminal law. Within Working Group X, "Freedom, Security and Justice", it was recommended to encompass the third pillar into the main body of the Treaties and separate regulations in substantive criminal law and criminal procedure matters.[12] The Working Group recommended that certain areas of substantive criminal law be approximated, which could be achieved by including a legal base in the new Treaty that would permit the adoption of minimum or common rules on the constituent elements of criminal acts and penalties in certain fields of crime. It was also suggested that the types of crime considered to have a transnational dimension be enumerated in the Treaty, and that an approximation of substantive criminal laws be carried out only through directives (or their successor). The Working Group recognised the need for approximation of some aspects of criminal procedure, which is widely acknowledged by practitioners and considered more urgent than the approximation of substantive criminal law. Such procedural approximation can facilitate the collaboration between law-enforcement agencies of the Member States and the Union bodies acting in the field, and the application of the principle of mutual recognition, as well as strengthening mutual confidence. Strengthening the operational cooperation was also a point of the discussions. Even though the European Constitutional Treaty project failed, these recommendations were partially implemented by the Treaty of Lisbon, signed in 2009, which brought significant amendments to the regulation of freedom, security, and justice.

It should be mentioned that for the same period, as complementary efforts to the amendment of the Treaties, policies were articulated in the field, such as the successive 5-year programs adopted at the European Council in Tampere, Hague, and Stockholm, which set targets for legislative actions.

Thus, according to the Tampere Program (15-16 October 1999) devoted to the establishment of an area of freedom, security and justice in the EU,[13]

> People have the right to expect the Union to address the threat to their freedom and legal rights posed by serious crime (…) The joint mobilisation of police and judicial resources is needed to guarantee that there is no hiding place for criminals or the proceeds of crime within the Union.[14]

The Tampere European Council of 1999 established 'the first multiannual policy framework for justice and home affairs'.[15] Over the next five years, the foundations were laid for a common asylum and immigration policy, namely, the harmonisation

12 CONV 426/02.
13 Calderoni, 2010, p. 14.
14 European Parliament, 1999.
15 Commission of the European Communities, 2009.

of border checks, and closer police and judicial cooperation based on the principle of mutual recognition and trust.

The terrorist attacks in New York in 2001 and in Madrid in 2004, the pressure caused by the intensification of migration flows, and the increase in the threat from organised crime have emphasised the need at European level to have a permanent strategy to respond to cross-border challenges, maintaining at the same time the fundamental rights of citizens in full. The Hague Program – strengthening freedom, security and justice in the EU, and adopted by the European Council in 2004, represented the EU's response to this need, having the following objectives:

> to improve the common capability of the Union and its Member States to guarantee fundamental rights, minimum procedural safeguards and access to justice, to provide protection in accordance with the Geneva Convention on Refugees and other international treaties to persons in need, to regulate migration flows and to control the external borders of the Union, to fight organised cross-border crime and repress the threat of terrorism, to realise the potential of Europol and Eurojust, to carry further the mutual recognition of judicial decisions and certificates both in civil and in criminal matters, and to eliminate legal and judicial obstacles in litigation in civil and family matters with cross-border implications.[16]

Through the Stockholm Program of 2009, entitled 'An open and secure Europe serving and protecting citizens', the priorities of the EU for the period 2010-2014 were established in the area of freedom, security and justice, namely the promotion of citizenship and fundamental rights, a Europe of law and justice, a Europe that protects, access to Europe in a globalised world, a Europe of responsibility, solidarity and partnership in migration and asylum matters, the role of Europe in a globalised world.[17] These priorities set by the Stockholm program are implemented through an action plan[18] which established a roadmap with the purpose of turning these political priorities into solid results.

Likewise, as regards the cooperation in criminal matters, we note the Prüm Treaty,[19] signed in 2005 by Belgium, Germany, France, the Netherlands, Luxembourg, Austria and Spain (to which Romania joined in 2008).[20] The signatory States, without prejudice to the provisions of the Treaty on the European Union and the Treaty establishing the European Community, intended that the adoption of this legal instrument

16 Ibid.
17 Stockholm Program, 2010.
18 European Commission, COM(2010) 171 Final.
19 Treaty of Prüm, 2007.
20 Law No. 146/2008.

> to play a pioneering role in order to reach the highest possible level of its own co-operation, primarily through a more improved exchange of information, carried out particularly in combating terrorism, cross-border crime and illegal migration, as well as to allow all other Member States of the EU to participate in this cooperation.[21]

In order to achieve this goal, the aim was to accelerate the exchange of information between the authorities of the member states, especially regarding genetic profiles (DNA), dactyloscopic data, vehicle registration data and other personal data.

This so-called "historical route map of criminal law"[22] shows that the structured framework that resulted from the Maastricht Treaty and continued until the Treaty of Lisbon played a significant role in shaping the current state of the field. The doctrine explains this structure, *inter alia*, by the highly fragmented nature of the policies that were included in the second and third pillars, as well as by the desire of States to have a certain degree of institutional cooperation in these areas – namely a common foreign, security policy and, justice and internal affairs – but which were not prepared 'for the entire supranational assembly of the community pillar',[23] preferring the implicit position of intergovernmentalism, in order to keep in this way the "maximum control in their own hands".[24]

2.2. The Treaty of Lisbon, a new framework for the development of European criminal law

The Treaty of Lisbon came into force on December 1st, 2009. It brought about changes in the European institutions and their working methods, while also reinforcing the democratic legitimacy of the Union and its fundamental values. According to the European Commission,

> even though the new legal framework does not fundamentally alter the possible scope of EU criminal law, it considerably enhances the possibility to progress with the development of a coherent EU Criminal Policy which is based on considerations both of effective enforcement and a solid protection of fundamental rights.[25]

Thus, the Treaty of Lisbon amended the provisions regarding the area of freedom, security and justice, abolishing some of the obstacles that hampered the development of this concept.[26] The mechanism of the three pillars has been replaced by a bipartite classification of competences (exclusive and shared). Any competence not conferred

21 Preamble to the Treaty.
22 Harding, 2015, p. 841.
23 Craigand de Burca, 2017, p. 1090.
24 Ibid.
25 See: European Commission, COM/2011/0573 Final.
26 Griller and Ziller, 2008, p. 58.

upon the Union by the Treaties belongs to the MS. The policy of freedom, security and justice (according to Article 4 TFEU) falls within the scope of shared competences, which allows the direct action of the Union in the national criminal policy, therefore establishing a European criminal policy. The Charter of Fundamental Rights carries particular importance, on which the Treaty of Lisbon has conferred a binding legal nature.[27] This lays down some important principles of criminal justice as the principles of legality and proportionality of criminal offenses and penalties (Article 49), or the right not to be judged or punished twice in criminal proceedings for the same offense (*ne bis in idem* principle, Article 50).

As for rules with a direct impact in the criminal field, the reorganisation of the EU by abolishing the pillared structure led to the disappearance of pillar III – Police and judicial cooperation in criminal matters, the substance of the matter being currently regulated in Title 5 TFEU, entitled Area of Freedom, Security and Justice, integrated into Part Three of the Treaty – Union policies and internal actions. This title comprises of four chapters, Chapter 1 – General provisions, Chapter 2 – Policies on Border Checks, Asylum and Immigration, Chapter 3 – Judicial Cooperation in Civil Matters and Chapter 4 – Judicial Cooperation in Criminal Matters, covering the most important rules for structuring European criminal law.

According to Article 67 of the TFEU, the Union is defined as 'an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States', established as objectives to ensure the absence of 'internal border controls for persons', to frame a common policy 'on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals', 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

to facilitate access to justice, 'in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters'.

Article 72 TFEU specifies that 'this Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'.

These texts were written in conjunction with those of Article 4 (2) TFEU, according to which the Union 'shall respect the equality of Member States in relation to the treaties, as well as their national identity, inherent in their fundamental political and constitutional structures, including in terms of local and regional autonomy', likely to outline the functions of the States as EU limits in police and judicial

27 See European Commission, COM (2010)573.

cooperation matters".[28] Therefore, respect for fundamental rights and the diversity of legal systems and traditions are emphasised, 'thus giving the protection of rights and legal diversity a safe place and a guiding role in the whole project of the area of freedom, security and justice'.[29] This accentuation is not without importance, and subsequent developments confirm it strongly in terms of promoting the concept of constitutional identity at the centre of the debates with reference to the relationships between the national legal orders and that of the EU.[30]

Chapter 4 – Judicial Cooperation in Criminal Matters enshrines the principle of mutual recognition of judgments and judicial decisions as a cornerstone in this field (a genuine "method of EU criminal law")[31] and establishes rules of substantive and procedural law in criminal matters.

As for the criminal procedure, its base is enshrined in Article 82 TFEU which lays down in paragraph (1) that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to:

> lay down rules and procedures for ensuring the recognition, throughout the whole Union, of all forms of judgments and judicial decisions;
> a) prevent and settle conflicts of jurisdiction between Member States;
> b) support the training of the judiciary and judicial staff;
> c) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.

Article 82(2) TFEU refers to procedural rules, enabling the European Parliament and the Council to adopt directives in order to establish minimum rules in accordance with the ordinary legislative procedure to the extent necessary of facilitating mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension. These rules shall concern:

a) the mutual admissibility of evidence between Member States;
b) the rights of individuals in criminal procedure;
c) the rights of victims of crime;
d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision. For the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.

28 Arnaiz and Llivina, 2013, p. 161.
29 Harding, 2015, p. 846.
30 For the "battles" around the meaning of the concept of constitutional identity, see Faraguna and Drinóczi, 2022.
31 Harding, 2015, p. 853.

Therefore, the competence of the EU in criminal procedure matters is limited by specific requirements, namely that the EU is empowered to: adopt only directives that establish minimum standards in the areas defined by the Treaty, take into account the legal traditions and systems of the Member States, allow the extension to other elements of the criminal procedure, which must be identified by the Council by decision, and adopted unanimously, following its approval by the European Parliament.

The competence of the EU to adopt rules of substantive criminal law is laid down in Article 83 TFEU. Thus, 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 crimes 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. These areas of crime are as follows: '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'. 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. It shall act unanimously after obtaining the consent of the European Parliament. Likewise, Article 83(2) lays down that

> 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.

Article 82 (3) and Article 83 (3) sets up a protection mechanism ("emergency brake")[32] for the MS, which can be used in the situation where they consider that the draft directives adopted according to Article 82 (2) or Article 83 would affect its criminal justice system. To the extent that the MS agree to make use of this mechanism, the ordinary legislative procedure shall be suspended, and after discussion, and in the case of a consensus, the European Council shall, within four months of the suspension, refer the draft back to the Council.

