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THE NEED AND POSSIBILITIES OF HARMONISATION IN CRIMINAL LAW MATTERS IN THE EU

Mantas Pakamanis*

Mykolas Romeris University, Faculty of Public Security, Departament of Law
Putvinskio str. 70, LT 44211 Kaunas
Tel.:+370 616 48902, e-mail: m.pakamanis@gmail.com

Annotation. EU Member States must recognize decisions stemming from the national law of other Member States. Citizens in the other Member States are not in the position to know how other national criminal law systems have developed. Agreeing on the procedure to recognize national decisions with the application of the mutual recognition principle, rather than substantive rules in the field of criminal law reflects a legitimacy and democratic deficit. In addition, the "extraterritorial" reach of national criminal law decisions poses significant challenges to the position of the individual in legal order. Besides, the existing legal diversity constitutes a "weapon" in the hands of criminals, as they may take advantage of the heterogeneity of the systems and of those they identify as less effective. The Treaty of Lisbon introduced changes, which regards criminal law harmonisation. Harmonisation involves a set of concrete EU-wide standards which would be negotiated and agreed by the EU institutions. This article explores the current constitutional concerns of the application of the principle of mutual recognition in criminal law and seeks to indicate the need and possibilities to use harmonisation in the development of EU criminal law.

Keywords: mutual recognition, harmonisation, EU criminal law, the Treaty of Lisbon.

INTRODUCTION

Application of the principle of mutual recognition has been the motor of European integration in criminal matters. The adoption in 2002 of the European Arrest Warrant constituted a spectacular development for European Union criminal law, and was followed by a series of further mutual recognition measures. The implementation of the European Arrest Warrant, and its interpretation by national constitutional courts, have cast light on a series of significant challenges that mutual recognition in criminal matters poses to the constitutional traditions of Member States and fundamental rights. This have caused the debate on primacy of European Union law over national constitutional law and brought to the fore issues of competence and legitimacy, and the reframing of the relationship between the Union and Member States in the field of criminal law. These legitimate national concerns need to be balanced against the need for effective EU action and sufficient democratic involvement is needed in the adoption of EU measures.[1]

[1] see S. Peers, Mutual Recognition and Criminal Law in the European Union. Has the Council Got it Wrong?, Common Market Law Review, 2004, p. 5-36.

Due to the need for balancing these concerns, the Treaty of Lisbon introduced changes, which regards criminal law harmonisation. However, they are complex and subject to important limitations. Nevertheless, the Treaty gives certain instruments to strike a reasonable balance between enhancing the efficiency and legitimacy of EU criminal law and assurance of the essential guarantees of Member States interests, related to constitutional concerns.

MUTUAL RECOGNITION IN CRIMINAL MATTERS IN THE EU AND CONSTITUTIONAL CONCERNS

1. THE PRINCIPLE OF MUTUAL RECOGNITION

The UK Government put forward during its EU Presidency in 1998 the idea of applying the mutual recognition principle in the field of criminal law, leading to the recognition by the European Council at Cardiff of "the need to enhance the ability of national legal systems to work closely together" and a request to the Council "to identify the scope for greater mutual recognition of decisions of each others' courts".[2] In its 1999 Tampere Conclusions, setting up a five year agenda for EU Justice and Home Affairs, the European Council endorsed the principle of mutual recognition, which in its view, "should become the cornerstone of judicial co-operation in criminal matters".[3] This led in 2001 to the adoption by Member States of a very detailed Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, which called on the Council to adopt no less than 24 measures in the field.[4] The Commission expressed the view that:

"Thus, borrowing from concepts that have worked very well in the creation of the Single Market, the idea was born that judicial co-operation might also benefit from the concept of mutual recognition which, simply stated, means that once a certain measure, such as a decision taken by a judge in exercising his or her official powers in one Member State, has been taken, that measure – in so far as it has extranational implications – would automatically be accepted in all other Member States, and have the same or at least similar effects there".[5]

[2] Para 39, doc. SN 150/1/98 REV 1.
[3] The reference to mutual recognition as the "cornerstone" of judicial co-operation in criminal matters in the EU was reiterated 5 years later, in the Hague Programme.
[4] O.J. 2001, C 12/10.
[5] Communication from the Commission to the Council and the European Parliament, Mutual Recognition of Final Decisions in Criminal Matters, COM(2000)495 final, Brussels 26 July 2000.

