Chapter 13

Criminal Judicial Cooperation from a Central and Eastern European Perspective

Balázs ELEK

ABSTRACT

Today, the European Union and EU law influence essentially all areas of the law in Member States. Criminal and criminal procedural law are no exception. The European Union can require Member States to criminalize certain defined behaviors, determine the opinion on criminal sanctions that will punish perpetrators, and oblige the states to apply measures in certain areas of criminal law and laws on criminal procedure. As such, the harmonization of substantive and procedural norms in the Member States' criminal law falls in the EU's scope of authority.

After the accession of the countries of Central and Eastern Europe to the European Union, the harmonization of criminal and criminal procedural law throughout the European Union has been taken to a new level. There were also previously trust-based agreements on criminal co-operation between East and Central European countries, so mutual trust in EU cooperation was not entirely new in these countries. The harmonization has also been facilitated by the fact that there have historically been many similarities between Member States' legal systems. One of the best examples of this is the habeas corpus principle.

The harmonization of criminal procedure rules has already been developed with the countries of East and Central Europe. However, the case law of the European Court of Justice regularly shows that in former Western European countries there is a greater distrust of the legislation of the East-Central European countries and that the new East–Central Member States often approach a legal issue quite differently.

KEYWORDS

criminal law, criminal procedural law, principle of mutual recognition, procedural rights.

1. Legal Harmonization of Criminal Law in the European Union

Today, the European Union and EU law influence essentially all areas of the law in Member States. Criminal law is no exception. The European Union can require Member States to criminalize certain defined behaviors, can determine the opinion on criminal sanctions that will punish perpetrators and can oblige the states to apply measures in certain areas of criminal law and laws on criminal procedure. As such,

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the harmonization of substantive and procedural norms in the Member States' criminal law falls in the EU's scope of authority.[1]

Likewise, Krisztina Karsai notes that the term 'integration of European criminal law' did not refer to a well-defined area of law until the Lisbon Treaty took effect. Legal scholars used it as a blanket term to cover the extraordinarily heterogeneous results of the developmental processes that were occurring in the subsystems of Member States' criminal statutes.[2]

Ius puniendi is traditionally considered an immanent power of the states. Notwithstanding, with the Treaty of Lisbon and the creation of the EU's Area of Freedom Security and Justice (AFSJ) it appeared that the EU Member States have individually reduced this original right which was until then jealously guarded and considered as un-transferable and un-detachable part of state sovereignty.[3]

Cooperation in matters of criminal law between Member States of the European Communities entered a new phase when the Lisbon Treaty entered into force on December 1, 2009. A massive new area of law, generated by a supranational organization, took shape in the form of 'European criminal law.' Today, this expression is generally accepted and is understood to mean the (existing and evolving) regulatory and institutional systems in the European Union's substantive and procedural criminal law.[4]

Karsai currently defines 'European criminal law' simply as an independent area of law that derives from the body of EU criminal legislation, which came to life through the Treaty on the Functioning of the European Union (TFEU).[5] This body of law is now a genuine area of EU law.[6]

By extension, legal harmonization can become a tool for eliminating 'forum shopping'—the practice by which perpetrators exploit the differences between Member States' criminal laws by choosing to have their case heard in the country where the regulations are most favorable to their particular circumstances.[7]

The Lisbon Treaty authorizes the harmonization of definitions of criminal offences and sanctions only when they fall in the 'extraordinary' category. Art. 79 of the TFEU gives authority to the EU in the field of trafficking in human beings, while Arts. 82–83 grant powers concerning shared competencies and Art. 325 for financial crime and fraud.[8]

TFEU Art. 83(1) states that the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension, resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

1 Udvarhelyi, 2013, pp. 295–315.
2 Karsai, 2015, pp. 15–16.
3 Misoski and Rumenov, 2017, pp. 364–390.
4 Farkas, 2012, pp. 139–158.
5 Karsai, 2015, pp. 15–16.
6 Wade, 2013, pp. 165–183.
7 Ligeti, 2008, p. 24.
8 Karsai, 2015, p. 26.

These crimes include terrorism; trafficking in human beings and the sexual exploitation of women and children; trafficking of illegal weapons; money-laundering; corruption; trafficking of illegal narcotics; counterfeiting of money and other financial instruments; computer-related crime; and organized crime.

As criminal activity develops, the Council may pass resolutions establishing that other kinds of criminal acts fulfill the criteria defined in this Article.

This sphere includes acts related to racism and xenophobia since they constitute violations of the central principles of freedom, security, and justice; they also represent components of the prohibition of discrimination, a fundamental right.[9]

The adoption of the minimum rules, as laid out in the Lisbon Treaty, may relate to criminal offences and punitive sanctions. However, since the Treaty can only prescribe minimum harmonization, Member States can apply stricter rules than those outlined in the directive.

