The legality of criminal law and the new competences of the TFEU

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I. Introduction – A Dogmatic Approach in Domestic Law

The last twenty years in the history of European Criminal Law (ECL) began with the demonstration of a dynamic development by first labeling "traditional forms" of mutual cooperation in criminal matters as "European" ones, then subsequently beginning to elaborate on new – singular and independent – forms of cooperation. Simultaneously, a new philosophy of cooperation emerged and began gaining strength in the field of criminal law, which came to be followed in present-day legislation and in applying the law. This philosophy reworked several "old" principles in this field – in a more precise manner – through the addition of new elements. Furthermore, the philosophy created new principles to this "European" criminal law, such that are considered to be inevitable and essential for the everyday functioning of this field of criminal law, as well as for future developments. The primary goal of this manuscript is to present the changing face of the legality principle with regard to the impacts of European integration on the criminal law systems.

In 2009, the Treaty of Lisbon came into force, and with this, the regulation of the Area of Freedom, Security and Justice (AFSJ) in the Treaty on the Functioning of the European Union (Art. 67-89 TFEU) became part of the rules on European Criminal Law.

Today there is no doubt concerning the concept of ECL: this branch of European law contains every legal norm issued on the legal basis of the third pillar and of its successor, the AFSJ. The counterparts of ECL rest in various sets of domestic criminal law, which constantly deal with having to accommodate to the impact and developments brought about by the European movement – in the form of "harmonized criminal law". Establishing a definition for this new legal terrain was initially difficult, due to the uncertainty of the Member States and the political implications of the question of whether the followed approach is proper and suitable.

By now, the basic framework of ECL has crystallized, and the twenty busy years of developing an originally indefinite legal phenomenon have now uncovered clear paths into the near future of ECL. In the last ten years, the early "soft definitions" have toughened and the existence of "European Criminal Law", whatever it might be, is no longer disputed.

II. Legality

Legality is the preeminent, most fundamental principle in modern criminal justice systems – and is also a pillar of the rule of law. Legality has played a central role in understanding the rule of law in Europe. The principle is comprised of two interconnected maxims: nullum crimen sine lege ("[there exists] no crime without a pre-existing penal law establishing such crime") and nulla poena sine lege ("[there exists] no punishment without a pre-existing penal law establishing such punishment").[1]

As *Hall* stated "the principle of legality is a summation of the form of all the penal laws, of what distinguishes them as positive laws from all other rules; and it qualifies and is presupposed by everything else in penal theory."[2] *Nagy*, in line with other European scholars influenced by German doctrine[3], distinguishes four elements of legality:

- (i) non-retroactivity of unfavorable criminal law (nullum crimen sine lege praevia),
- (ii) prohibition of analogy (analogia in malam partem) and unfavorable extensive application of law (nullum crimen sine lege stricta),
- (iii) certainty (nullum crimen sine lege certa),
- (iv) requirement of written norms in criminal law (nullum crimen sine lege scripta).

In many legal systems, legality is considered to comprise the interdiction of customary criminal provisions, requiring that criminalization results from a written law that can be traced back to the legislator. Therefore, the latter element is not a part of the general international concept of legality. Notably with respect to common law states[4] and international criminal law, none of the international conventions prohibits the application of customary criminal law as determined by es.[5]The importance of the principle embodies the potential of limiting states' power on individuals (or legal entities) in the very sensitive field of criminal justice and the possibility of offering a moral choice for individuals. As *Fletcher* summarized: "individuals have a right to know what could make a moral difference in their choosing to engage in the action or not"[6] and they have a right to know what the "law" is "at the time when they are said to violate it."[7]

On the European level, the principle of legal certainty has not yet been defined either in primary or in secondary law; it is classified as a general principle based on ECJ case law. The answer as to what is meant by the principle of legal certainty in EU law[8] may vary depending on the methods and

[1] The legality principle in a procedural sense is not subject to discussion in this study.

[2] *Hall*, General Principles of Criminal Law, 2nd ed. 1960, Reprint 2005, p. 27.

[3] *Gropp*, Strafrecht, Allgemeiner Teil, 4th ed. 2015, § 3 para. A; see also *Gellér*, Legality on Trial, 2002, p. 37 ff. Regarding Hungarian developments *Nagy/Szomora*, in: Jakab/Tatham/Takács (eds.), Transformation of Hungarian Legal Order 1985-2005, 2007, p. 193.

[4] See further *Ashworth*, Principles of Criminal Law, 1995, p. 59 ff.

[5] *Kreß*, in: Wolfrum (ed.), The Max Planck Encyclopedia of Public International Law, 7. Band, 2012, Nulla poena nullum crimen sine lege, para. 899-908; see also The Manifesto on European Criminal Policy by the European Criminal Policy Initiative. First published in ZIS 2009, 707.

[6] *Fletcher*, Basic Concepts of Criminal Law, 1998, p. 13.

[7] *Fletcher* (fn. 6), p. 213.

[8] For this paper, the use of "EU law" also covers the former Community law.

viewpoints chosen. According to *Raitio*,[9] in Community law, the principle refers to the principle of non-retroactivity, protection of legitimate expectations, protection of vested rights, issues of procedural time limits and immediate application of law, as well as the use of comprehensible language in the administration of the Community. However, "EU membership has created a situation in which the State is no longer the only source of legality. Apart from other factors (such as the development of the Welfare State aimed at protecting citizens from welfare risks), it is the multiplicity of legal orders claiming simultaneous validity and application that has arguably contributed to the diminished role of the principle of legality"[10].