Mutual recognition in the internal market involves the recognition of national regulatory standards and controls,[6] is geared to national administrators and legislators,[7] and results in facilitating the free movement of products and persons, thus enabling the enjoyment of fundamental Community law rights. Mutual recognition in criminal matters on the other hand involves the recognition and execution of court decisions by judges, in order to primarily facilitate the movement of enforcement rulings. Moreover, the intensity of intervention of the requested authority is greater in criminal matters, as further action may be needed in order to execute the judgment/order. While the logic behind recognition in the internal market and criminal law may be similar (there should be no obstacles to movement in a borderless EU) – which, in criminal matters leads to calls for compensatory measures (criminals should not benefit from the abolition of borders in the EU) – there is a different rationale between facilitating the exercise of a right to free movement of an individual and facilitating a decision that may ultimately limit this and other rights.

These differences notwithstanding, the founding principle of mutual recognition in both internal market and criminal law is similar: the recognition of national standards by other EU Member States. In that sense as Nicolaidis and Shaffer have noted, "recognition creates extraterritoriality".[8] National, standards must be recognized "extraterritorially", in the sense that they, must be applied and/or enforced by another Member State. The central element of the mechanism is that it is an individual national standard, judgment or order that must be recognized by other Member States is not an EU-wide negotiated standard.[9] In recognizing these standards in specific cases, national authorities implicitly accept as legitimate the national regulatory/legal/justice system which has produced them in the first place.[10] In that sense, mutual recognition represents a "journey into the unknown", where national authorities are in principle obliged to recognize standards emanating from the national system of any EU Member State on the basis of mutual trust, with a minimum of formality. As will be seen below, although accepting and applying foreign law has been a central element in private international law, this "journey into the unknown" in mutual recognition is different and

[6] see Armstrong, "Mutual recognition", in Barnard and Scott, The Law of the Single European Market, Oxford, Hart, 2002, p. 230-231.
[7] see Barnard, The Substantive Law of the EU. The Four Freedoms, OUP, 2004, p. 507.
8 see Nicolaidis and Shaffer, "Transnational Mutual Recognition Regimes: Governance without global government", 68 Law and Contemporary problems, 2005, p. 267.
[9] see Guild, Crime and the EU's Constitutional Future in an Area of Freedom, Security and Justice, 10 ELJ, 2004, p. 219.
[10] supra note 6, p. 231.

raises a number of concerns in the sensitive field of criminal law where a high level of legal certainty is required and the relationship between the individual and the State is at stake. It is because mutual recognition challenges traditional concepts of territoriality and sovereignty.

The first, and most analyzed, example of mutual recognition in criminal matters in the European Union has been the European Arrest Warrant.[11] The European Arrest Warrant has radically changed existing arrangements of co-operation on extradition and constitutes a strong precedent for the application of mutual recognition in criminal matters in the European Union.[12] This is recognized in the Preamble of the Framework Decision which states that the warrant "is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the 'cornerstone' of judicial co-operation".

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 an individual for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.[13] The Warrant is thus a national judicial decision which must be recognized and executed by the requested State. Co-operation is formalized, as the Warrant takes the form of a Certificate – a pro-forma form which is attached to the Framework Decision and contains a set of information on the requested person and the offence committed. The Warrant must be dealt with as a matter of urgency and the final decision on its execution must be taken within a period of 60 days or exceptionally 90 days from the arrest of the requested person. The requested authority is provided with very limited grounds for refusal to recognize and execute a Warrant. With some exceptions, the arrested person must be surrendered no later than 10 days after the final decision on the execution of the Warrant. The European Arrest Warrant thus introduces a procedure marked by automatization and speed. A judicial authority of an EU Member State must give effect to a decision by a similar authority in another Member State with a minimum of formality: suspects or convicted persons must be surrendered as