The EU legislator can prescribe the nature and scope of the punishment as well. EU norms prescribe efficient, proportional, and dissuasive sanctions—in most cases, imprisonment lasting for a determinate period. They often stipulate other kinds of sanctions, such as monetary fines, confiscation of property, expulsion orders, or disqualifying perpetrators from practicing their professions. A monetary fine is the most common sanction applied against legal entities. It is also possible to bar perpetrators from receiving state benefits and subsidies, forbid them to conduct certain business activities on a temporary or permanent basis, place them under court supervision, apply a court-ordered liquidation, or order the temporary or permanent closure of facilities used in the commission of a crime.[10]

2. The Process of Harmonizing Criminal Procedure Rules

2.1. The Principle of Loyalty and the Principle of Mutual Recognition

The cooperation among the EU Member States initially was based on traditional treaty law (e.g., extradition treaties).

The initial cooperation was defined by the *principle of loyalty*:

> 'The loyalty principle, or the principle of sincere cooperation, is a fundamental principle of EU law and has been central in shaping the EU's legal order.

9 Osztovits, 2008, pp. 1957–1958.

10 This also explains that the principle of mutual recognition extends to various sanctions, financial penalties, confiscation of property or even imprisonment, and conditional measures: Council Framework Decision 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ L 337, 16.12.2008, pp. 102–122; Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, OJ L 220, 15.8.2008, pp. 32–34; Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, OJ L 328, 24.11.2006, pp. 59–78.

> Particularly relevant in the early stages, when obligations were not as inclusive as they are nowadays, but the principle has never left the institutional stage. Member States show a high degree of loyalty to EU law, despite the lack of a general enforcement mechanism. This can partly be ascribed to "a degree of trust and the expectation that the other Member States will act similarly. As such loyalty is an outcome of trust and reciprocity.'[11]

The European Council decided in Tampere, Finland (1999), to set up an organization at the European level (EU) dealing with judicial cooperation in criminal matters.[12] This agency became the Eurojust (2002), which had the task to improve the coordination of investigations and prosecutions between the competent authorities in the Member States.[13]

The Tampere European Council in 1999 also adopted that the principle of mutual recognition would be the cornerstone in the establishment of the Area of Freedom, Security and Justice. So, the traditional cooperation of states would be replaced by transboundary cooperation between local judicial authorities of the EU Member States based on trust and mutual recognition.

Mutual recognition assumes that a judicial order issued by one Member State is to be recognized and executed by another Member State, except when there are grounds for refusal apply. The *principle of mutual recognition* in EU criminal (and criminal procedural law) assumed that the basic procedural rights were similar in the Member States. However, this assumption proved to be only partially true.

When courts of one Member State are ordered to trust and accept the judgments of another Member State, that involves a presumption of trust at the system level. Mutual recognition means that inside the EU Member States acknowledges and implement each other judicial decisions (and each other's defined legal actions) with no further examination or evaluation. This results in the removal of procedural barriers in the European Union. The principle of mutual recognition has brought about a remarkable change in legal thinking in EU Member States' cooperation by making criminal cooperation technically and legally simpler.

Mutual recognition of decisions in criminal matters can operate effectively only in a spirit of trust in which not only judicial authorities, but all actors in the criminal process consider decisions of the judicial authorities of other Member States as equivalent to their own, implying not only trust in the adequacy of other Member States' rules but also trust that those rules are correctly applied.[14] However, the spirit

11 Willems, 2016, pp. 211–244.

12 Wade, 2013, pp. 165–183.

13 In 1999 the European Commission also established an agency, the European Anti-Fraud Office (OLAF) in the framework of criminal cooperation to carry out independent investigations into fraud and corruption involving EU funds. Commission Decision of 28 April 1999 establishing the European Anti-fraud Office (OLAF) (notified under document number SEC [1999] 802) (1999/352/EC, ECSC, Euratom).

14 Judgment of the Court (Second Chamber) of 12 March 2020, Criminal proceedings against VW, Case C-659/18, ECLI:EU:C:2020:201 CJEU (hereinafter: CJEU Case C-659/18).

of trust can be built on a very long and bumpy road between countries that have previously participated in opposing alliances.

2.2. The Enlargement of the European Union to Central and Eastern Europe

The largest enlargement of the European Union took place on May 1, 2004, when the Czech Republic, Estonia, Poland, Latvia, Lithuania, Hungary, Slovakia, and Slovenia joined the Union. These countries were followed by Romania and Bulgaria in 2007 and Croatia in 2013.

It can be seen from this that when the Central European countries acceded the European Union, they were already joining an area where one of the main principles was the mutual recognition of decisions and mutual trust.