The same chapter covers rules regarding the institutional framework in criminal matters. Europol and Eurojust were reformed in order to make their activity more efficient and to be more operative in combating serious crimes affecting two or more MS or requiring a prosecution on common bases (Article 85 TFEU). In light of the investigation and prosecution components, the provisions of Article 85 (1) TFEU are significant, concerning the power of the European Parliament and the Council to adopt regulations by the ordinary legislative

32 See: Craig and de Burca, 2017, p. 1108.

procedure, to determine Eurojust's structure, operation, field of action, and tasks. Another essential institutional provision, laid down in Article 86 TFEU, provides the opportunity of establishing a European Public Prosecutor "to combat crimes affecting the financial interests of the Union". Thus, starting from Eurojust, the Council may issue regulations under a special legislative procedure to establish this new body. Likewise, Article 86 (1) sets up a special procedure, defined as an "emergency accelerator",[33] which permits, in the absence of unanimity in the Council, a group of at least nine Member States to request that the draft regulation be referred to the European Council. Article 86 (2) establishes the competence of the European Public Prosecutor's Office and Article 86(4) lays down the opportunity of the European Council to adopt

> a decision amending paragraph 1 in order to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension and amending accordingly paragraph 2 as regards the perpetrators of, and accomplices in, serious crimes affecting more than one Member State. The European Council shall act unanimously after obtaining the consent of the European Parliament and after consulting the Commission.

Although it may not be considered a codification of European criminal law as defined under the domestic law of the MS, the cited provisions highlight a significant aspect of supranational criminal law, both in terms of substantive and procedural matters. As for substantive criminal law, according to Article 83 TFEU, the European harmonisation of national criminal law is circumscribed to some sectors of its special part. The general part seems to be excluded from the scope of application of the criminal competence of the European Union, MS retaining their exclusive competence in this sector. However, the European harmonisation of domestic criminal law is also noticeable in its general part, a sense in which the ECJ proved to be a zealous architect in imposing the primacy of EU law. Consequently, the developments registered through and based on the Treaty of Lisbon justify the finding that European Criminal Law gradually takes place in the legal order of the EU, with a perspective of separate codification.

2.3. The way forward

2.3.1. Post-Lisbon legislative developments

The post-Lisbon period is marked by challenges, notably determined by the difficult acceptance of EU initiatives by the MS and the regulatory technique used to attain the EU's objectives in the field, namely the principle of mutual recognition, the "cornerstone" of developments in criminal matters.

33 Craig and de Burca, 2017, p. 1111.

In the 2011 European Commission Communication called 'Towards an EU Criminal Policy: Ensuring the Effective Implementation of EU Policies through Criminal Law',[34] the Commission presents a summary of policy areas that have been harmonised, as well as those where criminal law measures at the EU level are required. The objective is to ensure that taxpayers' money is equally protected across the Union, especially in the financial sector and in the fight against fraud affecting the financial interests of the European Union. Likewise, other harmonised policy areas were established, where the potential role of criminal law as a necessary tool to ensure effective enforcement could also be explored further, such as road transport concerning, for example, serious infringements of EU social, technical, safety and market rules for professional transports; data protection, for cases of serious breaches of existing EU rules; customs rules concerning the approximation of customs offences and penalties; environmental protection, if the existing criminal law legislation in this area requires further strengthening in the future in order to prevent and sanction environmental damage; fisheries policy; internal market policies to fight serious illegal practices such as counterfeiting and corruption or undeclared conflict of interests in the context of public procurement. The Commission specifies that 'these are areas which will require further assessment whether and in which areas minimum rules on the definition of criminal offences and sanctions may prove to be essential in order to ensure the effective implementation of EU legislation'.

As regards, in itself, to the path on which the EU legislator should follow when deciding on criminal law measures aimed at ensuring the effective implementation of EU policies which are the subject of harmonising measures, the Commission provides the necessary steps, the first being the assessment of necessity and proportionality ("ultima ratio," criminal law must always remain a measure of last resort), and the second (once demonstrate the need for criminal law) concerning which concrete actions to take, because EU legislation regarding the definition of criminal offenses and sanctions is limited to "minimum rules" under Article 83 of the Treaty. In this light, the Commission notes the conditions of "necessity and proportionality" and clear factual evidence (to establish the necessity for minimum rules on criminal law, the EU institutions need to be able to rely on clear objective evidence about the nature or effects of the crime in question and about a diverging legal situation in all Member States which could jeopardise the effective enforcement of an EU policy subject to harmonisation), tailoring the sanctions to the crime.

However, a cautious approach defining the development of European criminal law did not mean a stagnation of efforts in this field. The years that followed the entry into force of the Treaty of Lisbon brought significant legislative and institutional developments in the field of criminal law, both substantively and procedurally.

34 European Commission, 2011.

For example, in combating terrorism matters, the following were adopted: Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime; Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online.

In combatting corruption, cybercrime, fraud and money laundering, the following were adopted: Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA (Directive on cybercrime); Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crimes in the European Union; Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (Market Abuse Directive); Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA; Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 in the fight against fraud to the Union's financial interests by means of criminal law; Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing; Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law; Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders; Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA. As for victim protection matters, the following were adopted: Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims; Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography; Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order; Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime.

The transposition of some of these Directives into national law encountered difficulties and even triggered infringement procedures,[35] representing as many contexts of analysis for the legislative harmonisation in criminal matters at the EU level.

The legislative action was supported by the ECJ, which was involved in the development of European criminal law in several directions, by implementing the principles laid down in the Treaties (especially mutual recognition), the enhanced affirmation of the primacy of EU law and its effect of removing it from application of the contrary rules from the internal law of the MS, and autonomously defined certain concepts and terms of criminal law, for which the generality of terms used by European acts allow a large margin of appreciation.

Concerning the perspective of the MS in the field, it is worth mentioning Romania's initiative on the occasion of holding the Presidency of the EU Council to launch a debate on the topic entitled the

> Future of EU substantive criminal law", meant " to refresh the Council's assessment of the need to further introduce criminal provisions in new areas, in keeping with the EU competences established by the Treaties and thus providing a snapshot of needs currently perceived by MS.[36]

To prepare the debate, on 19 December 2018, the incoming Romanian Presidency presented a questionnaire with a set of nine questions addressed to the MS relating to four main areas: regulatory framework, sanctioning system, specific concepts and application of the regulatory framework (15728/18). Nineteen delegations provided written replies to the questionnaire.

The result, illustrating a prudent approach taken by the MS for the development of supranational criminal law, is summarised in the Draft report by the Presidency,[37] as follows:

1) The Union legislator should cautiously continue to exercise its competence to establish minimum rules concerning the definition of criminal offences and sanctions in line with Article 83 TFEU, giving due attention inter alia to the principles of ultima ratio, proportionality and subsidiarity.
2) At this stage, more efforts should be deployed to ensure the effectiveness and quality of the implementation of existing EU legislation. According to some Member States, this should include improving the tools for cooperation between Member States, both as regards judicial cooperation and in terms of exchange of best practices;
3) For the time being, further 'Lisbonisation' seems unnecessary. However, it might be appropriate to make an amendment to the text of point (d) of Article 2(1) of

35 European Commission , no date, Infringement decisions.
36 Council of the European Union, 2019.
37 Ibid.

Framework Decision 2004/757/JHA laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, so as to broaden the scope of that Article.12;

4) At this point in time, there is no need to develop a common definition or understanding of certain notions, such as 'serious crime' and 'minor cases'. Several Member States indicated that they should retain flexibility concerning the application of these notions. According to those Member States, the approach followed until now, whereby serious crime could be defined, where necessary, by using different criteria for a specific legislative instrument, should continue to be applied;
5) It could be appropriate to carry out a full and thorough analysis of the necessity and advisability of establishing (further) minimum rules concerning the definition of criminal offences and sanctions in the following areas: a) environmental crimes, including maritime, soil and air pollution;13 14 b) trafficking in cultural goods;15 c) the counterfeiting, falsification and illegal export of medical products;16 d) trafficking in human organs; e) manipulation of elections; f) crimes relating to artificial intelligence, subject to further defining the issue at stake.
6) Where it is demonstrated that there are good reasons for taking legislative action in any of the areas mentioned under points 5 and 6, or any other area, the possibility of using Article 83(2) TFEU as a legal basis should be considered before extending the scope of the first subparagraph of Article 83(1) TFEU (by unanimous decision of the Council pursuant to the third subparagraph of Article 83(1) TFEU).
7) Where the Union envisages legislating in an area that is already covered by an instrument of international law, in particular a convention of the Council of Europe, more in-depth dialogue with the relevant international organisation is necessary, *inter alia* to ensure complementarity and added value and to share information regarding best practices, obstacles to ratification, etc.
8) In order to ensure a high quality of Union legislation, all the technical specificities of the legislative process should be taken into account; this should include, *inter alia*, the allowance of sufficient time during the legislative process to carry out consultations at national level.
9) Directives adopted on the basis of Article 83 TFEU should allow Member States sufficient time to implement them. The period concerned should, in principle, be no less than 24 months. The legal form of a Directive leaves Member States flexibility on how best to carry out implementation in their national legal order, including decisions on which stakeholders they want to involve in the process.

It draws attention, first of all, to the conclusion that 'further "Lisbonisation" seems unnecessary', by the mentioned concept being understood, according to the same report, 'the process of replacing Framework Decisions adopted under the Amsterdam Treaty with Directives adopted under the Lisbon Treaty, thereby updating

the content of such instruments.' It appears that MS were hesitant to move forward with harmonising criminal laws through the Directive and instead focused on improving the existing framework, legislation quality and effectiveness, which requires time to settle and consolidate. In this light, the developments in European criminal law through ECJ jurisprudence, which we will refer to separately, and some tensions between Courts at the EU level in this regard, open a perspective of debates on the role of the judiciary in complementing and fulfil the will of the states in shaping the legal order of the EU.

2.3.2. Institutional developments. Establishment of the European Public Prosecutor's Office

Perhaps the most spectacular post-Lisbon institutional evolution was the establishment and strengthening of the European Public Prosecutor's Office (EPPO). As has previously been expressed,[38] the EPPO is certainly the result of a long-term reflection over the creation of some instruments which could strengthen the fight against cross-border crime.

The idea has been developed since the mid-1990s, based on an in-depth study, *Corpus Juris*,[39] containing criminal provisions for the protection of the Union's financial interests. We find the same idea in the Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor on December 11, 2001.[40] Later, in 2010, even Eurojust mentioned the institution as a potential solution for the cross-border crime issue in EU and despite the opposition shown by some MS which felt that their national sovereignty would be affected, the analysis and popularisation of this idea continued. Following the Commission's 2013 proposal to set up the EPPO, which met the resistance of 14 national parliaments of the European Union, the year 2017 was a decisive one. On February 7, 2017 the Council failed to reach a unanimous decision on a draft regulation. This led to a request from a group of 17 Member States on February 14, 2017, to send the draft regulation to the European Council. Later on April 3, 2017, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Germany, Finland, France, Greece, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Slovenia, and Spain notified the European Parliament, the Council, and the Commission about their desire to establish a type of enhanced cooperation based on the draft regulation. The subject was constantly on the agenda of the Justice and Home Affairs Councils and was eventually adopted at the end of the year as the Council Regulation (EU) 2017/1939 on October 12, 2017, implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (the EPPO).[41]

38 Toader and Safta, 2018, pp. 225–236.
39 Delmas-Marty and Vervaele, 2000.
40 European Commission, COM(2001) 817 final.
41 The author participated, as Minister of Justice, in Romania at that time, revealing Romania's position in favour of the establishment of the EPPO; in the statement made then we outlined that: 'It is a

Up to now, 22 Member States have joined the EPPO, and the EPPO started its activity on 1 June 2021. In the annual report for 2022, presented on 23 March 2023, before the European Parliament's Committee on Civil Liberties, Justice and Home Affairs it was showed that the EPPO received and processed 3,318 criminal complaints and opened 865 investigations and judges issued freezing orders amounting to €359.1 million in connection with EPPO investigations.