Examining legal certainty as projected onto the domain of criminal law, a connection between the two is evident in the principle of legality.[11] Therefore, an unavoidable and necessary consequence of the general acceptance of the legal certainty principle is that it strengthens the criminal law aspect of certainty, i.e. legality. This principle is also laid down in Art. 49 of the Charter of Fundamental Rights (CFR), as no one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense under national law or international law at the time when it was committed. The rule – similarly to the national legal (and fundamental rights) framework – contains as many components as required. One of these is the nullum crimen/nulla poena sine lege parlamentaria component. In domestic legal systems, the traditional legal structures and legal development constitute

- (i) either the need for parliamentary legislation in criminal matters or
- (ii) that the legislator should abstain from regulation.

However, in most European countries lex parlamentaria is required to regulate criminal law. On the European level, the exclusivity of lex parlamentaria is not conceivable, due to the unique and original legislative matrix and to the different meaning of democratic legitimacy[12] in the Union. Nonetheless, true democratic functioning is the essential facet of this system, even if democracy may – at least partially – have other requirements. As stated in the Manifesto:

> "In order to achieve a satisfactory level of democratic legitimacy in regard of secondary legislation with criminal law implications, and to ensure wide acceptance of such measures, the institutions involved in the legislative process must make sure that the national Parliaments are informed in any case (also now after the changes provided for by the Lisbon Treaty have come into effect) as early and as thoroughly as possible. This will enable the Member States to actually influence the final form and content of the instruments (and the voting of their representatives in the Council). Before legislative decisions are made, an equal co-operation between the Member States and the European institutions and among Member States is necessary for installing a sufficient level of democratic control."[13]

III. European Criminal Law Legislation and Legality

In the realm of the legality principle, the question may arise as to under which "domestic or international law"[14] the above provision of the Charter of Fundamental Rights demands, and under what type of interpretation it may be enforced in EU law itself. EU law comprises international legal norms (e.g. treaties), and considering the international legal characteristics of EU law, it shall not be ruled out that this provision – if relevant – be applied to EU norms as well. Could punishabilty according to EU law in itself be enough for the enforceability of legality? In connection with this, a significant issue has arisen with regard to the sustainability of indirect criminal legal responsibility deriving from EU law. Aside from all of this, the Charter further provides a broad meaning to the principle of legality in that compared to punishability according to internal, Member States law, (the EU) requirement provides for optional application of punishability according to international law.

The nulla poena sine lege principle can gain significance in the "area of freedom, security, and justice", in the realm of legislation effecting shared competence. As such, for example, this could not be a point of reference in cases where in one Member State, a final verdict is brought in a criminal procedure, which, in comparison to if criminal proceedings were to have been initiated in another Member State, a more lenient punishment would have awaited the accused. This provision cannot be enforced for the prohibition of the nebis in idem principle (and the enforcement of this upon Member States regulations).

The prerequisites of legality anchored truly in criminal law shall be fulfilled at the level of the EU law if the Union will use its divisions of ius puniendi.[15] The use of the powers

[9] *Raitio*, The Principle of Legal Certainty in EC Law, 2003, p. 382.

[10] *Besselink/Pennings/Prechal*, The Eclipse of the Legality Principle in the European Union, 2011, p. 4.

[11] In Hungary for example: The Fundamental Law of Hungary, Art. XXVIII, para. 4 sets forth the principle of legality as follows: "No one shall be held guilty of or be punished for an act which at the time when it was committed did not constitute a criminal offence under Hungarian law or, within the scope specified in an international treaty or a legal act of the European Union, under the law of another State."

[12] *Szilágyi*, Kitekintö 1996, 95; *Schmidt*, Journal of Common Market Studies 2004, 975.

[13] Ibid fn. 5 – Manifesto I Sect. 4c.

[14] For example, "which did not constitute a criminal offence under national law or international law" and "nach innerstaatlichem oder internationalem Recht nicht strafbar war".

[15] The notion itself is a broad concept and comprises a bundle of (several) competences in criminal law which are generally applied in domestic criminal law (particularly in continental legal families; see more in *Packer*, The Limits of Criminal Sanctions, 1986, p. 19 ff.), while others are determinative for

defined by the TFEU has different consequences for postulating legality.

The principle of legality sets certain demands both in terms of legislation and administration of justice, and also introduces prohibitions.

Only two of the above mentioned and herein acknowledged aspects of legality (lex scripta and lex certa) oblige the legislator by enforcing the principle at the European level. Despite the already mentioned characteristics of international criminal law, EU law in criminal matters cannot work without formal regulations, e.g. written norms. The accepted non-written sources of European law (the general principles themselves and the few rules of international public law) are not able to establish and "carve out" ECL content (ius puniendi, aspects of responsibility, sanctions, etc.). Therefore, it can be stated that in the case of issuing legal acts defined by the TFEU and the respective Community competences, the lex scripta requirement is fulfilled by the European legislator.

The second adhesive condicio sine qua non is the lex certa requirement, which might often be (or assumed to be) interfered with if the EU uses its divisions of ius puniendi – in particular that of the "power to define". In the case of directives, the process of domestic implementation ensures the required degree of certainty (etc.), the European norm does not dispose of the same degree of legality as the national criminal legal norm.