EU harmonization of criminal law and criminal procedure in the CEE region has not been as challenging as for former EU members in terms of mutual recognition and mutual trust in the judicial authorities of the Member States. However, the principle of mutual recognition existed between the Member States of Central and Eastern Europe even before their accession to the European Union, even if not explicitly in this form. The former socialist countries also sought a kind of 'integration'. So, with Slovakia and the Czech Republic, Hungary carried out direct legal aid even before the accession to the EU and even requests did not need to be translated.[15] Thus, the direct and smooth flow of legal aid introduced in the 2000 Convention was not a 'novelty' in the Hungarian–Slovak–Czech relations.[16]

2.3. The Common Roots of Judicial Certainty in European Countries

Mutual trust in court decisions may have developed at the European level because the level of judicial certainty has similar roots in European countries. Delmas-Marty and Spencer pointed out that judicial convictions have a similar origin in Anglo-Saxon and Continental countries. In the common law, the guilt of the accused must be established beyond a reasonable doubt. The level of certainty in French law is the '*intime* conviction'. In French law, the court must not convict except where it has '*une intime* conviction' that the accused is guilty. The expression of this phrase is found in the instruction to French Juries contained in Art. 353 of the Code of Criminal Procedure: 'The law puts to them just this single question, in which the whole of their duty is contained: 'Are you personally convinced?' The concept of intime conviction is equally found in German and in Hungarian law—as it is indeed in most of the systems which were influenced by French law in the 19th century. The expressions

15 See the Treaty between the Czechoslovak Socialist Republic and the Hungarian People's Republic on Legal Aid and Settlement of Legal Relations in Civil, Family and Criminal Matters, signed at Bratislava on March 28, 1989. Published in Hungary by the Act LXI of 1991.

16 There are similar bilateral conventions still in force with the surrounding countries. Some of them allow direct mutual assistance, like the Agreement between the People's Republic of Hungary and the People's Republic of Bulgaria on Legal Assistance in Civil, Family and Criminal Matters, signed at Sofia on 16 May 1966. Published in Hungary by the Legislative Decree 6 of 1966.

'*intime* conviction' and 'beyond reasonable doubt' have different origins. But if asked to explain what *intime* conviction means, a judge from France, Romania, Hungary, or any other country in continental Europe would reply, 'It means you must feel certain'. And that is the same how English judges actually direct juries as to the meaning of the standard of proof. How does the prosecution succeed in proving the defendant's guilt? The answer to that is even simple—by making you certain of it.[17]

The principle of mutual recognition of decisions raises this certainty to a fundamental level in relation to each other's decisions. This was the reason that a lengthy process has begun to harmonize procedural rights for cooperation between the Member States. This process has also been extended to allow the execution of sentences and transfer of sentenced persons from the other EU Member States. As a consequence of the mutual recognition of final decisions, the principle of ne bis in idem has become a key principle of EU cooperation.

2.4. The Ne Bis in Idem Principle

If we accept that, based on its structure, the procedure has a defined end-point, then the procedure ends permanently with the arrival of a procedural event, as the ideal goal could not be reached otherwise. The criminal procedure, as a dynamically moving process that evolves toward a goal, can be hardly imagined without an end-point, provided that it is not a Perpetuum mobile. The principle of ne bis in idem expresses that final decisions close the proceedings definitively and the defendant cannot be subjected to another procedure and another penalty.

The *ne bis in idem* principle means the prohibition of double jeopardy for the same act.

The *ne bis in idem* principle now also has an exclusionary effect because it also prohibits a new proceeding based on the same facts and evidence. The principle of ne bis in idem therefore constitutes a limitation of the criminal power of the State. In other words, this prohibition applies in the strict sense to criminal proceedings and criminal penalties. It does not preclude the possibility of a retrial in an extraordinary appeal procedure if new evidence becomes known.

The prohibition on double jeopardy is elaborated in Art. 4(1) of Protocol 7 of the European Convention on Human Rights, signed in Rome on November 4, 1950. It states,

> 'No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.'

Art. 54 of the Convention implementing the Schengen Agreement (CISA) also regulates the ne bis in idem principle for relations between EU Member States: 'A person whose

17 Delmas-Marty and Spencer, 2002, pp. 7–9.

trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts.'

The EU Charter of Fundamental Rights has elevated the *ne bis in idem* principle to the level of a basic right.[18]Art. 50 of the Charter, entitled 'Right not to be tried or punished twice in criminal proceedings for the same criminal offence,' states,

> 'No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted in the Union in accordance with the law.'

The European Court of Justice and the ECHR has interpreted the ne bis in idem principle in many of its decisions.[19] The significance of these decisions is that they seek to reconcile the differing criminal traditions of the Member States. Such decisions are, in particular, those that analyze the possibility of parallel criminal and administrative proceedings for the same acts, which is a particular feature of the legal systems of the countries of Central and Eastern Europe. The *ne bis in idem* principle is a good illustration of how much criminal cooperation changes after two Central European country joins the European Union.