[11] Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, O.J. 2002, L 190/1.
[12] see Alegre and Leaf, "Mutual recognition in European Judicial Co-operation: A step too far too soon? Case Study - the European Arrest Warrant", 10 ELJ, 2004, p. 200-217; Venemann, "The European Arrest Warrant and its Human Rights implications", 63 ZaoRV, 2003, p. 103-121; Wouters and Naert, "Of arrest warrants, terrorist offences and extradition deals: An appraisal of the EU's main criminal law measures against terrorism after 11 September", 41 CML Rev., 2004, p. 911-926; Gilmore, The Twin towers and the third pillar: some security agenda developments, EUI Working Paper LAW No 2003/7; Spencer, "The European Arrest Warrant", 6 CYELS, 2003, p. 201-217.
[13] Art. 1(1) of Framework Decision.

soon as possible, on the basis of completed forms, and ideally without the executing authorities looking beyond the form.

A Warrant may in fact be issued for acts punishable by the law of the issuing Member State by a custodial sentence or detention order of a maximum period of at least 12 months or, where a sentence has been passed or a detention order made, for sentences of at least four months. So a wide range of conduct and offences may fall within the scope of the Framework Decision. Moreover, a wide range of offences give rise to surrender without verification of the dual criminality of the act. This is the case for a list of 32 offences expressly enumerated in the Framework Decision, provided that they are punishable in the Member State issuing the European Arrest Warrant by a custodial sentence or a detention order for a maximum period of at least three years. The list includes offences which are both very common and diverse, both national and transnational. Some of these have been subject to harmonisation at EU level, while others remain defined strictly by national law (such as murder, grievous bodily injury, rape).[14]

While murder is a typical *mala per se* crime and as such punished in all systems, differences in detail abound.[15] However, not all systems distinguish between manslaughter as the basic form of (voluntary or involuntary) killing and murder as a qualified form. Thus, the Austrian and Greek Penal Codes only provide for a distinction between murder and manslaughter in that the latter is the basic form which can be mitigated in cases of the perpetrator being in a strong emotional state at the moment of commission (sect. 75, 76 Austrian Penal Code, Art. 299 Greek Penal Code). As for the qualifiers or aggravating circumstances that convert a simple killing into a murder, the systems vary widely: in English law the difference lies in the intention to kill qualifying as murder *versus* the voluntary or even involuntary forms of manslaughter. German law defines *Totschlag* as the basic form of killing (sec. 212 Penal Code) and *Mord* as a killing aggravated by various circumstances referring to the act of killing (treacherous, cruel, by means endangering the community) or to the perpetrator acting from a lust to kill etc. (sect. 211 Penal Code).[16]

14 see Keijzer, "The Double Criminality Requirement", Handbook on the European Arrest Warrant, Blekxtoon Ed., p. 137-163.
15 see Heine/Vest, "Murder/willful killing", in McDonald/Swaak-Goldman, Substantive and procedural aspects of international criminal law, vol. I., Kluwer, 2000, p. 176.
16 see Maurach/Schroeder/Maiwald, Strafrecht Besonderer Teil, Teilband I, C.F. Muller 9th ed., 2003, p. 27.