Despite this, it is possible that the directive contains not only the regulatory aims (i.e. it obliges the MS to achieve certain results, but leaves them freedom to determine the means), but it is issued setting forth clear definitions, without leaving any margin of appreciation for the national legislators of MS. In this case, e.g. if the European legislator used its "power to define", the same requirements of legality shall be met as if the MS's legislator would have exercised such "power" under domestic criminal law. Also the eventual normative framework created via regulations shall bear close resemblance with this method of legislation. In case of framework decisions already in effect, this issue concerning "power to define" is also apparent, but without any implication of direct application, as will be evidenced later.

> "Although the subsidiary character of harmonisation work at EU-level necessarily requires that the Member States have a certain degree of latitude in drafting the details of implementation (which implies a certain degree of vagueness as regards European legislative acts), the lex certa requirement is nevertheless important for EU legal instruments as a general principle of law and a fundamental element of any criminal law system based on the rule of law. The smaller the margin of freedom at the level of implementation, the more important it is that the European legislative acts satisfy the lex certa requirement. If a certain European legal instrument seeks to fully harmonise the proscriptions in the Member States, it should satisfy the lex certa requirement in the same way as if it were a criminal law provision."[16]

Furthermore, the ECJ[17] clearly pointed out that framework decisions shall not meet the threshold set by the legality principle under Member States law. In the case of Advocatenvoor de Wereld, the question was nothing of lesser importance than whether the regulation of "catalogue-offences"[18] in the Framework Decision on the European Arrest Warrant shall meet the standards set by the certainty requirement, with regard to criminal legality. The ratio decidendi was based on

the framework of international criminal law. The question of international ius puniendi has arisen in connection with international crimes, with the universal jurisdiction in criminal matters, with the criminal responsibility of individuals upon international law and with the existence of the supranational criminal tribunals. See more in *Nyitrai*, Nemzetközi és európai büntetőjog, 2006; *Bassiouni*, International Criminal Law, 1999. In a domestic (national) context, in my opinion, ius puniendi means the public power to punish: a) the power to choose: choice between values and interests which should be protected ("whether to punish"); b) the power to use criminal law: decision to use power to punish in order to protect above-mentioned values or interests ("why to punish"); c) the power to define crime and punishment in two aspects: aa) on the one hand, the decision about the threshold of protection (what is punishable behavior and "normal" behavior); and the decision about other prerequisites of punishment (age, justification, excuse etc.) in close connection with the former ("what to punish"); and, on the other hand, bb) decision about the limitations of punishment; d) the power to be severe: decision about the severity of the punishment, choice between (theoretically infinite) possibilities of punishment ("how to punish"); e) the power execute punishment: performance of punishment, i.e. the entire process of penal execution.

[16] Ibid fn. 5 – Manifesto I Sect. 1c.

[17] Many times, the ECJ had the opportunity to decide on references for preliminary ruling concerning underlying criminal procedures. In these decisions the principle of legality was oftentimes mentioned thus granted with a kind of "European validity". It is important to note that the ECJ did/does not apply criminal law in these cases, it is merely entitled (and obliged) to interpret the rules of the EU law even in cases where the preliminary question arises in connection with domestic criminal procedure. Through the several decisions of the ECJ that I mention herein, I do not intend to focus on the general legal principles of the EU law, I only direct my attention to the principle of legality in connection with criminal law, when relevant.

[18] Council Framework Decision 2002/584/JHA, OJ EU 2002 No. L 190, p.1, on the European arrest warrant and the surrender procedures between Member States. The offences listed in Art. 2 (herein referred to as "catalogue-offences") give rise to surrender pursuant to a European arrest warrant, without verification of the double criminality of the act, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State.

the unavoidable necessity of implementation and also the exclusion of any direct application of a framework decision.

> "The Framework Decision does not seek to harmonize the criminal offences in question in respect of their constituent elements or of the penalties which they attract. […] It follows that, in so far as it dispenses with verification of the requirement of double criminality in respect of the offences listed in that provision, Article 2(2) of the Framework Decision is not invalid on the ground that it infringes the principle of the legality of criminal offences and penalties."[19]

This might be true, but the picture is more colorful on the level of the MS through the implementation of vague concepts in connection with listed offenses (labeled as "cartoons of the statutory elements of any offenses"[20]). There are countries where the implementation was carried out with a simple takeover of the opaque catalogue of the framework decision, and others which implemented the list by establishing direct connections to national statutory offenses (e.g. Hungary). How the principle of legality (in Member States terms) could be enforced in such a different legal ambiance shall be subject to further comparative research.

As already stated, the ECJ was very clear with regard to the acceptance of legality, already in its initial decisions, as early as 1996, as the following example illustrates.

> "Where it is necessary to determine the extent of liability in criminal law arising under legislation adopted for the specific purpose of implementing a directive, the principle that a provision of the criminal law may not be applied extensively to the detriment of the defendant, which is the corollary of the principle of legality in relation to crime and punishment and more generally of the principle of legal certainty, precludes bringing criminal proceedings in respect of conduct not clearly defined as culpable by law."[21]

IV. Application of European Criminal Law

1. Basics

If we look for the implications of the legality principle on the level of the administration of justice (i.e. in relevant jurisprudence), the first important distinction shall be made concerning the addressee of the inflicting demands of the legality in criminal law. The Union itself cannot – yet – enforce criminal law; it does not exercise the "power to execute". Enforcement of EU law (in this regard) is a duty of the courts of the MS. This means that national criminal courts (and constitutional courts) shall apply and interpret the norms of EU law, where relevant. Which norms of EU law with criminal law content can gain legal force in the legal order of MS, through application in national criminal procedures, and if so, how exactly? In relation to this dilemma, the following distinction shall be clarified:

- There are cases where the direct application of EU law norms by the national criminal court is necessary, and
- There are cases where the decisive factor is the indirect effect of EU law norms that leads the court to depart from its previous jurisprudence and re-interpret the regulatory content of national norms in accordance with EU law.