Croatia's Office for Suppression of Corruption and Organized Crime issued an indictment against the director of a Hungarian company for a corruption offense. According to the indictment, he handed over a large amount of bribe money to a senior Croatian politician. In 2011, criminal proceedings were initiated against the director of the Hungarian company in Croatia. Croatian authorities applied to Hungary for international legal assistance to interrogate the director as a suspect. Hungary did not do all this, citing its national interests, but the prosecutor's office also initiated criminal proceedings against an unknown perpetrator in Hungary, where he was questioned as a witness and the criminal proceedings were terminated on the grounds that no crime had taken place. So, the criminal proceedings in Hungary were not pending against the director, he was only questioned as a witness.[20]

On October 1, 2013, after the Republic of Croatia's accession to the European Union and before criminal proceedings were initiated in Croatia, the Office for Suppression of Corruption and Organized Crime issued an European Arrest Warrant (EAW) against AY. The execution of that EAW was refused by decision of the Fővárosi Törvényszék (Budapest Regional Court, Hungary) of October 7, 2013, on the grounds

18 Karsai, 2015, p. 113.

19 See European Court of Human Rights (ECHR) Cases: Sergey Zolotukhin v. Russia, (Appl. No. 14939/03), Case of Mihalache v. Romania (Appl. No. 54012/10); A and B v. Norway (Applications nos. 24130/11 and 29758/11), Judgment of the CJEU (Grand Chamber) 26 February 2013 Åklagaren v. Hans Åkerberg Fransson, Case C-617/10, ECLI:EU:C:2013:105.; Judgment of the CJEU (Grand Chamber) of 20 March 2018 Enzo Di Puma v. Commissione Nazionale per le Società e la Borsa (Consob) and Commissione Nazionale per le Società e la Borsa (Consob) v. Antonio Zecca.; Joined Cases C-596/16 and C-597/16, ECLI:EU:C:2018:192.

20 Judgment of the CJEU (Fifth Chamber) of 25 July 2018 AY, Case C-268/17, ECLI:EU:C:2018:602. (hereinafter: CJEU Case C-268/17).

that the available information showed that criminal proceedings had already been brought in Hungary in respect of the same acts as those on which the EAW was based and those proceedings had been halted.

In this case, the CJEU ruled that the prohibition of double jeopardy is not based on the fact that the requested person (who is the subject of the EAW) was heard only as a witness during the investigation. Extradition of the requested person may not be refused on this basis. [21]

2.5. The EAW

The first legal instrument was adopted in 2002 on the EAW and the Surrender Procedures between the EU Member States.[22] The EAW is the first concrete measure in the field of criminal law implementing the principle of mutual recognition. The EAW was introduced after the 9/11 terrorist attacks to create a fast-track extradition system in the EU. A new system was needed to ensure efficient cooperation in transnational cases. However, a legal institution had to be established without prejudice to fundamental rights to liberty and the right to judicial hearings.

The *right to liberty* is one of the most important principles in judicial cooperation between Member States. The right to liberty requires that rules allowing for deprivation of liberty be enacted and enforced in an accessible and foreseeable way.[23] This means legal certainty. In law enforcement activities, the most common restriction on fundamental rights is the limitation on personal freedom—that is, the apprehension and preliminary detention of suspects. Habeas corpus proceedings are generally understood to be cases in which an individual in custody files an urgent petition to a court with the aim of obtaining his release. The principle is closely related to the accused party's right to a hearing before the bench and right to judicial review.

In these procedures, a basic rule is the principle of specialty. The specialty rule means that according to which person who has been surrendered may not be prosecuted, sentenced, or otherwise deprived of liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered.

2.5.1. The Common European Origins of the Habeas Corpus principle

Habeas corpus is the greatest safeguard of personal freedom, guaranteeing that an individual can only be deprived of liberty for a short period of time unless he is formally charged or arraigned before a judge. The principle first appeared in the 13th century as a means of preventing the arbitrary restriction of personal freedom during the war between England's barons and the king. An individual detained at the king's behest could receive a writ of *habeas corpus* from a judge, which would then be handed

21 CJEU Case C-268/17.

22 Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA).

23 Mancano, 2019, pp. 1–15.

to the arresting authorities. In this manner, the detainee could demand that the authorities disclose the reasons for his arrest, grant him a court hearing, and allow a judge to review the legality of the arrest. By sending back the writ, the authorities would confirm that they had fulfilled these conditions. The development of the *habeas corpus* principle covers several important milestones, including the prohibition on arbitrary detention enshrined in the Magna Carta.[24]

The very first written source of law in Hungary, the Golden Bull, shows that the Hungarian legal system was developing in parallel to that of England. Proclaimed in 1222 by King András II, this document qualifies the detention of suspects as the most basic restriction on the individual right to liberty. According to Ferdinandy, the Golden Bull represents 'the basic code of personal freedom in Hungarian public law' since it mandates the state to respect the individual and, by extension, personal freedom.[25] The Bull deals with arrest and detention in Art. II: 'We also desire that neither [the current monarchy] nor any king that succeeds us shall arbitrarily arrest or oppress any nobleman unless he is previously convicted in a court of law and through proper procedure.'

It is worth mentioning that the 1789 Declaration of the Rights of Man and of the Citizen also codified *habeas corpus*. The Universal Declaration of Human Rights, adopted in 1948 by the United Nations, makes the principle mandatory. *Habeas corpus* also constitutes a significant part of the European Convention on Human Rights, signed on November 4, 1950, in Rome intending to defend human rights and fundamental freedoms.