The EPPO has been set up as an independent body of the Union, with legal personality and competence established by law. The prosecutors in its structure act in the interest of the Union as a whole, and do not seek or accept instructions from any person outside the EPPO, or from any MS of the EU or institution, body, office or agency in the Union, in exercising their attributions in conformity with the Regulation. The EPPO is answerable to the European Parliament, the Council and the Commission for its general activities and shall submit annual reports on its general activities, in the official languages of the Union institutions, which are sent to the European Parliament, the national parliaments, and to the Council and the Commission.

The EPPO regulation has direct application, however, naturally it does not provide all the practical solutions for the functioning of a prosecutor's office. Likewise, it cannot solve the correlation issues of the internal regulations, from this perspective being necessary to take structured steps in more stages/directions. It is clear that the Regulation raises issues of interpretation under the lack of harmonising criminal law provisions at the European level, as well as of the different standards of protection of fundamental rights that still exist.

Suggestive in this regard is the recent request for a preliminary ruling submitted by the Oberlandesgericht Wien (Austria) on 25 April 2022 – G. K., B. O. D. GmbH, S. L. (C-281/22). The object of the case is the interpretation of Union law in particular the first subparagraph of Article 31(3) and Article 32 of Council Regulation (EU) 2017/1939 of 12 October 2017 concerning the implementation of enhanced

historic moment for the European construction. Romania agreed to participate in the enhanced cooperation for the establishment of the European Public Prosecutor's Office, intended to contribute to the protection of the Union's financial interests. Likewise, at the same time, Romania takes account of the fact that there are judges from Member States who participate, in different capacities, in the implementation of European justice. The establishment of the European Public Prosecutor's Office also has the meaning of balancing the legal mechanisms for the protection of common legitimate values and interests. We are open to contributing to the operationalisation of the European Public Prosecutor's Office, but also to the discussions that will be dedicated to expanding its powers; there are many other serious cross-border crimes that can only be prevented and fought together at European level. I personally believe that the extension of competence to acts of terrorism will represent only a step towards the extension of the competences of the European Public Prosecutor's Office to other types of crimes with a European dimension. I express the same conviction that the other Member States will also join the enhanced cooperation. We welcome all the efforts of the European Commission, the rotating EU Council Presidencies involved in the negotiation of this case and the Member States. For the future, we will focus our efforts on the operationalization of the European Public Prosecutor's Office, which will partly take over the powers from the level of the national legal space.' Juridice, 2017.

cooperation with a view to the establishment of a European Public Prosecutor's Office (EPPO).

At the time of writing this study, the opinion of the Advocate General is available,[42] according to whom these provisions must be interpreted as meaning that, in the case of cross-border investigations, the court approving a measure to be carried out in the MS, that the assisting European Delegated Prosecutor may assess only aspects related to the execution of an investigative measure. Article 31(3) and Article 32 of the EPPO Regulation must be interpreted as meaning that in the case of cross-border investigations, the court in the MS of the assisting European Delegated Prosecutor must accept the assessment by the handling European Delegated Prosecutor that the measure is justified, whether or not the latter is approved by prior judicial authorisation of the court in the MS of the handling European Delegated Prosecutor.

However, the viewpoints expressed in the case by the Austrian and German governments should not be neglected, according to which if the law of the MS of the European Delegated Assistant Prosecutor requires prior judicial authorisation for the execution of an investigative measure, such authorisation should involve a full judicial review, i.e., not only the procedural aspects (implementation of the measure), but also the substantive aspects that justify the measure in the first place. Therefore, in terms of this viewpoint, it is up to the court in the MS of the European Delegated Assistant Prosecutor to assess whether the requirement of the necessary level of suspicion regarding the commission of a crime has been met; whether the requested investigative measure would produce the necessary evidence for criminal prosecution; and whether the same evidence could not be obtained by a less intrusive measure.

As the Advocate General noted, the viewpoint of the two Governments could be understood as a concern for fundamental rights protection. MS have established coherent systems of criminal law. The protection of fundamental rights was carefully built into their legislation in the area of criminal prosecution and the sanctioning of crimes, an area in which states exercise their coercive powers affecting the private lives and liberties of individuals. However, the same does not happen at EU level, where there is no such coherence or harmonisation yet. Even in the absence of such consistency, the Advocate General nevertheless considers that the EPPO Regulation itself 'guarantees the protection of fundamental rights to a high degree.' This statement in the continuation of the argument on the component of fundamental rights also raise awareness, according to which

> it is true that in certain situations and from the perspective of some MS it may lead to a decrease of the previously protected level of individual rights. Nevertheless, those rights are protected at least at the level of the Charter and the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Harmonisation, after all, inevitably leads to a weakening of the protection of fundamental rights in

42 Opinion of Advocate General delivered on 22 June 2023. Case C-281/22, G.K., B.O.D. GmbH, S.L.

> Member States with a higher prior level of protection unless the highest standard is adopted as a common rule.

However, according to the Advocate General, this is 'the price of building a future together'. It will be interesting to see the positions of the MS constitutional courts concerning this matter of protection standards on fundamental rights, which, by all means, finds a correspondence in the case law of the ECJ, notably in the Melloni Case (C-399/11) to which the Advocate General explicitly refers. However, the issue raised constitutes a new impulse, in our opinion, towards the harmonisation in criminal law matters, regardless of the answer the ECJ. Ensuring the effectiveness of cross-border investigations while protecting fundamental rights is a key objective in the convergence of MS actions to achieve a higher degree of coherence in European criminal law.

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3. Key principles of European harmonisation in criminal matters. The role of the ECJ

3.1. EU legal autonomy

The exploration of the principles that underpin an increasingly closer integration and definition of European criminal law must be placed in the overall context of the EU's evolution towards legal autonomy. The EU legal order was established and enhanced over time as an organised and structured set of legal norms – diversified and hierarchical – having specific sources, notably being incorporated into the legal order of the MS, provided with institutions and procedures empowered to issue legislative acts, to interpret them, to ascertain and sanction, if necessary, their violation.

In this light, the legal order of the EU has two seemingly opposing characteristics. On one hand, it is an independent, self-contained legal system with its own sources, legal concepts, jurisdictional regulations, and legislative acts. On the other hand, it is integrated into the legal systems of MS, affecting subjects of Union law and national authorities, including national courts that apply Union law. The doctrine refers in this regard to "multi-level constitutionalism", revealing that it provides an explanation for the substantive unity of the EU system, which is composed of the various constitutions at the national level and the EU constitutional framework. In this light,

> EU constitutional law and notably the general principles developed by the ECJ case law are inspired by the national constitutional concepts, rights, principles and traditions, and the European constitutional and legal concepts, rights and principles, find their way back into the national constitutional law through legislation, through

> judicial dialogue pursuant to Article 267 TFEU, and through a system of best practices developed and shared at all levels.[43]

Within this framework, respect for fundamental rights occupies a central place, since, as has been shown,[44] 'attaining a fair balance between the European unity and the national diversity was achieved to a large extent through the jurisdictional protection of individual rights laid down in EU law'. In this regard, an essential role has lain with the ECJ which was constantly "woven", providing form and coherence to this autonomy, characterised even by itself, in Opinion 2/13, as being 'a structured network of principles, norms and mutual legal relationships interdependent that bind, mutually, the Union itself and its Member States'.

As for the MS, this autonomy has both a supranational and a transnational dimension. In the article Exploring the Autonomy of the European Union Legal Order, the authors[45] state that in terms of a supranational perspective, 'that autonomy require EU law – and only to this type of law – to establish the way in which normative conflicts must be settled' and in terms of a transnational perspective, 'that autonomy requires the Members States, above all, to share the same degree of commitment to the values on which the EU is based, laid down in Article 2 TEU'. Furthermore, it is considered that

> in terms of a transnational perspective, autonomy was given a real form through the principle of mutual trust and through the principle of equality of Member States before the law. Once Member States are equally committed to defending the values on which the EU is founded, they are all entitled to equal justice under EU law. In the light of that mutual commitment, the old rivalries and mistrust no longer have a reason to exist and must be replaced by mutual respect and mutual trust.

The trust and mutual respect explain, support and are supported by the equality of the MS before the treaties, resulting in the enforcement of the primacy of EU law as the only way to adequately ensure the uniform interpretation and application of EU law at the level of the MS.[46] To this effect, the criminal law of the EU is perhaps the most eloquent illustration of a genuine strategy that has acted effectively in terms of aligning the legal systems of the MS based on some core principles, without directly requiring or entailing the adoption of normative acts at the supranational level. The application of the principle of mutual recognition and, developed in correlation with it, the principles of mutual trust and sincere cooperation, have consistently shaped the national norms in the matter by complying with common standards for the protection of fundamental rights, adhering to the same meaning of certain concepts that

43 Pernice, 2017.
44 Lenaerts, 2014.
45 Lenaerts, Gutiérrez-Fons and Stanislas, 2021.
46 Ibid.

have received an autonomous meaning in EU law, and the removal from the application of criminal rules from the national law contrary to EU law.

3.2. Key principles of European harmonisation in criminal matters

3.2.1. The principle of mutual recognition

The principle of mutual recognition has played a fundamental role in establishing the internal market, from where it was taken and applied by analogy to establish an area of freedom, security and justice without internal borders. Thus, in 1998, under the British presidency of the European Council, the idea of facilitating the recognition by each MS of the decisions issued by the courts of the other MS was furthered, through a minimum of procedures and formalities. In its 1999 Tampere conclusions, the European Council 'endorsed the principle of mutual recognition which (...) should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union'.[47] Following the entry into force of the Treaty of Lisbon, it found its place within the treaties, as a genuine constitutional principle, expressly laid down in Article 67, 70, 81 and 82 TFEU.

We could characterise the principle of mutual recognition as the basis of the integrative strategy specific to European criminal law. In the opinion of the president of the ECJ,[48] this principle is an appropriate tool to overcome the opposition of the MS in relation to the harmonisation of substantive aspects of their criminal legislation. The method/strategy thus chosen allowed the States to follow the same direction, of a closer and faster cooperation, without making many or immediate amendments to the national legislation. This role is more visible through the case law by which the ECJ ruled upon the relationship between the principle of mutual recognition and the protection of fundamental rights. Given the scope of the study, we will briefly mention only some key reference cases regarding the European arrest warrant, in which the application of the principle of mutual recognition radically influenced the shaping of criminal law and European constitutionalism.