2. CONSTITUTIONAL CONCERNS

Criminal law regulates the relationship between the individual, and the State, and guarantees not only Stale interests but also individual freedoms and rights in limiting State intervention. Court orders and judgments in the criminal sphere may have a substantial impact on fundamental rights, and any inroads to such rights caused, by criminal law must be extensively debated and justified. Using mutual recognition to achieve regulatory competition (as has been the case in the internal market) cannot be repeated in the criminal law sphere, as the logic of criminal law is different and market considerations cannot give a solution.[17] While market efficiency requires a degree of flexibility and aims at profit maximization, clear and predictable criminal law principles are essential to provide legal certainty in a society based on the rule of law. The, existence of these publicly negotiated rules is a condition of public trust in the national legal order. The application of the mutual recognition principle in criminal matters on the terms described above, has raised a number of constitutional concerns. A major objection has centered on the abolition of the dual criminality requirement, which is seen to constitute a breach of the legality principle. While proponents of mutual recognition have argued that maintaining dual criminality is contrary to the very principle of mutual recognition,[18] those expressing concerns note that the abolition of dual criminality is contrary to the constitutionally enshrined in a number of Member States – principle of legality (or *nullem crimen sine lege)*. Constitutionally it is not acceptable to execute an enforcement decision related to an act that is not an offence under the law of the executing State.[19] The executing State should not be asked to employ its criminal enforcement mechanism, to help prosecute/punish behavior which is not a criminal offence in its national legal order. Concerns in this context involve in particular offences which have not been unction at EU level.[20]

A related, but broader concern involves the link between legality and legitimacy of criminal law at the national, and EU level.[21] Criminal law is fundamental in a society

[17] see Majone, Dilemmas of European Integration. The Ambiguities and Pitfalls of Integration by Stealth, OUP, 2005, p. 71.
[18] see Nilsson, "Mutual Trust or Mutual Mistrust?", in de Kerchove and Weyembergh (Eds.), Editions de l'Universits de Bruxelles, 2005, p. 158.
[19] See Kaiafa-Gbandi, To Poiniko Dikaio stin Europaiki Enossi (Criminal Law in the European Union), Sakkoulas editions, Athens-Thessaloniki, 2003, p. 328.
[20] for instance, euthanasia, under certain circumstances, is no longer an offence in the Netherlands and Belgium. However, Member States which have chosen not to criminalize euthanasia, should in principle be ready to execute a European Arrest Warrant, issued by authorities of counties in which euthanasia remains an offence.
[21] see Van den Wyngaert, "Eurojust and the European Public Prosecutor in the Corpus Juris Model: Water and Fire?", in Walker (Ed.), Europe's Area of Freedom, Security and Justice, OUP, 2004, p. 232.

governed by the rule of law, as it contains rules delineating the relationship between the individual and the State and thus providing guarantees and safeguards for the individual regarding the extent and limits of acceptable behavior and reach of State power and force.[22] Criminal law and the limits that it sets must be openly negotiated and agreed via a democratic process, and citizens must be aware of exactly what the rules are. However, mutual recognition challenges this framework.

The "extraterritorial" reach of national criminal law decisions in these terms poses significant challenges to the position of the individual in the national legal order. By recognizing and executing a decision by another Member State, the guarantees of the criminal law of the executing Member State are challenged, as the limits of the criminal law become uncertain. This may lead to the worsening of the position of the individual, by enhancing prosecutorial efficiency. It may lead to cases where applying mutual recognition would result in compromising well-established constitutional protection in the executing State and thus challenge the relationship between the individual and the State created on the basis of citizenship and territoriality. By requiring authorities in EU Member States to recognize and execute enforcement decisions from any other Member State, citizens and residents in the EU are subject to an area where, in order to address the abolition of borders and the movement it entails, the individual is subject to a proliferation of enforcement action taken to protect interest defined at national level. This leads to the over-extension of the punitive sphere.[23] A related concern, voiced primarily with regard to the application of the European Arrest Warrant in practice, is the concern that the recognition of Warrants with the minimum of formality along with the abolition of the dual criminality leads to the breach of suspects right.[24] In particular, whether the suspect enjoys ECHR rights in the issuing State – the right to a fair trial and the protection from torture.