Art. 5 of the Convention lists the circumstances under which it is possible to deprive an individual of liberty. The Convention not only details the scope of circumstances but also discusses the most important procedural necessities, such as the requirement that court proceedings be overseen by a judge. An arrested or detained individual must, with all deliberate speed, appear before a judge or other public official who is legally vested with commensurate powers. Throughout the period of arrest or detention, every individual who is deprived of liberty has the right to a hearing, during which the court will decide on the legality of the detention; in case of unlawful detention, the court will order the petitioner released.[26]

The Convention's clause on arrests is supplemented by other recommendations. These include Resolution 11 (1965) of the Council of Europe's Committee of Ministers, which suggests that detention of suspects should not be an automatic requirement, but rather a decision made by a court of law following an examination of the facts and circumstances of the particular case. Arrest should be regarded as an exceptional measure that can be ordered and sustained only when absolutely necessary.

24 Mezey, 2015, pp. 2–6.
25 Ferdinandy, 1899, p. 169.
26 Act XXXI of 1993 on the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, Rome; Art. 5, Right to Liberty and Security.

The European Court of Human Rights has, in numerous judgments, addressed the legality of detention considering the guarantee of due process enshrined in Art. 5 of the European Convention on Human Rights.

In harmony with the provisions Art. 5(1c), every person who is arrested or detained must be brought promptly before a judge (or other public officer authorized by law to exercise judicial power); the arrested or detained individual has a right to a hearing on his or her case in a reasonable amount of time, or must be released until the hearing takes place. His or her release must take place under conditions that will guarantee their appearance at the hearing.

In EU law, it is also required by the directive on the right to information in criminal proceedings[27] that the Member States shall ensure that suspects or accused persons who are arrested or detained are provided promptly with a written Letter of Rights, which contains information about the maximum number of hours or days suspects or accused persons may be deprived of liberty before being brought before a judicial authority.

The rules relating to the legality of detention also stem from the principles that ultimately led to the common rules of the European Arrest Warrant. The European arrest warrant is a judicial decision issued by a Member 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.[28] The mechanism of the European arrest warrant is based on a high level of confidence between the Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Art. 6(1) of the Treaty on European Union.

The execution of the European arrest warrant may be refused if there are reasonable grounds for believing that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions, or sexual orientation.

The requested person may not be transferred even if there is a risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

The case law of the European Court of Justice has also raised the question of whether the execution of a European Arrest Warrant can be refused if there is a danger of judicial independence.

2.5.2. The Independence of the Courts of an Eastern Central European Member State and the Enforceability of the European Arrest Warrant

A Dutch court asked the European Court of Justice whether the execution of an EAW issued by Polish courts could be refused on the grounds that the independence of

27 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1.6.2012.

28 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA).

Polish national courts was reported. The CJEU ruled that if the Member State executing the EAW has information that the independence of judges in the Member State issuing the arrest warrant is at stake, this should not be an obstacle to judicial cooperation without carrying out specific and precise verification. It also means that the executing court cannot refuse to execute the EAW for such a reason.[29]

2.5.3. The Right to a Judicial Hearing in the Practice of the CJEU

A preliminary referral question was formulated in the context of the execution in Romania of four EAWs issued by the German authorities against a Romanian national who had not been heard before issuing the EAW. The CJEU decided that the Framework Decision (FD) EAW cannot be interpreted as meaning that the requested authority may refuse to execute an EAW because the person had not been heard before issuing the EAW. The FD EAW grants the right to be heard in the state of execution which complies with the rights recognized under Arts. 47 and 48 of the EU Charter.[30]

2.5.4. The Principle of Proportionality

Respecting the principles of the European Union, a European Arrest Warrant may be issued only if it is strictly necessary and proportionate. A list of criteria must be considered when assessing proportionality. The principle of proportionality means that for example, the minor nature of the offence or the suspect's circumstances (for example, poor health or the time elapsed since the alleged offence) may make extradition disproportionate. The principle of proportionality includes the seriousness of the crime, the health conditions of the requested person, and his or her family circumstances. The Member States consider the seriousness of the offence, the length of sentence, the existence of a less severe measure, as well as an analysis of its cost and benefits before issuing an EAW.[31]

In many cases, it is seen that through the execution of an EAW a disproportionate restriction of freedom occurs because those same cases would never allow detaining a person at the national level.

Limitations to the exercise of the rights and freedoms recognized by the Charter of Fundamental Rights are subject to the principle of proportionality. It requires that the restriction be suitable and necessary to achieve a legitimate aim.[32] The propor-

29 Joined Cases C 354/20 PPU and C 412/20 PPU: Judgment of the Court (Grand Chamber) of 17 December 2020, OJ C 62, 22.2.2021, pp. 1–10.

30 Judgment of the CJEU (Grand Chamber) 29 January 2013 Ciprian Vasile Radu, Case C-396/11, ECLI:EU:C:2013:39.

31 However, in many cases it is seen that through the execution of a EAW a disproportionate restriction of freedom occurs, because those same cases would never allow to detain a person at the national level. Bachmaier, 2015, pp. 505–526.