The substance of the matter is the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States,[49] amended by the Council Framework Decision 2009/299/JHA of 26 February 2009.[50] Article 1 paragraphs 1 and 2 of Council Framework Decision defines the European arrest warrant as 'a judicial decision issued by a Member

47 European Parliament, 1999.

48 Lenaerts, 2015.

49 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, p. 3.

50 Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, p. 24.

State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order', establishing the MS obligation to execute it 'on the basis of the principle of mutual recognition'. Paragraph 3 of the same Article states that 'This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union'.

One of the reference cases for the weight given to the principle of mutual trust was *C-396/11 Radu*.[51] In this case, Mr. Radu, a person wanted on the basis of European arrest warrants issued to carry out criminal prosecution in Germany, opposed the execution invoking the fact that, on the date that Framework Decision 2002/584 was adopted, neither the fundamental rights laid down in the ECHR, nor those set out in the Charter had been specifically incorporated into the founding Treaties of the EU. Pursuant to Article 6 TEU, however, the provisions both of the Charter and of the ECHR have become provisions of primary EU law and, therefore, Framework Decision 2002/584 should henceforth be interpreted and applied in accordance with the Charter and the ECHR. Secondly, Mr Radu pointed out that that framework decision had not been implemented consistently by the MS. Lastly, Mr Radu submitted that the judicial authorities of the executing MS were obliged to ascertain whether the fundamental rights guaranteed by the Charter and the ECtHR were being observed in the issuing MS. In this context, Curtea de Apel Constanța, as the executing judicial authority, decided to refer some questions, summarised by the ECJ in the following legal issue:, namely whether Framework Decision 2002/584, in the light of Articles 47 and 48 of the Charter, as well as Article 6 of the ECHR, must be interpreted in the sense that the executing judicial authorities can refuse to execute a European Arrest Warrant issued for the purpose of criminal prosecution on the grounds that the issuing judicial authorities did not hear the wanted person before issuing this arrest warrant.

Answering the referring Court's questions thus focused, the ECJ decided that the Council Framework Decision 2002/584/JHA of 13 June 2002 must be interpreted in the sense that

> the executing judicial authorities cannot refuse the execution of a European arrest warrant issued for the purpose of carrying out criminal prosecution for the reason that the wanted person was not heard in the issuing Member State prior to the issuance of this arrest warrant.

The Court based its approach on the principle of mutual recognition, explaining that the purpose of Framework Decision 2002/584 ('the first concrete measure in the field of criminal law implementing the principle of mutual recognition')[52] is to re-

51 Case C-396/11.
52 Case C-396/11.

place the multilateral system of extradition between MS with a system of surrender, as between judicial authorities, of convicted persons or suspects for the purpose of enforcing judgments or of conducting prosecutions, that system being based on the principle of mutual recognition ("the cornerstone" of judicial cooperation).[53] Regarding the fundamental rights invoked in the case, the Court was concise, concluding that 'the European legislature has ensured that the right to be heard will be observed in the executing MS in such a way as not to compromise the effectiveness of the European arrest warrant system.'[54]

The ECJ's approach has been criticised, arguing that it avoided the issue of the relationship between fundamental rights and the European arrest warrant[55] raised in the case, in the sense that the opportunity was missed for an in–depth analysis of the issues that the European arrest warrant raises in terms of respect for these rights and the constitutional diversity of the MS. At the same time, this kind of reasoning determined, as several authors have noted, the path to the historic judgment of the Court in Case C-399/11 Melloni,[56] a veritable turning point in European constitutionalism. From that Melloni moment, the idea of unconditional acceptance of common standards for the protection of fundamental rights at the supranational level was imposed, regardless of other various, and even higher national standards.

Case C-399/11 Melloni concerned an Italian national who had been judged and convicted in absentia. The Procura Generale della Repubblica (Italian Public Prosecutor's Office) issued a European arrest warrant for the execution of the sentence. Following his arrest by the Spanish police, Mr Melloni opposed surrender to the Italian authorities. He filed a "recurso de amparo" (petition for constitutional protection) against that order before the Tribunal Constitucional (Constitutional Court), alleging infringement of the absolute requirements deriving from the right to a fair trial proclaimed in Article 24 (2) of the Spanish Constitution. Thus, the very essence of a fair trial had been vitiated in such a way as to undermine human dignity, as a result of allowing surrender to countries which, in the event of very serious offences, validate findings of guilt made *in absentia*, without making surrender subject to the condition that the convicted party is able to challenge them in order to safeguard his rights of defence. In this context, the Tribunal Constitucional notified the ECJ to rule whether Framework Decision 2002/584 precludes the Spanish courts from making surrender of Mr Melloni conditional on the right to have the conviction in question reviewed. Answering the preliminary questions, the ECJ decided, *inter alia*, that

> Article 53 of the Charter of Fundamental Rights of the European Union must be interpreted as not allowing a Member State to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member

53 Paras. 33, 34.
54 Para. 41.
55 Raffaelli, 2019, p. 363.
56 Case C-399/11.

> State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution.

Thus, according to the ECJ, the interpretation according to which Article 53 of the Charter gives general authorisation to a MS to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, when necessary, to give it priority over the application of provisions of EU law, cannot be accepted, because it would undermine the principle of primacy of EU law. The interpretation was supplemented in *C617/10 of 26 February 2013, Hans* Åkerberg *Fransson*,[57] where the ECJ held, in essence, that where there are no harmonised standards for the protection of fundamental rights at EU level, the national courts can apply national standards, but they must not affect the "primacy, unity and effectiveness of EU law".

The Melloni case sparked vivid debates, affirming its major constitutional importance by the fact that the principles of recognition and mutual trust were given precedence over the standards of protection of fundamental rights enshrined in the Constitutions: 'it is a case where European criminal law becomes constitutional law'.[58] Since the ECJ ruling raised questionable effects for the protection of human rights, things did not remain stationary. The issue of protection standards in the context of the diversity of national regulations has been taken up in high-profile cases in criminal matters, such as Taricco,[59] MAS[60] and, more recently, Eurobox Promotion[61] and Lin.[62] The ECJ once again weighed the various rights and interests, pronouncing judgments that represented veritable "tests of acceptability" for CCs. In a sometimes tense climate, but which also led to constructive dialogues, the ECJ has taken new steps on the path of legal integration, grounding its reasoning by developing the principles of mutual trust and loyal cooperation.

3.2.2. The principle of mutual trust

The successful application of the principle of mutual recognition requires mutual trust and cooperation between the national judicial systems. The ECJ explains the importance of mutual trust in Opinion 2/13 of 18 December 2014, stating that

> it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other

57 Case C-617/10.
58 Mitsilegas and Mancano, 2019, p. 401.
59 Case C-105/14.
60 Case C-42/17.
61 Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19.
62 Case C-107/23 PPU.

> Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (…). (para. 191);
> Thus, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU. (para. 192)

Opinion 2/13 identifies two main objects[63] of the principle of mutual trust: recognition of (and respect for) the shared values of the EU and compliance with EU law. It is evident that both dimensions are complex. Meeting the membership criteria, including the verification of these requirements at the moment of accession to the EU, cannot be an absolute presumption for the future. Therefore, to give substance to mutual trust, the ECJ introduced "limits", which means the obligation to verify, in specific circumstances, compliance with the values upheld by EU member states. Illustrative in this regard is the Judgment of 5 April 2016, delivered in *Joined Cases C404/15 and C659/15 PPU*,[64] having as its subject-matter the requests for a preliminary ruling made by the Higher Regional Court of Bremen, Germany, in proceedings relating to the execution of European arrest warrants issued in respect of Pál Aranyosi (C404/15) and Robert Căldăraru (C659/15 PPU). On that occasion, the ECJ ruled that

> where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing MS that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by a European arrest warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions for his detention in the issuing MS, to a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, in the event of his surrender to that MS.

Through another preliminary reference, addressed by a Court from Germany, in Case *C-128/18, Dorobanțu*,[65] the ECJ was required to thoroughly present the interpretation given to Framework Decision European arrest warrant by Judgment of 5 April 2016, delivered in Joined Cases, C-404/15, Aranyosi and C-659/15 PPU, Căldăraru. In essence, in the context of the execution of a European arrest warrant

63 For a detailed approach see Boháček, 2022, pp. 103–40.
64 Joined Cases C-404/15 and C-659/15 PPU.
65 Case C-128/18.

issued by the Romanian judicial authorities, in the name of a Romanian citizen, for the purpose of criminal prosecution, the referring court wanted to find out what the minimum requirements regarding detention conditions would be, as well as the criteria for assessing those conditions, in terms of respecting the person's right not to be subject to punishment or inhuman or degrading treatment. By the delivered judgment, the ECJ ruled that the assessment of the executing judicial authority

> is not limited to the review of obvious inadequacies. For the purposes of that assessment, the executing judicial authority must request from the issuing judicial authority the information that it deems necessary and must rely, in principle, on the assurances given by the issuing judicial authority, in the absence of any specific indications that the conditions of detention infringe Article 4 of the Charter of Fundamental Rights.

In this regard, the ECJ referred to 'the minimum requirements under Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, as interpreted by the European Court of Human Rights'. These cases give expression to new developments/clarifications regarding the principle of mutual recognition. It is based on the trust between the MS, but not a "blind" trust. It requires the verification of the MS in terms of respect of the EU values. There were commentaries[66] with reference to these judgments that the ECJ approach

> constituted a paradigmatic shift on mutual recognition based on automaticity: the court stated expressly that the presumption of compliance with fundamental rights in the receiving MS is rebuttable and it placed specific duties to sending authorities to examine fundamental rights compliance.

Or, in another commentary,[67] 'the limitations of the principles of mutual recognition and mutual trust are on the menu, however only in exceptional circumstances'. The period following these decisions was focused on strengthening mutual trust. Thus, for example, in the Council Conclusions on mutual recognition in criminal matters 'Promoting mutual recognition by enhancing mutual trust' (2018/C 449/02),[68] various issues are emphasised, 'notably of a practical or policy nature – being able to impair mutual trust' and the need for 'an ongoing effort to foster and enhance this trust' was expressed. The Council states the importance of the timely and correct implementation of European instruments and continuous adaptation of the legislation of the MS to supranational requirements, on the importance of independence, the training of the judges, and the cooperation with various European bodies in the

66 Mitsilegas, Martino and Mancano, 2019, pp. 421–437.
67 Lazowski, 2019, pp. 437–455.
68 2018/C 449/02.

field. The MS are encouraged to establish (non-binding) guidelines on the application of the EU mutual recognition instruments to help practitioners understand how the national legislation implementing the EU instruments is to be interpreted and applied and invited to encourage practitioners to make full use of the possibilities of the EJN and Eurojust, following their respective mandates.