3. THE FUNCTIONS OF HARMONISATION

Harmonisation is not the same as unification. When harmonisation is referred to, it does not mean the complete replacement of national criminal law systems by a single, uniform European criminal law, but the approximation of aspects of the different criminal law

[22] see Kaiafa-Ghandi, "The development towards harmonization within criminal law in the European Union – A citizen's perspective", 9 European journal of Crime, Criminal law and Criminal justice, 2001, p. 242.
[23] see Schunemann, "Fortschritte und Fehltritte in der Strafrechtspflege der EU", Goldtammer's Archiv fur Strafrecht, 2004, p. 203.
[24] see Garlick, „The European Arrest Warrant and the ECHR", in Blekxtoon, p. 167-182.

systems. In many but not all cases, this will involve minimum harmonisation, whereby the Member States will retain the freedom to take measures going beyond the minimum set rules.[25]

Anne Weyembergh has noted that the functions of approximation (harmonisation) can be classified into two different types: the autonomous and the auxiliary.[26]

3.1. THE AUTONOMOUS FUNCTION OF HARMONISATION

First of all, there is the so-called autonomous function, in which the harmonisation of the criminal law of the Member States is an autonomous means to create an area of freedom, security and justice.[27] The existence of a common area of law presumes that the differences in the level of legal protection cannot be too great. Harmonisation helps to bring about equal legal protection within the Union, against both crime and government actions – concerning individual rights, free movement and equality of treatment before the law.

The existing legal diversity constitutes a "weapon" in the hands of criminals: they may take advantage of the heterogeneity of the systems and of those they identify as less effective, using them as sanctuaries or safe havens.[28] In other respects, because of the increasing permeability of borders and because of the development of interdependence, the criminal laws of each State and the choices made by them in the criminal field have indisputable influence and effect upon the territories of fellow Member States. Consequently, the States are no longer "masters in their own house", due to a loss in their ability to maintain law and order within their national territory.[29] In this context, legal nationalism and retrenchment policies appear to be vain in the face of common challenges and problems, contrary, harmonisation appears to be a trick or a stratagem to recover its sovereignty or at least a part of its lost power. Consequently, harmonisation of substantive criminal law would help to fight crime because criminals could not benefit from differences in penalization and safe havens could also be prevented (for example, drug tourism in the border regions of the Netherlands).

[25] Further reflections on the term harmonisation can be found for example in A. Klip and H. van der Wilt (eds), Harmonisation and Harmonising Measures in Criminal Law, Amsterdam, 2002. See also A. Klip, European Criminal Law. An Integrative Approach. Antwerp, 2009.
[26] see A. Weyembergh, "The Functions of Approximation of Penal Legislation within the European Union", Maastricht Journal of European and Comparative Law, 2005, p. 155-170.
[27] It derives from Title V of the Treaty of Lisbon, which regulates the "Area of freedom, security and justice".
[28] A. Bernardi, "Opportunity de l'harmonisation", in M. Delmas-Marty, G. Giudicelli-Delage & E. Lambert-Abdelgawad (eds), 2003, p. 461.
[29] see J. Habermas, "Une nouvelle constellation politique", Fayard, 2000, p. 47.

Fight against crime and security are of course central, but freedom and justice cannot be forgotten. It is pretty clear that the mechanism of judicial cooperation based on mutual recognition focuses on the security goal and neglects more or less the goals of freedom and justice. In this respect, harmonisation's role is essential, because of the need to develop approximation to fulfill the so-called shield function of criminal law: criminal law should indeed not only have a sword function, in the sense that it should not only aim at protecting individuals against crime, but it should also afford protection to individuals against the State's violence.[30] Moreover, shield function of criminal law corresponds, to the Member States commitment to respect and protect fundamental rights. It could be argued that the ambition should be to give citizens a common sense of justice throughout the Union. This would imply that procedural rules should respond to broadly the same guarantees, ensuring that people will not be treated unevenly according to the jurisdiction dealing with their case and that the difficulties with which citizens are confronted in cross-border cooperation should be neutralized as far as possible. The current differences between internal laws and the resulting complexity create difficulties for individuals. It could be illustrated by a premise: if access to the substantive and procedural rules is not always easy at the national level, it is much more intricate in cross-border litigation. Individuals cannot hope to know and understand indifferent laws. However, everybody should have easy access to the rules of the game. The result is that heterogeneity leads to a lack of transparency, reduces access to justice and affects legal certainty. It is obvious that deepening of harmonisation would help to solve the identified problems for the citizens. To sum up, harmonisation of the law of criminal procedure and substantive criminal law should not only guarantee that effective action can be taken on a common basis throughout the Union, but also that the citizens of the Union receive equal legal protection throughout the Union and their conduct would be regulated with certainty.