32 Art. 52 CFREU: 1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

tionality also means that the severity of penalties must not be disproportionate to the criminal offence (Art. 49 CFREU). The proportionality involves both the legislative and the sentencing levels, i.e., the penalties as provided by the law and applied to the concrete cases by the judges.[33]

The principle of proportionality in the practice of the CJEU may be well illustrated with a case which was initiated by a judge from Poland. The CJEU ruled that it is not contrary to EU law and thus does not infringe the principle of proportionality if a Member States classify as a criminal offence the possession of a significant quantity of narcotic drugs or psychotropic substances both for personal consumption and for the purposes of illicit drug trafficking while leaving the interpretation of the concept of 'significant quantity of narcotic drugs or psychotropic substances to the discretion of the national courts on a case-by-case basis. However, this is subject to the condition that interpretation is reasonably foreseeable.'[34]

2.6. European Supervision Order

The European supervision order (ESO) establishes a system in which judicial authorities of Member States are required to recognize and enforce decisions on supervision measures issued by another MS.[35] Council Framework Decision 2009/829/JHA aimed to reduce pre-trial detention in a cross-border context.[36] The ESO strengthens the right to liberty and the presumption of innocence in the European Union by ensuring cooperation between judicial authorities when a person is subject to obligations or supervision pending a court decision. One of the main reasons for the creation of the ESO was that suspects or accused persons who are not nationals of the country where the criminal proceedings are taking place have a higher risk of arrest. This is the case even if the other circumstances are the same as for a person residing in the Member State of criminal proceedings. Discriminatory treatment against non-resident EU citizens in criminal proceedings is incompatible with the objective of the EU to facilitate a common European area of justice. The ESO was adopted as a legal instrument intended for solving the issue of keeping foreigners under detention and creating unequal conditions for foreigners if compared with residents of that state.[37]

The Framework Decision lays down the rules, according to which one Member State recognizes a decision on supervision measures issued in another Member State as an alternative to provisional detention.

33 Mancano, 2019, pp. 1–15.

34 Judgment of the CJEU (First Chamber) of 11 June 2020 Criminal proceedings against JI, Case C 634/18, ECLI:EU:C:2020:455.

35 Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.

36 Klimek, 2017, p. 76.

37 Jurka and Zentelyte, 2017, pp. 31–45.

2.7. The Treaty of Lisbon and Procedural Rights

The Treaty of Lisbon provided a constitutional framework for the principle of mutual recognition and significantly broadened legislative powers in the field of criminal procedure law. Under the Lisbon Treaty, the principle of mutual recognition must be followed by a degree of harmonization of criminal procedural law.

The Treaty on the Functioning of the European Union (TFEU) confers upon the European Union competence to adopt minimum rules on the rights of individuals in criminal procedure.[38] Based on the TFEU, several measures on the rights of individuals in criminal proceedings have been adopted.

In 2009 the Council proposed a roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings. The roadmap proclaimed that there is room for further action on the part of the European Union to ensure full implementation and respect of Convention standards, so it provides for a harmonization obligation on the field of translation and interpretation, information on rights and information about the charges, legal advice and legal aid, communication with relatives, employers and consular authorities, special safeguards for suspected or accused persons who are vulnerable, and last but not least a Green Paper on pre-trial detention.[39]

The roadmap aimed to ensure that the rights enshrined in the ECHR are respected in practice and consistent manner across all Member States.

Following the roadmap, new directives have been adopted on the right to interpretation and translation in criminal proceedings and on the right to information in criminal proceedings.[40]

A Hungarian preliminary ruling procedure in connection with the directive on the right to interpretation and translation is a good example of how often the nature of legal thinking is different in the Member States. The question referred for a preliminary ruling was whether the convicted person could be required to pay a translation fee in a special procedure in which a court is examining the compatibility of a criminal conviction handed down in another Member State with Hungarian law. However, the EUCJ ruled that not only could the defendant not be required to pay a translation fee in such proceedings, but that the introduction of such a special procedure was also contrary to EU law.[41]

38 Art. 82(2)(b) TFEU.

39 Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings 2009/C 295/01 (The Council of the European Union), OJ C 295, 4.12.2009.

40 Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010.
Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1.6.2012.

41 Judgment of the CJEU (Fifth Chamber) of 9 June 2016 Proceedings brought by István Balogh, Case C-25/15, ECLI:EU:C:2016:423.

A framework decision was already adopted by the Council in 2009 on the recognition of decisions rendered in the absence of the accused or suspect.[42] This framework decision intended to establish clear and common rules for non-recognition where the final decision was taken in the absence of the accused.

Following the enlargement of the European Union to Central and Eastern Europe, the number of official languages in the Union has risen to 23. There are currently 506 (23x22) possible language combinations in the EU. The borders have become more open, which has increased the problem of the right to interpretation and translation in criminal cooperation.