Obviously these instances have different legal character, but their common feature is the combination of national vs. European level of legislation, application and interpretation of law. Theoretically, the principle of legality could surface under both scenarios. In the first above described case, the eventual recognition of lex stricta and lex scripta rooted in EU law will take place in the national criminal procedure. The second one is the "infamous" legal consequence of European integration; however, in this case it can be traced how the influence of EU law norms affects the interpretation of principles rooted in national law. During the layout of research findings, special attention will be given to the lex praevia rule and its European context.

2. Lex mitior

Before plunging into the depths of academic debate, the lex praevia aspect needs to be mentioned, i.e. the non-retroactivity of unfavorable criminal law (lex mitior) and the requirement of pre-existing regulation before the perpetration of a criminal act or the imposition of a sanction.

The lex mitior principle is recognized by all Member States, but there are differences with regard to its normative status, especially pertaining to the question of whether the principle is of a constitutional character. The ECJ held in 1983 that "non-retroactivity of penal provisions is common to all the Member States and enshrined in Art. 7 of the ECHR. It is one of the general principles of EC law."[22] However we may recall that the ECJ repeatedly held that

> "the principle of legal certainty requires that a regulation should not be applied retroactively, regardless of whether such an application might produce favorable or unfavorable effects for the person concerned, unless a sufficiently clear indication can be found either in the terms of the regulation or in its stated objectives which allows the conclusion to be drawn that the regulation was not merely providing for the future".[23]

This interpretation was upheld as the Court stated that (i) EU law does not contain any principle equivalent to that of im-

[19] ECJ, Judgment of 3.5.2007 – C-303/05 (Advocaten voor de Wereld VZW), ECR I-3633, 52 ff.
[20] *Hefendehl*, ZIS 2006, 231.
[21] ECJ, Judgment of 12.12.1996 – C-74/95, C-129/95 (Criminal proceedings against X), ECR I-6609.
[22] ECJ, Judgment of 20.4.1983 – Case 63/83 (Regina/Kent Kirk), ECR 1984, 2689.
[23] ECJ, Judgment of 29.1.1985 – Case 234/83 (Gesamthochschule Duisburg vs. Hauptzollamt München-Mitte), ECR 327, 20.

mediate application of the more lenient criminal provisions (lex mitior), and that (ii) in the absence of rules to harmonize penalties for breach of Community law, it is up to the domestic legal system of each Member State to determine them. The Court nonetheless considers that the Community-law principle of equivalence does not preclude breaches of Community law from being penalized under substantive and procedural conditions analogous to those applicable to infringements of national law of a similar nature and importance.[24]

Nonetheless, as regards implications for criminal law, there is a need to underline their specificity; the retroactive application of the more lenient penalty was also confirmed by the Court as part of the common constitutional heritage of the MS:

> "It follows that this principle must be regarded as forming part of the general principles of Community law which national courts must respect when applying the national legislation adopted for the purpose of implementing Community law and, more particularly in the present cases, the directives on company law."[25]

Moreover, in Goicoechea**,** the avocat general Kokott emphasized another important element of lex praevia:

> "The principle does not apply to the procedural aspects of criminal law. A person may thus have applied to him procedural provisions introduced or amended after the date of the offence he is charged with without the principle nullum crimen, nulla poena sine lege praevia being breached."[26]

We shall not fail to point out – as it is also relevant – that in this regard, it is not the "mere labeling" of the norm by the legislator that is determinative, but the objective targeted by the norm is a more relevant factor, if the rule – which might be set forth in a procedural code – contains substantive requirements of criminal responsibility (or of punishment), that must be considered as pertinent to the lex praevia, where relevant.[27] Further implications of the lexpraevia requirement are highlighted below.

3. Legality and Direct Effect

Definition of clear rules allows for the option of the direct application of directives due to the jurisdiction of the ECJ. The issue of direct application/effect of EU law with criminal law content is not a simple one. A directive has vertical direct effect once the deadline for implementation has passed; in this case a person (be it natural or legal) may rely on the text against a Member State in court. The ECJ has established[28] several conditions so that an individual may be able to refer to a directive before the courts, specifically:

- (i) if the provisions of a directive are unconditional and sufficiently precise, and
- (ii) if the directive has not yet been or not correctly implemented by the pre-determined deadline.

This means first of all, that the direct application of EU law directives with criminal law content needs to meet the threshold established by the content of the (national) legality principle, because in the case of applying the provisions of a directive in a domestic criminal procedure, the directive becomes part of the criminal law framework only in relation to the disputed issue of fact or law. Theoretically, the same is true for regulations, therefore the requirement of civil law systems for written penal provisions is fulfilled, and the court is bound to those as well. Furthermore, this legal construction initially excludes the possibility of introducing customary or judge-made law (lex scripta) in criminal procedures.