In this light, measures as the establishment of the Rule of Law Mechanism[69] can be seen as a political effort to verify and ensure mutual trust between EU states. This Mechanism provides a process for an annual dialogue between the Commission, the Council and the European Parliament together with Member States as well as national parliaments, civil society and other stakeholders on the rule of law. It focuses on four pillars: the judicial system, the anti-corruption framework, media pluralism, and other related institutional aspects of the system of checks and balances. The pillars cover all areas of the action and functioning of state authorities, including the legislative process, implementation of laws and policies, and judicial authority. The annual report provides valuable information and recommendations to ensure that all MS remain aligned with the fundamental values of the EU. This mechanism also acts as a driving force for coherence in EU law since in order to comply with the recommendations, the MS will have to adopt legislative measures.

3.2.3. The principle of sincere cooperation

According to the Article 4 para. (3) TUE,

> 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.

This article is the basis of many of the historic judgments of the ECJ being invoked in all kinds of contexts that have shaped the European legal order, which rightly determined its qualification by some authors as an article with "Federalizing" tendencies.[70] We will explain in a separate section the way in which, in a specific conflict situation, the ECJ uses this principle to support the binding character of the Commission' Recommendations within the Mechanism of Verification and Cooperation imposed on Romania.

69 See COM(2020) 580 final.
70 Mota and van Iersel, 2021.

3.2.4. The principle of effectiveness of EU law in protecting the Union's financial interests

The principle of effectiveness of EU law in protecting the Union's financial interests, became increasingly important among the principles that coagulate the European legal order. As will be seen with reference to the recent ECJ cases that concerned rules on limitation period, the expansive force, the cross applicability of fundamental principles and rights previously analysed, and the existence, in some cases, of implicit linking points between national and EU law, is likely to impose obligations (via case law of the ECJ) on both the national legislator to respect EU law (even when it acts in exercise of purely national competence) and the national courts which have to disapply national general rules in criminal matters (including the decisions of the constitutional courts) in specific situations.

As for the European legislative framework in the matter, Article 325 TFEU should be mentioned which provides that

> The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies. Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests. […].

Likewise, the Convention on the protection of the European Communities' financial interests drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, signed in Luxembourg on 26 July 1995 (OJ 1995 C 316, p. 49; "the PFI Convention"), lays down in the Preamble that

> the contracting parties to that convention, Member States of the European Union, are convinced 'that protection of the European Communities' financial interests calls for the criminal prosecution of fraudulent conduct injuring [the] interests in question' and of 'the need to make such conduct punishable with effective, proportionate and dissuasive criminal penalties, without prejudice to the possibility of applying other penalties in appropriate cases, and of the need, at least in serious cases, to make such conduct punishable with deprivation of liberty.

Concerning the reference case law, *Taricco* judgement, Case C105/14 is well known, in which the ECJ declared the incompatibility of a part of the Italian rules on limitation period (Articles 160(3) and 161(2) of the Criminal Code) with EU law (especially, with Article 325 TFEU) emphasising that

> is liable to have an adverse effect on fulfilment of the MSs' obligations under Article 325(1) and (2) TFEU if that national rule prevents the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union, or provides for longer limitation periods in respect of cases of fraud affecting the financial interests of the Member State concerned than in respect of those affecting the financial interests of the European Union, which it is for the national court to verify. The national court must give full effect to Article 325(1) and (2) TFEU, if need be, by disapplying the provisions of national law the effect of which would be to prevent the Member State concerned from fulfilling its obligations under Article 325(1) and (2) TFEU.

Since, according to the Italian Constitutional Court,[71] the limitation period belongs to the general part of criminal law and has a substantive nature, the EU would not have any competence on the domestic statute of limitation period. However, according to the ECJ judgment, even rules belonging to purely domestic competences (such as, apparently, the ones on limitation period) can assume a European relevance, which require the domestic legislator to respect EU law even when it acts in an exercise of a purely national competence. The Taricco Case sent not only a strong signal upholding the principle of the effectiveness of EU law in protecting the Union's financial interests, but also concerning the power of the ECJ to "moderate" de criminal law. However, as pointed out,[72] the ECJ chose not to engage in detail with the classification of the statute of limitation periods as a matter of substantive or of procedural law, thus triggering protection under the principle of legality.

In relation to the uncertainties resulted from the ECJ settlement, the Italian Constitutional Court addressed a preliminary reference, essentially concerning the substantive legal nature of the limitation period, and the principle of legality and the protection of fundamental rights, as established by the standards of the Charter. By the judgment delivered in *Case C42/17, MAS*, the ECJ ruled that

> Article 325(1) and (2) TFEU must be interpreted as requiring the national court, in criminal proceedings for infringements relating to value added tax, to disapply national provisions on limitation, forming part of national substantive law, which prevent the application of effective and deterrent criminal penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union, or which lay down shorter limitation periods for cases of serious fraud affecting those interests than for those affecting the financial interests of the Member State concerned, unless that disapplication entails a breach of the principle that offences and penalties must be defined by law because of the lack of precision of the applicable law or because of the retroactive application of legislation imposing

71 Rossi, 2017.
72 Ibid.

> conditions of criminal liability stricter than those in force at the time the infringement was committed.

Furthermore, the ECJ held that

> it is primarily for the national legislature to lay down rules on limitation that enable compliance with the obligations under Article *325 TFEU, in* the light of the considerations set out by the Court in paragraph *58 of* the Taricco judgment. It is that legislature's task to ensure that the national rules on limitation in criminal matters do not lead to impunity in a significant number of cases of serious VAT fraud, or are more severe for accused persons in cases of fraud affecting the financial interests of the Member State concerned than in those affecting the financial interests of the European Union. (para. 41)

These cases aroused lively debates, being generally considered that the dialogue between the ECJ and the Italian Constitutional Court could be seen as reaching a successful outcome from the perspective of both Courts in terms of identifying a "middle ground", in which the position of the Italian Court on the legality principle is not jeopardised, whilst maintaining the basic principles put forward by ECJ in Taricco I. However, the meaning and scope of the principle of legality remain to be further clarified. Also unclear is the impact of EU harmonisation on limitation periods on the conceptualisation of the principle of legality in national law.

The recent judgment delivered by the ECJ in *Case Lin C-107/23 PPU of 24 July 2023*[73] brings new developments in this regard, in a situation concerning the incidence of the limitation period in conjunction with the rules of a retroactive application of the more favourable criminal law.

In its request for a preliminary ruling, made in the context of extraordinary appeals brought by the appellants in the main proceedings seeking to have the final judgments convicting them of tax evasion and establishment of an organised criminal group and imposing prison sentences pursuant to those convictions set aside, the Court of Appeal, Brasov refers to national case-law relating to the initial version of Article 155(1) of the Criminal Code, regarding the limitation period, which may have a decisive effect on the situation of the appellants. Thus, the referring Court states firstly, that the Curtea Constituțională (CCR), by its judgment No 297/2018, upheld a plea of unconstitutionality concerning that provision in so far as it provided for the limitation period for criminal liability to be interrupted by the performance of "any procedural act". For several years, the national legislature did not take action following judgment No 297/2018 of the CCR, in order to replace the provision held to be unconstitutional, namely Article 155(1) of the Criminal Code. As a result, the CCR, by its judgment No 358/2022, upheld a further plea of unconstitutionality concerning Article 155(1) of the Criminal Code.

73 Case C-107/23 PPU.

In that judgment, emphasising the lack of action by the legislature since judgment No 297/2018, and the fact that the combined effect of the latter judgment and a lack of action had given rise to a new situation which lacked clarity and foreseeability with regards to the rules applicable to the interruption of the limitation period for criminal liability, which had resulted in inconsistent case-law, the CCR stated that between the date of publication of judgment No 297/2018 and the entry into force of a legislative measure determining the applicable rule, '[Romanian] positive law [did] not provide for any ground for interrupting the limitation period for criminal liability'. Judgment No 67/2022 of 25 October 2022, published on 28th November 2022, the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice) decided that, under Romanian law, the rules relating to the interruption of the limitation period for criminal liability fall within the scope of substantive criminal law and that, consequently, they are subject to the principle of non-retroactivity of criminal law, without prejudice, to the principle of the retroactive application of the more lenient criminal law (*lex mitior*), as guaranteed, *inter alia*, in Article 15(2) of the Romanian Constitution. Consequently, the High Court of Cassation and Justice held that a final conviction may, in principle, be the subject of an extraordinary appeal based on the effects of judgments No 297/2018 and No 358/2022 of the CCR. (paras. 23–34)

In this complex situation given by the national rulings of the highest national courts, the ECJ decided as follows:

> 1. Article 325(1) TFEU and Article 2(1) of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, (…) must be interpreted as meaning that the courts of a Member State are not required to disapply the judgments of the constitutional court of that Member State invalidating the national legislative provision governing the grounds for interrupting the limitation period in criminal matters, as a result of a breach of the principle that offences and penalties must be defined by law, as protected under national law, as to its requirements relating to the foreseeability and precision of criminal law, even if, as a consequence of those judgments, a considerable number of criminal cases, including cases relating to offences of serious fraud affecting the financial interests of the European Union, will be discontinued because of the expiry of the limitation period for criminal liability. However, those provisions of EU law must be interpreted as meaning that the courts of that Member State are required to disapply a national standard of protection relating to the principle of the retroactive application of the more lenient criminal law (lex mitior) which makes it possible, including in the context of appeals brought against final judgments, to call into question the interruption of the limitation period for criminal liability in such cases by procedural acts which took place before such a finding of invalidity. 2 (…)

The key grounds for the settlement provided in point 1 lies mainly in para. 124 according to which the national courts cannot, in the context of judicial proceedings seeking to impose criminal penalties for serious fraud offences affecting the financial interests of the European Union, apply the national standard of protection relating to the principle of the retroactive application of the more lenient criminal law (lex mitior), as referred to in paragraph 119 above, in order to call into question the interruption of the limitation period for criminal liability by procedural acts which took place before 25 June 2018, the date of publication of judgment No 297/2018 of the Curtea Constituțională (Constitutional Court).

Paragraph 119, to which it refers, shall read as follows:

> However, it is apparent from the explanations provided by the referring court that judgment No 67/2022 of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice) is also based on the principle of the retroactive application of the more lenient criminal law (lex mitior) arising from judgments No 297/2018 and No 358/2022 of the Curtea Constituțională (Constitutional Court). According to the referring court's interpretation of judgment No 67/2022 of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice), the latter court found that, in accordance with that principle, the effects of the absence of grounds for interrupting the limitation period for criminal liability under Romanian law, resulting from those two judgments of the Curtea Constituțională (Constitutional Court), could be applied retroactively to procedural acts which took place before 25 June 2018, that is to say the date of publication of judgment No 297/2018 of the Curtea Constituțională (Constitutional Court).