So, the first legal instrument after the roadmap was Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings. It requires translation before police and judicial authorities, including communication between a suspected or accused person and his/her legal counsel in direct connection with any questioning or hearing during proceedings, or with the lodging of an appeal or other procedural application.

The directive establishing minimum standards on the rights, support, and protection of victims of crime was adopted in 2012.[43] The purpose of this directive is to ensure that victims of crime receive the appropriate information, support and protection and are able to participate in criminal proceedings.

This was followed by Directive 2012/13/EU of the European Parliament and the Council on the right to information in criminal proceedings. This introduced an obligation for the competent authorities to warn the suspected or accused of his or her most fundamental rights; like the right to remain silent, the right of access to a lawyer, and the right to be informed of the accusation.[44] The reason for adopting the directive was that the extent of mutual recognition is very much dependent on many parameters, which include mechanisms for safeguarding the rights of suspects or accused persons. The directive sets common minimum standards that strengthen confidence in the criminal justice of another Member State. This directive lays down rules concerning the right to information of suspects or accused persons, relating to their rights in criminal proceedings and to the accusation against them. It also lays down rules concerning the right to information of persons subject to a EAW relating to their rights.

Directive 2013/48/EU of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and in EAW proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

42 Council Framework Decision 2009/299/JHA on 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, OJ L 81, 27.3.2009.

43 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, and replacing Council Framework Decision 2001/220/JHA, OJ L 315, 14.11.2012.

44 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1.6.2012.

Suspects or accused persons should have the right to communicate with the lawyer representing them. Suspects or accused persons should, while deprived of liberty, have the right to communicate without undue delay with at least one other person, such as a relative, nominated by them.

This directive was interpreted in the light of questions referred by a Bulgarian court in a reference for a preliminary ruling. The court has ruled that the national legislation, which requires a national court to dismiss the defense lawyer against the will of the defendants, is not contrary to the directive if the interests of those defendants are contrary to each other and both have given the same defense power of attorney.[45]

2.8. European Investigation Order

The Stockholm Program adopted by the European Council (2009) considered the setting up of a comprehensive system for obtaining evidence in cases with a cross-border dimension. The aim was to create a new flexible system for judicial cooperation. It was also intended that the grounds for refusal could be invoked as narrowly as possible.

This new approach is based on a single instrument called the European Investigation Order (EIO). The purpose of the EIO is to gather evidence in the executing State. This includes the obtaining of evidence that is already in the possession of the executing authority.

The EIO establishes a single regime for obtaining evidence. Additional rules are however necessary for certain types of investigative measures which should be indicated in the EIO, such as the temporary transfer of persons held in custody, hearing by video or telephone conference, obtaining of information related to bank accounts or banking transactions, controlled deliveries, or covert investigations

The EIO is a judicial decision which has been issued or validated by a judicial authority of a Member State ('the issuing state') to have one or several specific investigative measure(s) carried out in another Member State ('the executing state') to obtain evidence. The 'issuing authority' may be a judge, a court, an investigating judge, or even a public prosecutor. 'Executing authority' means an authority having the competence to recognize an EIO and ensure its execution.[46]

The EIO is issued on a standard form. The EIO should be executed automatically, without further formalities, unless the executing Member State detects a reason for refusal on the grounds for non-recognition. Such a ground for refusal may, for example, be in breach of the ne bis in idem principle or relate to an act which is not a criminal offence in the executing Member State.

If the executing Member State does not want to implement the EIO, it must first conduct a consultation with the issuing Member State. The EIO provides for judicial

45 Judgment of the CJEU (Grand Chamber) of 5 June 2018, Criminal proceedings against Nikolay Kolev and Others, Case C-612/15, ECLI:EU:C:2018:392.

46 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 1.5.2014.

cooperation in procedural institutions such as transfer of evidence, temporary transfer to the executing State of persons held in custody to carry out an investigative measure, hear by videoconference or other audiovisual transmissions, hearing by telephone conference, information on bank and other financial accounts, covert investigations, interception of telecommunications with the technical assistance of another Member State. For the purposes of the EIO, the prosecution should also be considered a judicial authority, regardless of whether it is subordinate to the executive of a Member State.[47]

The principle of proportionality in the case of a EIO means that it can only be issued if it is absolutely necessary and its acquisition would have been ordered in a domestic case. The EIO is already a legal institution that is often used by the Central and Eastern European Member States in their relations with each other.

In a criminal case, the subject matter of the proceedings was that the suspect had imported sugar into Bulgaria from the Czech Republic but had not paid value-added tax because he had proved by false documents that he had forwarded the sugar to Romania. The Bulgarian Criminal Court has issued a EIO to conduct a house search and seizure in the Czech Republic. The EIO was also intended to examine witnesses by videoconference. However, the issuing court had a problem filling in the form because it could not indicate the remedies available under domestic law. In that regard, that court points out that Bulgarian law does not provide for any legal remedy against decisions ordering a search, a seizure, or the hearing of witnesses, but the directive requires remedies to be completed. The Bulgarian court, therefore, referred for a preliminary ruling on how to complete the form in such a case. The CJEU's decision was, in essence, that in such a case the remedies need not be indicated when issuing an EIO.[48] The execution of the EIO is a matter of simplicity and should be pursued by the requesting Member State.