The lex stricta aspect of legality contains the prohibition of unfavorable analogy. This, however, cannot be applied, not even in the case of comparable EU law norms due to the fact that there is no special European (legal) interest which could overwrite the traditional meaning of legality.

However, in comparing EU law requirements and the principle of legality, a genuine European limitation can be detected in terms of direct application of EU law with criminal law implications, one that is not covered by the herein detailed and reaffirmed four aspects of legality. It can also be labeled as an exception from applying written (criminal) law, even though there is statutory law in effect. This is the one aspect of the direct application of directives, where only the person concerned may rely on the directive exclusively in order to gain legal advantage with regard to adjudication. Projecting it on criminal law, the ECJ stated:

> "A national authority may not rely, as against an individual upon a provision of a directive whose necessary im-

[24] See more in Opinion of avocet general Léger delivered on 16 July 1998 (Case C-230/97, Criminal proceedings against Ibiyinka A woyemi [1998], ECR I-06781).

[25] ECJ, Judgment of 3.5.2005 – C-387/02, C-391/02, C-403/02 (Criminal proceedings against Silvio Berlusconi, Sergio Adelchi, Marcello Dell'Utri and others), ECR I-3565, 68 f.

[26] View of avocet general Kokott delivered on 6 August 2008 (C-296/08 PPU, Extradition proceedings against Ignacio Pedro Santesteban Goicoechea. [2008], ECR I-06307, 45).

[27] The domestic doctrinal differentiating between substantive or procedural requirements of the criminal responsibility might diverge in the different Member States of the Union, for example the consequences of the statute of limitation. In Germany, the postponing enlargement of the necessary period for the statute of limitation does not fall under the ban of retroactivity (see *Lenckner/Eser/Stree/Eisele/Heine/Perron/Sternberg-Lieben*, in: Schönke/Schröder, Strafgesetzbuch, Kommentar, 29th ed. 2014, § 2 para. 1, 42), whereas it does in Hungary (see *Nagy*, A magyar büntetőjog általános része, 2010, p. 183 f.). Though the probability of any preliminary ruling is rather rare concerning this issue, it could have a unification effect with regard to the interpretation of Art. 49 CFR.

[28] In particular: ECJ, Judgment of 19.1.1982 – 8/81 (Becker vs. Finanzamt Münster-Innenstadt), ECR 1982, 53.

> plementation in national law has not yet taken place. In applying its national legislation, a court of a member state is required to interpret that legislation in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189 of the Treaty but a directive cannot, of itself and independently of a law adopted for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive."[29]

In 1982, express ius puniendi was not imaginable as a determinative power of the Community; therefore, it was almost necessary to exclude any form of interpretation touching upon issues surrounding criminal responsibility. Today, directives can be issued on the authority of Art. 82, 83 TFEU, just as directives and regulations under Art. 325 TFEU within the scope of the EU's "power to define" (i.e. a split of ius puniendi).

a) Legislation on Minimum Rules

In the case of directives under Art. 82 or 83 TFEU, the aim of the EU is to establish de minimis rules with respect to definitions of criminal offenses and sanctions in the areas of particularly serious crimes that usually have a cross-border dimension resulting from the nature or impact of such offenses or from a special need to combat them on a common basis. Issuing a directive, the Union can define the minimum statutory elements of certain offenses and the minimum rules for the imposition of sanctions.

In the possible direct application of principles aimed at criminal responsibility, the most important question is how this can be effectively applied in criminal proceedings, and how the legal status of the person concerned – the person under prosecution – is affected by direct application. This is dependent upon what the regulative minimums – which the state did not or did not properly integrate into its own legal system – pertained to exactly. In this analysis, several factors must be considered:

- Whether the EU minimum affects the positive or negative element of criminal responsibility
- Whether the national law (without amendments/or brought into effect without appropriate transposition) contains responsibility more or less stringent in comparison to the directive
- In certain cases, whether there is an explicit directive prohibiting criminalization (perhaps prohibition that can be expanded through legal interpretation)
- In certain cases, whether the directive provides room for discretion.

In my opinion, from the combined impact of these factors, the following situations could arise (Table 1, p. 37).

If minimum rules are absent from the domestic criminal code, the above mentioned European limitation restricts the consequences of relying on the directive, namely EU law on its own cannot establish (or aggravate) criminal responsibility in the context of a national criminal procedure. The special structure of criminal law (e.g. prohibitions) and the non-exclusionary competence of the Union in the field of ECL have placed minimum-regulation into a special legal framework. If the directive – as a norm of orientation about what shall be punishable at least – only contains minimum standards and the Member States did not implement these or did, albeit, not properly – then the person affected cannot obtain a favorable or an advantageous legal position by relying on the directive. Namely, the minimum elements of statutory offenses offered by the EU law norm are not to establish the threshold for non-punishing i.e. the upper limit (cap) of punishability. The Commission defines the minimum rules on offenses as follows:

> "the definition of the offences, i.e. the description of conduct considered to be criminal, always covers the conduct of the main perpetrator but also in most cases ancillary conduct such as instigating, aiding and abetting. In some cases, the attempt to commit the offence is also covered. All EU criminal law instruments include in the definition intentional conduct, but in some cases also seriously negligent conduct. Some instruments further define what should be considered as "aggravating" or "mitigating" circumstances for the determination of the sanction in a particular case.
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> Generally, EU legislation covers offences committed by natural persons as well as by legal persons such as companies or associations. The latter can be important in many areas, e.g. concerning responsibility for oil spills. However, in existing legislation, Member States have always been left with the choice concerning the type of liability of legal persons for the commission of criminal offences, as the concept of criminal liability of legal persons does not exist in all national legal orders[30]

One might argue that the regulatory level of ECL – fortunately – is far from that applied in the MS; i.e. this means that the EU is not entitled to design the absolute thresholds of criminal responsibility in an exclusionary manner. Therefore, where directives contain minimum regulation (of statutory elements), it is then not possible to directly apply this, because it would be unreasonable in comparison to the existing Member States criminal framework.