3.2. THE AUXILIARY FUNCTION OF HARMONISATION

Besides autonomous function, harmonisation also has a support (or auxiliary) function. The main idea of this is that effective cooperation between the Member States in criminal

[30] see J.A.E. Vervaele, "Regulation et repression au sein de l'Etat providence: la fonction "bouclier" et la fonction "epee" du droit penal en desequilibre, 21 Deviance et Societe, 1997.

matters would be facilitated if the differences existing between the criminal law systems of the Member States were not too great.[31]

The process of mutual recognition is based on mutual confidence, which plays a lot more important role here in than the context of classical mechanisms of cooperation. The Court of Justice of the European Union has stated: "there is a necessary implication that Member States have mutual trust in their criminal justice systems and that each of them 173unction173d the criminal law in force in the other Member States even then the outcome would be different if its own national law were applied".[32] It is obvious that to declare the existence of such a trust or to proclaim its necessity is not enough. Moreover, it could lead to mutual mistrust.[33]

Different tools can be used to create or develop mutual trust, as for instance mutual evaluation of the criminal justice systems, the development of contacts between the practitioners, etc. However, it could be seen that harmonisation of substantive criminal law as well as of criminal procedures is the essential element to move from climate of mistrust to one of genuine confidence. To sum up, harmonisation is important, first of all for the existence or creation of mutual trust among the Member States, because it is easier to trust other Member States if one knows that the approach to criminal matters is not based on a fundamentally different model as mutual trust is a basis for cooperation based on the principle of mutual recognition.

4. THE TREATY OF LISBON AND NEW POWERS TO HARMONISE CRIMINAL LAW

4.1. BACKGROUND AND OVERVIEW

Before the Treaty of Lisbon the rules concerning the harmonisation of criminal law were set out in Title VI TEU. All former third pillar measures had to be adopted by unanimity in the Council, following a proposal from the Commission or the initiative of any Member

[31] see S. Peers, „Mutual Recognition and Criminal Law in the European Union. Has the Council Got it Wrong?", Common Market Law Review, 2004, p. 5-36. See also P. Asp, „Mutual Recognition and the Development of Criminal Law Cooperation within the EU", in E. Husabo and A. Strandbakken (eds), Harmonization of Criminal Law in Europe, Antwerp, 2005, p. 31-33.
[32] joined cases C-187/01 and C-385/01, Criminal proceedings against Huseyin Gozutok and Klaus Brugge, 2003, ECR 1-01345.
[33] I. Jegouzo, "La creation d'un mecanisme devaluation mutuelle de la justice, corollaire de lareconnaissance mutuelle", in G. de Kerchove & A. Weyembergh, (eds), Securite et justice, Bruxelles, 2003, p. 147.

State.[34] The European Parliament had to be consulted on all measures, including implementing measures.[35] This decision-making process limited the effectiveness of EU action, due to the requirement of unanimity, and the democratic supervision of EU decision-making, due to the limited role of the EP. Competence to harmonize criminal law was set out in Art.31(l) TEU. The third pillar competences concerned: police co-operation (including Europol); criminal law cooperation, including Europol (Art.30); Eurojust (Art.31(2)); and cross-border actions by policing or judicial authorities (Art.32). The Council was able to act by means of Conventions, Framework Decisions, Decisions and Common Positions.

As regards criminal law, Chapter 4 of Title V of the Treaty of Lisbon contains the provisions on criminal law competence – Arts 82 to 86 TFEU – which replaces the former Art.31 TEU. I will focus on Arts 82 and 83 TFEU, which address criminal procedure and substantive criminal law. Articles 82(2) and 83 (but not Art.82(l)) is also subject to identical special rules which have become known informally as "emergency brakes", which will be discussed below.