2.9. The Right to a Fair Trial and the Lack of Trust

The right to a fair trial is one of the basic principles of a democratic society. The right of suspects and accused persons to be present at the trial is based on that right and should be ensured throughout the Union.[49]

The right to a fair trial is one of the basic principles in a democratic society. The right of suspects and accused persons to be present at the trial is based on that right and should be ensured throughout the Union. The right of suspects and accused persons to be present at the trial is not absolute. Under certain conditions, suspects and accused persons should be able, expressly or tacitly, but unequivocally, to waive that right.[50]

47 Judgment of the CJEU (Grand Chamber) of 8 December 2020, Criminal proceedings against A and Other Case C 584/19, ECLI:EU:C:2020:1002.

48 Judgment of the CJEU (First Chamber) of 24 October 2019 Criminal proceedings against Ivan Gavanozov, Case C-324/17, ECLI:EU:C:2019:892.

49 Directive (EU) 2016/343 of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

50 Ibid.

In one case, Romanian courts sentenced two Romanian citizens to imprisonment *in absentia* and then asked for their extradition from Germany. The German judicial authorities have requested assurances from Romania that the case of the requested persons will be retried.

Finally, the CJEU ruled, that the executing judicial authority may not refuse to execute a EAW, where the person concerned has prevented the service of a summons on him in person and did not appear in person at the trial because he had absconded to the executing Member State, on the sole ground that that authority has not been given the assurance to a new trial.[51]

2.10. Presumption of Innocence and the Facts of the Judgment

The directive on the presumption of innocence also seeks to establish common minimum rules.[52] The purpose of this directive is to enhance the right to a fair trial in criminal proceedings by laying down common minimum rules concerning certain aspects of the presumption of innocence and the right to be present at the trial.

This directive aims to strengthen the trust of Member States in each other's criminal justice systems and thus to facilitate mutual recognition of decisions in criminal matters. Such common minimum rules may also remove obstacles to the free movement of citizens throughout the territory of the Member States.[53]

A Bulgarian court has initiated a preliminary ruling procedure to determine whether the presumption of innocence is infringed if the facts of the judgment also include persons whose criminal liability has not yet been decided by the court.

The CJEU ruled that it is not contrary to the presumption of innocence that the judgment of the court includes the acts of the accused who made the indictment, as well as the acts of the persons whose criminal liability has not yet been decided by the court.[54]

3. Closing Remarks

By the accession of the Central and Eastern European states to the European Union, integration has begun not only in the economic field but also in the long process including the harmonization of criminal law and criminal procedural law based on mutual trust.

51 Case C 416/20 PPU: Judgment of the CJEU (Fourth Chamber) of 17 December 2020, OJ C 62, 22.2.2021, pp. 11–11.

52 Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ L 65, 11.3.2016.

53 Ibid.

54 Judgment of the Court (Second Chamber) of 5 September 2019 Criminal proceedings against AH and Others, Case C 377/18, ECLI:EU:C:2019:670, pp. 27–28.

We have seen that in the earlier international treaties of the Central and Eastern European Member States, mutual recognition and respect for each other's judicial decisions was not at all unknown. Moreover, it had previously been based entirely on the principle of equality and mutual respect. The accession of the countries of Central and Eastern Europe resulted in a change in many areas of the legislation governing criminal convictions. Undoubtedly, the attitude of law enforcers, the legal systems and cultures have changed a great deal in the newly acceded countries.

However, it should also be mentioned that there is a regular suspicion on the part of the law enforcement authorities of the former EU Member States toward the judicial authorities of the new Member States. It is similar to the idea that the previously joined Member States fear their prosperity from the newly joined Member States, forgetting how huge the market is that has opened up to them, not to mention the skilled and hardworking people who have contributed to the economic development of the states already members of the Union.

It does not usually happen that the judicial authorities in Central and Eastern Europe question the fairness of a criminal procedure, nor the rule of law in the legal and political systems of the former Member States. However, despite the fundamental provision of mutual trust, additional guarantees are often required executing a procedural act, which is unduly degrading for the Central and Eastern European states. However, in some cases, prison conditions are not worse, nor there are fewer procedural guarantees, in these countries.

Judicial cooperation, like economic integration, will only have a future if the Member States respect each other and each other's legal systems not only at the level of expression of principles but also in the everyday law enforcement practice. In my opinion, cooperation in the field of criminal law and criminal procedural law has developed in the right direction at the level of legislation since the Treaty of Lisbon. Guarantee principles and legal standards have been established that can essentially ensure effective cooperation.

The obstacle to truly effective cooperation remains the approach that does not consider decisions by other Member States to be taken seriously and seeks various loopholes from its implementation at the enforcement level. I also consider it an excuse to label the judicial system of another Member State with different pseudo-democratic adjectives without that state having a thorough knowledge of it.

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