[29] ECJ, Judgment of 8.10.1987 – Case 80/86 (Criminal proceedings against Kolpinghuis Nijmegen BV), ECR 1987, 3969.

[30] Communication from the Commission to the European Parliament, the Council. The European Economic and Social Committee and the Committee of the Regions of 20.9.2011, Towards an EU Criminal Policy, Ensuring the effective implementation of EU policies through criminal law, COM (2011) 573 final, p. 9.

The EU source of law on trafficking of human being provides a specific regulatory example,[31] in which Art. 2 para. 4 states that "the consent of a victim of trafficking in human beings to the exploitation, whether intended or actual, shall be irrelevant, where any of the means set forth in paragraph 1 has been used." Here, dogmatic questions about the relevance of the consent of the victim are not part of the subject of the investigation, therefore in this sense, it is worth emphasizing that in the case of violence (force) effecting the free will of the victim, consent of the victim inherently cannot be taken into consideration, but a majority of the listed circumstances are such that consent could be legally effective (with regard to the criminal responsibility of the perpetrator). This is what the directive precludes, and thus, in comparison to all such Member States regulation that provides some sort of "mitigating" sanction for consent of the victim shall be considered more stringent, and thus, in the absence of transposition cannot be applied directly.

An example of the second main category shall follow: in the case of child pornography,[32]Art. 5 para. 7 and 8 of the Directive set forth that Member States have the discretion to decide whether or not to criminalize cases involving child pornography where the person on the pornographic material appears to be a child, but is in fact over 18 years of age; and furthermore, in cases where the recording was produced and is possessed solely for private use. The Hungarian Criminal Code does not punish the former, but as for the latter, under § 204 of the Criminal Code it is merely factual, as the purpose of production or possession is immaterial. However, in this case the directive regulation clearly states that here, MS have free discretion in deciding punishability, thus the effected persons would not be able to rely on "improper" transposition.

A different type of constellation is evident in the regulation of illicit drug trafficking[33] Art. 2 para. 2 provides exclusion from the scope of the Framework Decision if the conduct involving production, cultivation, etc. is committed by the perpetrator exclusively for personal use. Assuming that the framework decision will soon be replaced by a directive, in which the exclusion would remain, then in cases where the conduct involved (production for) personal consumption, the question could arise as to whether for Member States punishability, the perpetrator could rely on "improper" transposition and "extort" unpunishablity. Based on interpretation of the text, it does not extend to cover material scope, and thus does not collide with EU expectations.

Minimum-regulation does not mean such a strict regulation, compared to which MS-level differences would not be permitted – as can be seen in the above summary. Because of the above, it can also be said that the indirect effect of directives will be less likely to prevail in the case of criminal law regulation, since the limitations are narrowed by two sources: limitations from both European law and criminal law prevail.

Although in the above – moving ahead a bit – I assumed it to be evidenced that, in connection with other conditions of criminal responsibility, the question must be answered as to whether these are contained in the above conceptual scope of the Treaty on the Functioning of the European Union, and thus can, for example, legal age of punishability, illegality/provisions on grounds for exemption from criminal responsibility, statutory limitations, the concept of threat (etc.) can be subject to minimum-regulation.

If broadly interpreted, the indirect effect application of the directive may be exposed, the enforcement of punishability limitation not known in national law may bring about favorable change in the legal situation of the person undergoing criminal proceedings

If narrowly interpreted, only specific description of conduct could be brought into the scope of the term of "facts" in the Treaty on the Functioning of the EU, the approximation of law could only be applied to the scope of the special part. This in itself could be correct. However, in many cases the "facts" of the directives define separate punishability limitations for certain scopes of crime. Additionally, they also contain general part regulations (complicity, stages). These are all contrary to narrow interpretation, even if from the Member States perspective, the tendency would be to follow this.

b) Legislation on Minimum Sanctions

This situation is also true of minimum rules of sanctioning established by a directive under Arts. 82 or 83 of the TFEU. Setting the minimum standards does not prohibit the imposition of other or more severe sanctions, and it shall also be obvious that an eventual reliance of a private person on a non-implemented directive cannot amount to a favorable procedural standing in respect of minimum sanctions. According to the Commission:

> "Regarding sanctions, EU criminal law can require Member States to take effective, proportionate and dissuasive criminal sanctions for a specific conduct. Effectiveness requires that the sanction is suitable to achieve the desired goal, i.e. observance of the rules; proportionality requires that the sanction must be commensurate with the gravity of the conduct and its effects and must not exceed what is necessary to achieve the aim; and dissuasiveness requires that the sanctions constitute an adequate deterrent for potential future perpetrators. Sometimes, EU criminal law determines more specifically, which types and/or levels of sanctions are to be made applicable. Provisions concerning confiscation can also be included. It is not the primary

[31] Directive 2011/36/EU of 6.4.2011, OJ EU 2011 No. 101/1, on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

[32] Directive 2011/92/EU of 13.12.2011, OJ EU 2011 No. L 26, on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA.