4.2. CRIMINAL PROCEDURE

Article 82 TFEU, concerning criminal procedure, provides as follows:

"1. Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to:

a) lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions;

b) prevent and settle conflicts of jurisdiction between Member States;

c) support the training of the judiciary and judicial staff;

d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.

2. To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border

[34] TEU Art.34(2).
[35] TEU Art.39.

dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern:

a) 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.

Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals."

First of all, paragraph 1 concerns mutual recognition rules as such, whereas paragraph 2 concerns procedural harmonization in order to facilitate mutual recognition.

Compared to the former TEU provisions, the new Article 82 paragraph 1 adds a reference to the principle of mutual recognition, which includes approximation of law. It should be stressed that the specific requirement that judicial cooperation "shall include" approximation of procedural and substantive law indicates clearly that the European Union could not limit itself to adopting mutual recognition measures.

Moreover, paragraph 2 of the new Article deals with establishing "minimum rules" in domestic criminal procedure. The concept of "minimum rules" is implicitly defined in the third sub-paragraph of paragraph 2, which, provides that Member States would be free to introduce or maintain higher standards for individuals. This provision means that Member States would be free to provide for higher standards of protection for suspects and victims than the EU measures provide for, but not lower standards.

4.3. SUBSTANTIVE CRIMINAL LAW

Like Art.82 TFEU, Art.83 TFEU also confers two separate powers. It provides as follows:

"1. 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.

These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and 176unction176 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.

2. 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. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76."

It can be seen that Art. 83(1) TFEU confers the power to harmonise substantive criminal law in ten specified fields, by means of the ordinary legislative procedure. These would be "minimum rules" which concerns "the definition of criminal offences and sanctions", and the specified areas of crime are "particularly serious" and as having a "cross-border dimension". The 10 specified areas of crime are listed, and the Treaty also confers power upon the Council to extend this list to "other areas of crime that meet the criteria" set out in the first sub-paragraph to define particularly serious crime with a cross-border nature dimension, "on the basis of developments in crime".

Article 83(2) TFEU confers powers to adopt substantive criminal law measures ("minimum rules with regard to the definition of criminal offences and sanctions in the area concerned") related to other Union policies, if this were "essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures".

Article 83(3) TFEU specifies that the emergency brake process applies to both paragraphs 1 and 2. This process is identical to the emergency brake applicable to the adoption of measures concerning domestic criminal procedure.

4.4. THE "EMERGENCY BRAKE"

The emergency brake process applies to key aspects of EU criminal law in the Treaty of Lisbon. The process allows any Member State to object to a proposed measure on the grounds that the measure "would affect fundamental aspects of its criminal justice system", and refer the proposal to the European Council. This would suspend the ordinary legislative procedure. Within four months, the European Council would either have to refer the measure back to the Council, in the event of "consensus", thereby resuming the ordinary legislative procedure, or in the event of "disagreement", a group of at least nine Member States could launch enhanced cooperation on the basis of the draft directive concerned. This group of Member States could proceed with enhanced co-operation by means of a "fast-track" process, without needing to comply with any of the substantive or procedural requirements which would normally apply before enhanced co-operation could be 177unction177d.

The conditions include the requirement of a proposal from the Commission, consent of the EP and the support of a qualified majority of all Member States.[36] In the Council, only the representatives of the participating Member States could vote on the legislation; but in the EP, all MEPs would have a vote. It should also be pointed out that a Member State which did not originally participate in the adoption of the legislation could participate later if it were able to comply with the relevant conditions.[37]

CONCLUSION

The application of the principle of mutual recognition in criminal matters in the European Union is based on a rethinking of territoriality: linked with the fundamental objective of the abolition of borders in the European Union – the new territoriality views the Union as a single "area", where facilitation of free movement must be the primary aim. However, in criminal matters, the emphasis has been placed at the national level: equating people with court decisions, the logic of this system dictates that it is national judicial decisions, and consequently national legal and constitutional systems, that must move freely with the minimum of formality and be respected by other national jurisdictions in the EU. The result is one "area", but with no coherent "system" – it is national systems that must be recognized. This "extraterritoriality" of the national, based on mutual trust raises