It should be noted that the ECJ strictly conditioned its interpretation, limiting the courts from applying the more favourable national criminal law standard in situations "as referred to in paragraph *119* above", namely in the sense that the effects of the lack of cases for interrupting the limitation period of criminal liability in Romanian law arising from the decisions of the CCR to retroactively proceed (in the sense of a more favourable criminal law) to procedural documents entered into force before 25th June 2018, namely the publication date of Decision No 297/2018 of the latter court. Therefore, the regime of limitation periods as a matter of substantive or procedural law, or its significance in the EU law was not clarified. The ECJ placed the issue under the protection of fundamental rights standards, allowing the courts of law to make their own analyses and decisions. This ruling also mentioned the recent jurisprudence of the ECJ, which allowed courts of law to disapply decisions made by the CCR. Furthermore, this also applies to decisions made by the High Court of Cassation and Justice, even if they are considered binding under domestic law.

This solution raises several issues:

– a risk of collision of the courts of law with the High Court of Cassation and Justice (in terms of the possibility to remove its decisions from application);

critical opinions were expressed in this regard in Romania[74] emphasising the role of the High Court of Cassation and Justice in the interpretation and uniform application of laws;
– an indirect collision with the CCR (in terms of the possibility to remove its decisions from application); the CCR established in its case-law that the decisions by which the unconstitutionality of an incriminating rule is found to be assimilated to the effects of a decriminalisation criminal law[75] (entailing the scope of the principle of retroactive application of more favourable criminal laws);
– a problem of interpretation, in itself, of the national standard of protection relating to the principle of the retroactive application of the more lenient criminal law (*lex mitior*). A correlative constitutional text that could be discussed is Art. 15 para. (2), which enshrines the future application of the law, with the exception of the more favourable criminal and contravention law, Art. 126 para. (3), and which provides for the role of the ICCJ of uniform interpretation and application of the law by all other courts, and Art. 147 para. (4) which establishes the general binding character of CCR decisions. The ECJ basically opposes all these articles of the Romanian Constitution, Article 325(1) TFEU and Article 2(1) of the Convention drawn up pursuant to Article K.3 of the Treaty on EU on the protection of the financial interests of the European Communities.

It could be argued that European criminal law is renewed, through the interpretation of the ECJ, constitutional law.

3.3. *The EU principles shaping the Romanian legislation in criminal matters*

3.3.1. Prison law in Romania

The development of post-accession criminal legislation in Romania is an extensive topic that can be the subject of a separate study. In the present framework, following the analysis aimed at the principle of mutual trust and sincere coopeartion, we will provide a few highlights regarding the legislation on detention conditions (prison law) and the Criminale Code (via Cooperation and Verification Mechanism), likely to provide a national perspective of the shaping of domestic law in the EU context.

Thus, regarding the conditions of detention in Romania, the ECJ and ECHR rulings (some of them previously mentioned in our study) have determined complex measures at a political level, for compliance with European standards in the matter (a condition for the application of the principle of mutual recognition).

For example, according to the Memorandum of 16th January 2018 with the topic 'Approval of the calendar of measures 2018-2024 for the resolution of prison

74 See for example: Les, 2023.
75 Decision No 651/2018, Official Gazette No. 1083 of 20 December 2018.

overcrowding and of detention conditions, in the execution of the pilot decision Rezmiveș and others against Romania, delivered by the ECHR on 25th April 2017'[76] five main directions of action were established: changes in legislation aimed at reducing the penitenciary population and improving the detention condition; investments in physical infrastructure of penitentiaries aimed at expanding the number of places of detention and modernising existing ones; the effective functioning of the probation system to facilitate the application of community sanctions and measures to reduce the prison population; the implementation of programs and strategies to channel people from the penitentiary system; and legislative measures to ensure an effective appeal for the harm suffered. A monitoring mechanism consisting of the organisation of a six-monthly evaluation of action plans undertaken by each institution at formal meetings of the Working Group for Monitoring and Evaluation of the Calendar of Measures, including the Ministry of Justice, the Ministry of Foreign Affairs was also established – The Government Agent for the ECHR, the Ministry of Public Finance, the National Penitentiary Administration, the National Penitentiary Directorate. The Secretariat of the Group is provided by the Ministry of Justice.

Legislatively, significant amendments of the criminal legislation on the components of the execution of punishments took place.[77] Law No 169/2017 amending and supplementing Law No 254/2013 on the execution of sentences and detention measures ordered by the judicial bodies during the criminal proceedings was adopted, initiated prior to the pronouncement of the pilot decision, and subsequently enforced.[78] Law No 169/2017 mainly established a compensatory mechanism for granting a benefit, meaning days considered to be executed for a period in custody in inadequate detention facilities. Law No 61/2018 amending and supplementing the Government Ordinance no. 26/1994 on the right to food, in peacetime, of the personnel in the national defence sector, public order and national security[79] was also adopted, as well as Order of the Minister of Justice no. 2772/C/2017 on the approval of minimum standards on the accommodation of persons deprived of their liberty,[80] and the Order of the Minister of Justice no. 2773/C/2017 for the approval of the centralised situation of buildings which are inadequate in terms of detention conditions.[81]

The development of the probation system,[82] as well as the social reintegration of convicted persons should also be noted. In this respect, by Government Ruling no. 389/2015 on the approval of the National Strategy for Social Reintegration of Persons deprived of their liberty, 2015-2019[83] a series of actions aimed at reducing

76 Juridice, 2018, Calendarul.
77 See Safta, 2020.
78 Published in the Official Gazette no. 571/18 July 2017.
79 Published in the Official Gazette no. 227 of 14 March 2018.
80 Published in the Official Gazette no. 822 of 18 October 2017.
81 Ibid.
82 Law No 252/2013 regarding the organisation and functioning of the probation system, published in the Official Gazette no. 512 of 14 August 2013.
83 Published in the Official Gazette no. 532 of 16 July 2015.

the recidivism rate were implemented and the Inter-ministerial Commission was set up and functioning to coordinate and implement the provisions of the National Social Reintegration Strategy for Persons deprived of their liberty, 2015-2019. Currently, these efforts continue, in the new framework given by the National Social Reintegration Strategy for Persons deprived of their liberty, 2020-2024.[84]

The legislative measures were accompanied by numerous administrative measures, so that currently the penitentiary system is radically changed compared to the date on which Romania's first sentencing decisions for detention conditions were pronounced.

3.3.2. The effects of the Verification and Cooperation Mechanism (CVM)

One of the most interesting aspects of EU impact on Romanian criminal law is the application of Cooperation Mechanism (CVM) set up through Decision 2006/928.[85] When Romania joined the EU, the European Commission noted some unresolved issues, particularly related to the accountability and effectiveness of the judicial system, which motivated the adoption of CVM 'to address specific benchmarks in the areas of judicial reform and the fight against corruption.' According to Article 1 of Decision 2006/928,

> Romania shall, by 31 March of each year, and for the first time by 31 March 2007, report to the Commission on the progress made in addressing each of the benchmarks provided for in the Annex."(…)
> 1) Ensure a more transparent, and efficient judicial process notably by enhancing the capacity and accountability of the Superior Council of Magistracy. Report and monitor the impact of the new civil and penal procedures codes.
> 2) Establish, as foreseen, an integrity agency with responsibilities for verifying assets, incompatibilities and potential conflicts of interest, and for issuing mandatory decisions on the basis of which dissuasive sanctions can be taken.
> 3) Building on progress already made, continue to conduct professional, non-partisan investigations into allegations of high-level corruption.
> 4) Take further measures to prevent and fight against corruption, in particular within the local government.

In 2022, after 15 years of monitoring, the Commission concluded,[86] in essence, that Romania had made sufficient progress in terms of fulfilling the commitments it had assumed within the CVM and that all benchmarks could be satisfactorily closed. The

84 Approved by Government Ruling No 430/2020, published in the Official Gazette no. 494 of 11 June 2020.

85 Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (notified under document number C(2006) 6569) (2006/928/EC).

86 See: Euronews, 2022.

monitoring under this Mechanism was officially closed on 15th of September 2023,[87] and Romania's rule of law will continue within its annual cycle, similarly to all MS.

We will not go into details regarding the laborious nature of the CVM, which implied extensive annual meetings with the Commission's experts and complex reports, as well as significant amendments to the legislation in civil and criminal matters, civil procedural and criminal law, integrity, the fight against corruption, the organisation and functioning of justice, and other institutions and authorities. In this context, we will point out only a few milestones aimed at adopting and applying new Criminal and Criminal Procedure Codes. The flawed route of these regulations, the difficulty of their enactment and implementation, and the numerous issues of constitutionality they raised, urge us to reflect on the time and effort required for essential amendments in the criminal legislation of the States and the complexity of the European legislative harmonisation process.

Thus, in the first Report, in 2007, the European Commission marked[88] positively the beginning of the work of the national Commission for the elaboration of the new Code of Criminal Procedure, retaining details regarding the general approach of the new regulation. One year later, in the 2008 Report,[89] the establishment of the National Integrity Agency was positively outlined and, in the "Improvements needed" section, it was noted that there was a necessity to 'finalise a new Criminal Procedure Code (CPC) and make progress on the draft Criminal Code'. According to the Commission,

> This would provide a clearer and effective framework for prosecution and allow better cooperation with other Member States. In addition, the controversial amendments to the emergency ordinance amending the existing Criminal Code and the Code of Criminal Procedure introduced in Parliament should be dropped. They would seriously restrict meaningful investigation.

The Commission founds in the 2009 Report[90] that the adoption of the Criminal Code in June 2009[91] is 'an important expression of political commitment, and a significant step forward in terms of securing a more efficient legal system.' Moreover, it was held that

> the Codes are foreseen to enter into force only when the relevant Procedural Codes (presented at the same time by the government to the Parliament) have been debated and agreed in normal parliamentary procedure. The earliest expected date of entry into force for all four Codes is 2011. An implementing law for the application of the

87 European Commission, Press release, 2023.
88 COM/2007/0378 final.
89 COM/2008/0494 final, {SEC(2008) 2539}.
90 See: European Commission, no date, Reports on progress for Bulgaria and Romania under the Cooperation and Verification Mechanism (CVM).
91 Criminal Code of 17 July 2009 (Law No 286/2009), Official Gazette no. 510 of 24 July 2009.