[33] Council Framework Decision 2004/757/JHA of 5.10.2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking.

> goal of an EU-wide approximation to increase the respective sanction levels applicable in the Member States but rather to reduce the degree of variation between the national systems and to ensure that the requirements of "effective, proportionate and dissuasive" sanctions are indeed met in all Member States."[34]

If we ask ourselves why specifically minimum sanctions are included in the Commission's communication, it becomes clear that the objective is to unify protections: similar values shall be protected in (almost) similar ways, but not below the threshold defined by the EU (the majority of MS). Prima facie, such regulation might be convincing, but the oversight of this regulation can be detected without difficulty. If the minimum level is set as equivalent to the MS-minimums already in place, then the instrument will add – to put it delicately – "a big nothing" to the system of protections.[35] If, however, the EU minimum threshold is set above the existing minimum threshold within the MS, this indeed provides added value. On the other hand, this does not amount to a favorable trend in my view, because it can be argued that this will result in an increased level of repression throughout Europe.

In connection with the consequences of mutual recognition, an increase in repression would be capable of "traumatizing" the national systems of criminal law, and of bringing about several disturbances or dysfunctions in domestic frameworks.

However, one field does exist, in which these suggestions are valid, although in an opposing manner: it remains unclear from the dogmatic approaches examined whether other requirements of criminal responsibility (required legal age of punishability for any offense in the directive; grounds of justification or excuse; rules on statute of limitation; etc.) belong to the statutory elements of an offence under national law, on top of the statutorily forbidden conduct. In case of a broad interpretation, the possibility of (a favorable) direct application of a directive is open, since in case of these said statutory elements – if they are at all defined as such – the EU law norm would offer circumstances for mitigating or erasing criminal responsibility. In connection with these elements, favorable reliance of a person on the directive could become a legal reality. On the contrary, as a first step, I hereby argue for a narrow interpretation (i.e. that statutory elements of an offence should not include other requirements of criminal responsibility), since it would allow for a bigger enthusiasm on the part of MS to accept such norms, if they are not obstructed by the EU law norm in applying Member States criminal law untouched by aforementioned minimum legislation. It would be better if the "traumatization" of national criminal laws through such directives would progress at a slower pace. Having allowed enough time to pass, we might be able to see how national criminal laws can adapt to and survive a reality interwoven with directives relevant to criminal law. Only then would I support the application of a broad interpretation, enabling the next phase of criminal law integration to begin.

However, no similar minimum standards can be discovered under Art. 325 para. 4 of the TFEU. This means that if the European legislator will issue the necessary measures (directive or regulation) preventing and combating fraud affecting the financial interests of the Union, the TFEU itself allows the creation of criminal standards and even the enactment of a relevant directive or regulation. In this case, the eventual restrictions which flow from the special character of the minimum-legislation and from the required implementation will not establish original, sui generis limitations countering the use of ius puniendi at the EU level. Recently the ECJ has stated this interpretation with its new judgement in Ivo Taricco and Others case.[36]

4. Legality and Indirect Effect

A distinguished legal phenomenon of European legal integration is the indirect effect of EU law norms, which leads to the judicial interpretation of national norms in accordance with EU law.[37] This is the principle and obligation of conforming interpretation (or of "harmonious interpretation" cf. de Búrca) which is of particular importance regarding directives and – yet existing – framework decisions. As the ECJ stated in Pupino:

> "the obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law is limited by general principles of law, particularly those of legal certainty and non-retroactivity. In particular, those principles prevent that obligation from leading to the criminal liability of persons who contravene the provisions of a framework decision from being determined or aggravated on the basis of such a decision alone, independently of an implementing law. The obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law ceases when the latter cannot receive an application which would lead to a result compatible with that envisaged by that framework decision."[38]

In order to properly analyze whether and how legality can be examined in the case of indirect effect, the following aspects shall be examined. What are the temporal requirements for indirect effect and which legal acts of EU law are granted such indirect effect? What does it mean if the interpretation of a criminal norm changes and what might be the consequences of such change? And finally, could the changing EU law result in a changing interpretation of national criminal

[34] Ibid. fn. 30 p. 9.

[35] *Asp*, The Importance of the Principles of Subsidiarity and Coherence in the Development of EU EuCLR 2011/1, p. 50.

[36] Judgment of 8.9.2015 – Case C-105/14.

[37] Leading judgment: ECJ, Judgment of 10.4.1984 – Case 14/83 (Von Colson and Kamman vs. Land Nordrhein Westfalen), ECR 1984, 1891. In-depth analysis in *Craig/de Búrca*, EU Law, Text, Cases and Materials, 5th ed. 2011, p. 200 ff.