[36] See Art.329(1) TFEU.
[37] See Art.331(1) TFEU.

constitutional concerns both for national legal systems and for EU law as such, as the operation of mutual recognition in the field of criminal law is closely linked with State sovereignty and legitimacy, the protection of fundamental rights and the rule of law. At the national level, courts and citizens are asked to embark on a "journey into the unknown" and to recognize with the minimum of formality decisions emanating from the system of any given Member State, even in cases where the 178unction at stake is not an offence in the legal system of the executing State. This raises serious concerns of legality and legitimacy – citizens must accept completely "external" standards, which are the fundamental rules regulating the relationship between the individual and the State in criminal matters. This way of proceeding does little favours for trust between national systems, but also for trust of citizens in their own national polity.

The Treaty of Lisbon brought some changes in this context, as it includes competence for the EU to adopt harmonisation measures, such as directives, in the fields of substantive criminal law and criminal procedure. However, it must be stressed that this competence has been conferred specifically in order to promote mutual recognition. Consequently, mutual recognition has a prominent place in the EU's future in criminal matters, however this article argued that smooth functioning of mutual recognition could not be achieved without harmonisation of criminal law.

EU criminal law should not follow its repressive orientation, as it was showed that the mechanism of judicial cooperation based on mutual recognition focuses on the security goal or so-called sword function of criminal law. In this respect, harmonisation's role is essential, because of the need to develop approximation to fulfill the so-called shield function of criminal law, as it should also afford protection to individuals against the State's violence. Harmonisation of criminal law should ensure individual rights, free movement, equality of treatment before the law and also create mutual trust among the Member States.

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BAUDŽIAMOSIOS TEISĖS KLAUSIMŲ DERINIMO POREIKIS IR GALIMYBĖS ES

Mantas Pakamanis*
Mykolo Romerio universitetas

S a n t r a u k a

ES valstybės narės turi pripažinti sprendimus, priimtus pagal kitų valstybių narių nacionalinę teisę. Piliečiai, gyvenantys šalyse narėse, nežino, kaip vystėsi kitų šalių nacionalinės baudžiamosios teisės sistemos. Pritarimas procedūrai pripažinti kitos valstybės sprendimus pagal abipusio pripažinimo principą, o ne remiantis materialiomis taisyklėmis, kelia teisėtumo ir demokratijos stokos baudžiamojoje teisėje klausimus. Taip pat suteikiama galimybė kitos valstybės sprendimams, priimtiems taikant nacionalinę baudžiamąją teisę, veikti „eksteritorialiai“ kelia klausimus dėl asmens padėties tokioje teisinėje sistemoje. Be to, egzistuojantys teisinių sistemų skirtumai duoda „ginklą“ į nusikaltėlių rankas, nes jie gali pasinaudoti sistemų heterogeniškumu, t. y. tų, kurias jie laiko mažiau efektyviomis. Lisabonos sutartis lėmė pokyčius, susijusius su baudžiamosios teisės derinimu. Derinimas apima daug konkrečių ES mastu taikytinų standartų, kurie būtų sutarti ir priimti ES institucijų. Šiame straipsnyje nagrinėjamos kylančios konstitucinės problemos dėl abipusio pripažinimo principo taikymo baudžiamojoje teisėje ir siekiama parodyti derinimo poreikį ir galimybes ES baudžiamojoje teisėje.

Pagrindinės sąvokos: tarpusavio pripažinimas, derinimas, ES baudžiamoji teisė, Lisabonos Sutartis

Mantas Pakamanis*, Mykolo Romerio universiteto viešojo saugumo fakulteto Teisės katedros lektorius. Mokslinių tyrimų kryptys: Europos Sąjungos teisė, Europos Sąjungos baudžiamoji teisė, baudžiamoji teisė, civilinė teisė.
Mantas Pakamanis*, Mykolas Romeris University, Faculty of Public security, Department of Law, Lecturer. Research interests: European Union law, European Union criminal law, criminal law, civil law.