> Codes will be needed. It is important to ensure that this implementing law and also the adoption procedure concerning the Procedural Codes do not lead to the reintroduction of provisions that were contested in the past or new ones which would undermine the efficiency of meaningful investigations into high level corruption and subsequent court proceedings.(…)

The 2010 Report[92] noted that

> The preparations for the entry into force of the four new codes, now scheduled for October 2011, are an important opportunity for a thorough reform of the Romanian judicial system.
> To sustain this reform process, the Commission calls upon Romania to build on the strong Parliamentary support for the procedural codes and extend this political will to other areas,

and on the same line, the 2011 Report[93] recommended 'the adoption of active measures to accompany the entry into force of the Civil Code and the adoption of a comprehensive plan for the implementation of the other three new codes'. The 2012 Report[94] registered a synthesis of the steps taken, noting that

> Since accession, Romania has pursued an ambitious legislative agenda. This has included new Civil and Criminal Codes and the accompanying procedural codes, with the explicit aim of modernising the judicial process. International experience was drawn upon in support of these efforts. The adoption of the codes in 2009 and 2010 represented a major result on the part of the Government, the Parliament and the judiciary, even if the implementation process has been lengthy. (…) the new Criminal and Criminal Procedure Codes are currently foreseen for entry into force next year. Though there have been concerns about whether the systems are in place to effectively implement the changes, and measures to prepare for implementation will need to be intensified, these Codes represent a major attempt at modernisation and if properly implemented, could bring considerable benefits for the efficiency, transparency and consistency of the judicial process.

92 European Commission, 2010, Report from the Commission to the European Parliament and the Council on progress in Romania under the Co-operation and Verification Mechanism {SEC(2010) 949}.

93 European Commission, 2011, Report from the Commission to the European Parliament and the Council on progress in Romania under the Co-operation and Verification Mechanism {SEC(2011) 968 final}.

94 European Commission, 2012, Report from the Commission to the European Parliament and the Council on progress in Romania under the Co-operation and Verification Mechanism {SWD(2012) 231 final}.

Furthermore, the 2012 Report is the most extensive up to that point, containing recommendations on multiple levels, including on the appointment of the Advocate of the People, the regime of emergency ordinances, and the decisions of the Constitutional Court.

The 2013 Report[95] held that 'the entry into force of the Criminal Code and the Code of Criminal Procedure is tentatively scheduled for February 2014. More clarity is needed on how to avoid these dates slipping still further', and the 2014 Report, reminding that 'successive CVM reports have followed the process of developing new legal Codes in Romania' noted that

> whilst implementation has not been easy, particularly when parallel systems have had to be maintained, there has been an increasing sense that the judicial leadership institutions have been working together with the Ministry of Justice to facilitate the transition. The preparations for the entry into force of the new Criminal Codes have sought to learn from the experience of the past. (…) The new Code of Criminal Procedure to be implemented from February is a major undertaking: all provisions are directly applicable, and the code introduces two new institutions, the "rights and freedom judge" and the "preliminary chamber" judge. It is therefore particularly important that problems are anticipated and resolved where possible. Regular monitoring of the actual effect and implementation of the new provisions will be important once the new Codes are in force.

Furthermore, the Commission noted that

> a remaining difficulty is the instability of the new Codes a few months before their entry into force. Several legal problems have been identified, which may require amendments of the codes or of the law for the application of the Criminal Procedure Code still to be adopted before the entry into force. In addition, in December the Romanian Parliament voted a series of controversial amendments to the Criminal Code, which were ruled unconstitutional by the Constitutional Court.

The 2015 Report[96] stated that

> the implementation of the new Criminal and Criminal Procedures Codes in February 2014 was a major undertaking, and a test of the ability of the judicial system to adapt. The change was successfully achieved, (…). Some innovatory measures, such as a possibility for plea bargains, seem to have already been used to good effect.

95 COM/2013/047 final.

96 European Commission, 2015, Report from the Commission to the European Parliament and the Council on progress in Romania under the Co-operation and Verification Mechanism {SWD(2015) 8 final}.

The 2016[97] and 2017 Reports[98] found the situation resulted from the new amendments to the Codes, necessary, in part, as a result of the constitutionality issues identified by the CCR, and the 2018 Report[99] provides a wide space to the issue, which had reached a certain impasse due to the amendments that constitute 'a profound overhaul of the Codes of 2014', as well as of finding certain provisions of the new laws as unconstitutional. The Commission noted the critical conclusions and recommendation presented in the Venice Commission Opinion on 20 October regarding the same amendments, pointing out 'the lack of quality of the legislation, and to shortcomings in its preparation as well as contradictions with the case law of ECtHR and with the international obligations of the country, especially regarding the fight against corruption'.

The 2021 Report[100] referring to the 2019 findings, subsequent regulatory concerns and the current situation, noting that

> amendments to the two codes remain necessary. In the first place, this is required to follow up on a number of far-reaching decisions of the Constitutional Court made since 2014, which have annulled provisions of both codes and had a particular impact on the fight against corruption and organised crime. In the absence of solid legislative and policy solutions, legal uncertainty hinders some individual cases and, as a result, affects the fight against corruption. (…) This opens the way to the process of revision of the criminal code and criminal procedure code to follow up on the Constitutional Court decisions, taking fully into account the need for compatibility with EU law and international anti-corruption instruments, as well as the recommendations under the CVM and the Venice Commission opinion set out in the recommendations.

This evolution of the adoption and amendments of the Criminal and Criminal Procedure Codes must be analysed in a wider context, in conjunction with reforms aimed equally at other institutions and procedures. We mention, as an example of legislative amendments, resulted from the need to comply with the requirements of a procedural nature (the duration of criminal trials indicated in the 2009 CVM Report) the changes in the procedure for settling the exceptions of unconstitutionality, in terms of eliminating the mandatory suspension in the files in which these exceptions are raised. The amendment also entails the introduction of new extraordinary

97 European Commission, 2022, Questions and answers: Cooperation and Verification Mechanism for Bulgaria and Romania.

98 European Commission, 2017, Technical report: Progress in Romania under the Co-operation and Verification Mechanism {SWD(2017) 701 final}.

99 European Commission, 2018, Technical report: Progress in Romania under the Co-operation and Verification Mechanism {SWD(2018) 551 final}.

100 European Commission, 2021, Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism {COM(2021) 370 final}.

appeals in criminal and civil matters, in case of allowing the exceptions of unconstitutionality following the settlement of the cases in which they were raised.

From this entire flawed route, it can be noted that for at least 15 years, the criminal legislation in Romania has been under the "lens" of the European Commission. Many of the current regulations have been "shaped", not only as a result of the transposition of directives or in the application of framework decisions, but also distinctly from them, to respond to the requirements of legislative harmonisation in attaining the desired goals of the shared values (among which integrity and fighting against corruption are the key points). While the pressure and haste with which the new Codes were adopted, the successive postponement of the implementation, and the fairly quick finding of the need for the new laws to be amended, led to difficulties noticed by the Commission, they were taken into account for further monitoring within the Rule of Law Mechanism:

> The annual Rule of Law Report cycle will enable the implementation phase of many of the agreed reforms to continue to be monitored in practice. Issues such as the new regime following the dismantling of the Section for the Investigation of Offences in the Judiciary, the functioning of the Judicial Inspection, human resources in the judiciary, the implementation of court decisions by public administration, the impact of the upcoming revision of criminal legislation on the effectiveness of the fight against corruption, and the evolution of the integrity framework and its application, including by Parliament, can continue to be followed-up in this way. This will be part of the monitoring of the justice system and anti-corruption as two of the core pillars of the reports.[101]

It is evident that, while the supranational level has adopted criminal rules and procedures, the States' criminal legislation has undergone a process of "Europeanisation", conforming to European supranational standards. This process has led to the emergence of new criminal law concepts, particularly in States that have recently acceded to the EU. In the case of Romania, through the CVM and the Monitoring Reports, essential changes have occurred in the criminal field, replacing a normative framework whose foundations had been laid decades ago.[102] The statement of reasons of the new Romanian Criminal Code underlines this very clearly, noting, *inter alia*, that

> Responding to the requirements of the monitoring process of the European Commission, the draft has as its starting point the need for the development of a new

101 See Report From The Commission To The European Parliament And The Council On Progress in Romania under the Cooperation and Verification Mechanism COM/2022/664 final.

102 Thus, by Article 250 of Law No 187/2012 for the implementation of Law No 286/2009 regarding the Criminal Code was repealed Law No 15/1968 regarding the Criminal Code, republished in the Official Gazette of Romania, Part I, no. 65 of 16 April 1997, with subsequent amendments and supplements.

> Criminal Code, which will take over the elements that can be maintained from the Code in force and from Law No 301/2004 and integrate them on the basis of a unitary concept alongside elements taken from other reference systems but also from the regulations adopted at the level of the European Union for the creation of the area of freedom, security and justice.

This "shaping" of the Romanian legislation was possible due to the binding force of the CVM, as well as the Recommendations issued by the European Commission in this context. Following the evolution of monitoring, we find that, over time, the Commission's Reports have become more extensive, including more and more areas deemed to be subject to the reference objectives, detailed in a number of following Recommendations, and then checked on a point-by-point basis. From this perspective, we believe that it is useful to point out the debate regarding the legal nature of the CVM and especially the Commission's Recommendations within the MCV. The disputes of the courts on this subject and the decisions of the ECJ need to be understood, as long as could be applicable *mutatis mutandis* also regarding the Rule of Law Mechanism, which this time targets all MS.[103]

Thus, in a series of preliminary referrals by the Romanian courts, the ECJ held not only the binding nature of the CVM, but also of the Reports drawn up by the Commission and the Recommendations. The ECJ invoked in this regard the principle of loyal and sincere cooperation that harmoniously complements the principles of mutual recognition and trust.

According to the ECJ,[104]

> it follows from the principle of sincere cooperation, laid down in Article 4(3) TEU, that the Member States are obliged to take all the measures necessary to guarantee the application and effectiveness of EU law and to eliminate the unlawful consequences of a breach of that law."(par.176) " In those circumstances, in order to comply with the benchmarks set out in the Annex to Decision 2006/928, Romania must take due account of the requirements and recommendations formulated in the reports drawn up by the Commission under that decision. *(*para. 177)

The ECJ concluded, in light of the foregoing considerations, that

> The benchmarks in the Annex to Decision 2006/928 are intended to ensure that Romania complies with the value of the rule of law, set out in Article 2 TEU, and are binding on it, in the sense that Romania is required to take the appropriate measures for the purposes of meeting those benchmarks, taking due account, under the principle of sincere cooperation laid down in Article 4(3) TEU, of the reports drawn up by

103 See COM/2020/580 final.
104 Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19, C-397/19.

> the Commission on the basis of that decision, and in particular the recommendations made in those reports. (para. 178)

The few highlights presented demonstrate that the development of the principle of mutual trust with reference to the loyal cooperation that the MS are required to observe in order to respect the values of the rule of law established in the Treaties, gives a continuous and convergent, ascending character to the adaptation of the legislation of the MS, including the criminal component.

3.4. Some thoughts concerning the future of constitutional justice in Europe, in relation with the protection of human rights

The presentation highlights important milestones in the development of the principles of mutual recognition, mutual trust, sincere cooperation and the effective protection of the EU's financial interests. These principles have consistently influenced national legal systems by aligning them with common standards for the protection of fundamental rights, adhering to the same meaning of concepts that have an autonomous meaning in EU law, and removing criminal rules from domestic law that contradicts EU law. Although these principles have a high potential for "federalising", it is important to consider the potential of conflicts that may arise when they collide with national regulations or courts. Therefore, it is necessary to define these constitutional principles systematically to anticipate the risks and find ways to respond to them.

Commenting on the meaning of the Melloni Case, ECJ President, K Lenaerts[105] outlined that one of the main objectives of the European integration in criminal matters is to prevent criminals from exploiting freedom of movement as a means of pursuing their illegal activities with impunity. By facilitating the mutual recognition of judicial decisions in criminal matters, the SLSJ supports the effectiveness of national criminal legislation as it is legitimate for the EU legislator to establish restrictions on individual rights, as long as the MS can be reassured that those restrictions respect the EU Charter, in other words the constitutional consensus of the EU. Therefore, the harmonised standards for the protection of fundamental rights at EU level (even inferior to those in the national constitutions) emerge in the light of this revolutionary decision, based on the principle of mutual recognition, as the expression of a constitutional consensus at EU level, the meaning of which is explained by the ECJ, under the interpretation of the Charter. In this way, it seems that a constitutionalisation is attained in the absence of the amendments to the treaties and a constitution in the formal meaning of the concept: "The ECJ decided that the legislative consensus established in the framework decision complies with the constitutional consensus enshrined in the EU Charter"; 'thus, the legislative consensus of the EU prevailed over the diversity of values'.[106]

105 Lenaerts, 2014.
106 Ibid.

We agree that zero tolerance and effective measures should be taken to fight against criminality, regardless of whether it exists on a national or supranational level. However, it is not as simple as it seems. The concept of "harmony" is difficult to achieve when fundamental rights are in question. The protection of these rights should always be a main priority. The protection of the financial interests of the EU and, generally speaking, the fight against crime must be reconciled with this main priority, which is also essential for the existence of the rule of law. European criminal law in the broad sense, which includes the Convention for the Protection of Human Rights and Fundamental Freedoms, and its guardian, the ECtHR, should be considered in this regard. The "layers of protection" (constitutions, Charta, Convention) and the courts responsible for their interpretation and application make it questionable to accept lower standards of fundamental rights protection than those guaranteed by the constitutions of MS.

As noted in the Lin Case C107/23 PPU of 24 July 2023, the ECJ requires the removal of a national standard as regards the retroactive application of the more favourable criminal law. It is true that the ECJ is not referring to the *de plano* removal of this standard, but in the sense that results from the decisions issued by the Romanian supreme and constitutional courts, which put into question the way in which these courts understand national law in correlation with the EU values. This could be also an interesting separate topic, concerning not only the relationship between courts, but the profile and competence of the courts in the complex structure of the EU. However, if the *de plano* removal of the application of the more favourable criminal law had been directly discussed, it would have raised significant problems, since this principle is strongly grounded in the constitutional traditions of the MS. The quasi-unanimity of the criminal codes enshrine it in the general part, which governs the entire configuration of the criminal law (see, for example, Article 61 – Austria, Article 2 – Bulgaria, Chapter I, Section 2- Czech Republic, Article 2 – Germany, Article 2 – Greece, Article 2 – Italy, Article 112-1 – France, Section 4- Latvia, Article 2 – Luxembourg, Article 3- Lithuania, Article 27- Malta, Art.4 – Poland, Article 2 – Slovakia, Article 7 – Slovenia, Article 26 – Spain). Likewise, the ECHR applies it, even if it is not expressly enshrined in the Convention. Thus, for example, the ECHR held that

> even though Article 7 § 1 of the Convention does not expressly mention the principle of the retroactivity of the lighter penalty (unlike Article 15 § 1 in fine of the United Nations Covenant on Civil and Political Rights and Article 9 of the American Convention on Human Rights), the Court held that Article 7 § 1 guarantees not only the principle of non-retroactivity of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law. That principle is embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favourable to the defendant (Scoppola v. Italy (no. 2) [GC], §§ 103-109.

Consequenly, a *de plano* removal could be invoked before the ECtHR by the interested parties, leading to a direct conflict of protection standards/that of the Convention as interpreted by the ECtHR and that of the Charter/as interpreted by the ECJ.

Similar conflicts could always arise in relation to other fundamental rights as long as the standards established by the Charter (in its interpretation) could not oppose other higher standards (that is, national). These higher standards could come from the Convention and are invoked based on the national Constitution, such as in Romania where the Convention takes priority over national law if it contains more favourable provisions. Protecting the EU's financial interests can be achieved without sacrificing fundamental rights. It is also important to note that standards cannot differ based on whether European law is involved, as it could lead to discrimination when applying the same concepts, especially in criminal law.

Nonetheless, it is remarkable how through the decisions of the ECJ, European criminal law emerges not only as a branch that has acquired a substantial enhancement, but also as a strong factor of the reconfiguration of the EU as a structure of States, united by a constitutional consensus. As was observed,[107] the ECJ sees itself as a 'motor of European criminal justice', as the guardian of the principles of European criminal law. It remains to be seen how national judges will learn and how the high courts will react in this context.

Coming back to the Lin Case, which contrasts the ECJ with the ÎCCJ (High Court of Cassation and Justice) and, was mediated, with the CCR, we consider that it also put into question the authority of the decisions of these Courts and their constitutional role. This type of "relativising" the decisions of the Constitutional Court and Supreme Court requires special attention and analysis, especially considering their mandatory general effect as established by the National Constitution. However, as the ECJ cannot be transformed into a court to "reform" the decisions of the national and constitutional supreme courts, even if they could be erroneous, the most reasonable attitude remains the cooperation and development of a mechanism in this regard, entailing the involvement of these latter courts in cases in which their judgments are in question. When it comes from the interpretation of the instrument of protection of human rights, "constitutional consensus" should be supported by the convergent case-law of the national constitutional courts,[108] namely the ECtHR and the ECJ. From this perspective, and in light of recent case law of the ECJ concerning the effects of the decisions of the constitutional courts, a thorough debate on the future of justice in the EU is increasingly needed.

107 Braum, 2021, pp. 14–22.
108 Case C-430/21.

4. Conclusions

In a suggestive expression, 'the EU is like a moving target which continuously redefines itself'.[109] The field of criminal law illustrates and supports this unceasing redefinition. Thus, although the EU's involvement in criminal law has led to challenges and tensions,[110] developments in this field are significant both the branch of law itself and for the evolution of the EU as an autonomous legal order.

Regarding the challenges, the statement of reasons of the Spanish Criminal Code caught our attention[111] during a perusal of the Criminal Codes of the EU MS. Arguing the 'importance of the Criminal Code in any civilised society', the Spanish legislator points out that

> the Criminal Code defines criminal and misdemeanours that constitute the cases for application of the supreme action that may be taken by the coercive power of the State, that is, criminal sentencing. Thus, the Criminal Code holds a key place in the Law as a whole, to the extent that, not without reason, it has been considered a sort of «Negative Constitution».

This excerpt explains one important challenge concerning the emerging EU criminal law: although it is not a State, and does not have a Constitution in the formal sense, the EU has a coercive power specific to States. This "power" was assigned by the MS, which introduced in the treaties the possibility for the EU to adopt not only rules of criminal procedure, but also of substantive criminal law, and must reconcile the coercive power of each of the MS in its own territory.

The establishment of criminal rules is the most suggestive proof of EU autonomy. Progressively, both at a political and regulatory level, and with the consistent involvement of ECJ, a convergence was achieved, adding new elements for the unification of criminal law in the EU. As was emphasised,[112] EU law is no longer limited to economic issues related to the establishment and functioning of the internal market. EU law has evolved following the adoption of successive treaty reforms so that it currently takes effects on the rules that have traditionally been reserved for national States. These are visible in the Directives that have succeeded or replaced framework decisions, but also through the application of mechanisms aimed at strengthening the uniform application of EU law at the level of the MS where it is difficult to attain political consensus. Mutual trust, supported by an enhanced activism of the ECJ in the promotion and protection of the values that establish the constitutional core of the EU is seen as probably the strongest engine of

109 Nuotio, 2014, p. 1117.
110 Craig and de Burca, 2017, p. 1113.
111 Organic Law 10/1995, on the Criminal Code, Official Gazette no. 281 of 24 November 1995.
112 Lenaerts, 2015.

development in recent years, also leading to extensive amendments in the criminal regulations in the MS.

The Treaties themselves, as amended in Lisbon, refer distinctly to rules of substantive, procedural and institutional criminal law. As for the general criminal law, which would seem to be the competence of the MS, it is shaping its autonomy at the European level through the case-law of the ECJ which places the harmonisation process in this field under the standards for the protection of fundamental rights and the obligations of the States based on other treaty rules with direct applicability, such as those aimed at the protection of the EU's financial interests. The aforementioned development coexists with national systems, being important (but also increasingly difficult) to distinguish between the competence of the States on the one hand and that of the EU on the other, in order to avoid conflicts and inconsistencies that would endanger the common objectives undertaken.

When it comes to criminal law tensions, the study's jurisprudential benchmarks suggest that there are conflicting forces at work. The criminal law is still under pressure, between differentiation and harmonisation, in seeking a common approach. Given that a "penal rainbow"[113] in terms of the regulations of the MS still exists, convergence in codification involves more than jurisprudential "adjustments". The varying criminalisation of specific actions in different national legal systems is a result of each state's unique development, sensitivities, history, socio-economic context, and standards of protecting fundamental rights outlined in their respective Constitutions. This has led to moments of tension that often result in visible conflicts between constitutional courts at the European level. As shown,[114] national courts tend to be reluctant to accept that the very different rules that exist in other European legal systems are as efficient, in terms of ensuring respect for fundamental rights. In the absence of a certain degree of harmonisation of rules, it is difficult to apply the presumption of mutual trust, as issues of constitutionality or even of the resulting infringement of the national constitutional identity, laid down in Article 4 TEU, may arise. The recent period has strengthened the ECJ's[115] role regarding its disputes with the national constitutional courts, where rules of substantive national criminal law have been at issue. Once more, the ECJ also imposed the primacy of EU law in this field, balancing the various rights and interests at stake, which leads to an increasingly constitutional convergence.

Regarding the European criminal law in terms of the constitutional significance, it can be concluded that a traditional State structure is not always necessary for a common criminal law to exist, even on a substantial level. The development of European criminal law has occurred through various forms and instruments and will continue to do so. Therefore, closer harmonisation in this field does not necessarily result in a classic federal state structure. It looks that a structure *sui generis*

113 Harding, 2015, p. 854.
114 Raffaelli, 2019, p. 372.
115 Lenaerts, 2013.

of states, united by the common will and values expressed in treaties, can support a common criminal law. By all means, this evolution shines a light on reconsiderations concerning the classic notion of sovereignty, since 'the sovereign is the one who punishes'.[116] The principle of mutual recognition reflects shared sovereignty,[117] which is why it is crucial to define this principle and its limits not only by the courts but also by the legislator.

In this light, it might be useful to invite the MS to a new debate on the future of substantive criminal law in the EU.

116 Braum, 2021.
117 Ibid.

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