[38] ECJ, Judgment of 16.6.2005 – C-105/03 (Criminal proceedings against Maria Pupino), ECR I-5285, 41 ff.

law, and does the latter impact the prohibition of retroactivity?

a) Temporal (and formal) Requirements of Indirect Effect

In the re-structuring of the Union, the FD was abolished from among the legal acts and as for the still effective ones, a targeted legislation process has been started, through which the Commission intends to replace every FD with directives. Until the end of this process, an FD continues to bind the Member States and they can be relied on as presented above. The ECJ, in Pupino, constitutes the indirect effect of a FD similarly to that of directives. This judgment predicted the direction of the development of ECL already in 2005. Nonetheless, the direct effect (similar to that of directives) was not extended for FD; hence, the direct application of FD was expressly excluded under Art. 34 para. 2 Nr. b (ex) TEU. Despite this, one question remains, namely, what is the legal nature of directives and FD before the deadline for their implementation expires. This question is of essential importance in the scope of obliging MS to interpret their own national norms in the light of EU law.

Directives and FD enter into force on the day of their publication in the Official Journal of the European Union (OJ) or on a later date as defined by the directive/FD itself (e.g. it shall enter into force on the twentieth day following publication). These legal acts shall also contain rules on transposition or implementation which sets the exact deadline for the enactment of Member States legislation in compliance with the content of these legal acts; real-life practice is very colorful – such deadlines might vary between one year to five years[39] or more, depending on the expected difficulties of the implementation process. These legal acts shall bring the Member States legislator to issue the implementing norms or to amend the existing legal framework if it is necessary for the completion of requirements which flow from EU law. If the transposition deadline expires, the direct application of the directive opens; meanwhile, it is also clear that the indirect effect of both directives and FD is acknowledged and enforced by the ECJ.

Prima facie, we might be of the opinion that these secondary norms do not have a substantial effect on the national administration of justice (only on national legislation) during the implementation period. However, this is not the case. The ECJ unveiled important aspects of this issue step by step, and recognized some important factors. The ECJ has made it clear that directives may have an impact even before the implementation period has passed. In 1997, Inter-Environnement Wallonie held:

> "[A] directive has legal effect with respect to the Member State to which it is addressed from the moment of its notification. […] Since the purpose of such a period [for implementation] is, in particular, to give Member States the necessary time to adopt transposition measures, they cannot be faulted for not having transposed the directive into their internal legal order before expiry of that period. Nevertheless, it is during the transposition period that the Member States must take the measures necessary to ensure that the result prescribed by the directive is achieved at the end of that period. Although the Member States are not obliged to adopt those measures before the end of the period prescribed for transposition, it follows from the second paragraph of Article 5 in conjunction with the third paragraph of Article 189 of the Treaty and from the directive itself that during that period they must refrain from taking any measures liable seriously to compromise the result prescribed. It is for the national court to assess whether that is the case as regards the national provisions whose legality it is called upon to consider. In making that assessment, the national court must consider, in particular, whether the provisions in issue purport to constitute full transposition of the directive, as well as the effects in practice of applying those incompatible provisions and of their duration in time."[40]

This obligation applies to all state entities, including national courts, which must refrain from action before the implementation period has passed from interpreting national law so as to prejudice the attainment of the objectives of the directive.[41] The ECJ fortified its standpoint on the issue in Mangold (2005):

> "[i]nterpretation cannot be affected by the fact that, when the contract in question was concluded, the period prescribed for transposition into domestic law of Directive 2000/78 had not yet expired. During the period prescribed for transposition of a directive, the Member States must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by that directive. In this connection it is immaterial whether or not the rule of domestic law in question, adopted after the directive entered into force, is concerned with the transposition of the directive."[42]

As *Dannecker* points out accurately: if the European legislator issues a list of certain legal concepts that should be applied in Member States law as defined by the EU legislator, these should indeed be considered, notwithstanding the fact that the implementation deadline has not yet expired. Summarily, it can be concluded that relevant provisions of national law in contradiction with these aforesaid concepts, will be considered undesirable **(**unerwünscht**)** from the date of entry into force of the directive in question.[43]

Lastly, Adelener (2006) shall also be mentioned at this point, where the ECJ summarized its jurisprudence on this

[39] E.g. in case of the 2001/220/JHA Council Framework Decision of 15.3.2001 on the standing of victims in criminal proceedings, OJ EU No. L 082, p. 1 ff.

[40] ECJ, Judgment of 18.12.1997 – C-129/96 (Inter-Environnement Wallonie ASBL vs. Régionwallonne), ECR I-7411.

[41] See more in Ibid. fn. 35. p. 43.

[42] ECJ, Judgment of 22.11.2005 – C-144/04 (Werner Mangold vs. Rüdiger Helm), ECR 2005, 9981.

[43] *Dannecker*, ZIS 2006, 316.

issue, and emphasized a further important element concerning the belated transposition of the EU law norm:

> "In accordance with the Court's settled case-law […] during the period prescribed for transposition of a directive, the Member States to which it is addressed must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by it. In this connection it is immaterial whether or not the provision of national law at issue which has been adopted after the directive in question entered into force is concerned with the transposition of the directive. Given that all the authorities of the Member States are subject to the obligation to ensure that provisions of Community law take full effect, the obligation to refrain from taking measures, as set out in the previous paragraph, applies just as much to national courts. It follows that, from the date upon which a directive has entered into force, the courts of the Member States must refrain as far as possible from interpreting domestic law in a manner which might seriously compromise, after the period for transposition has expired, attainment of the objective pursued by that directive."[44]

> "Where a directive is transposed belatedly, the date on which the national implementing measures actually enter into force in the Member State concerned does not constitute the relevant point in time. Such a solution would be liable seriously to jeopardize the full effectiveness of Community law and its uniform application by means, in particular, of directives."[45]

Accordingly, the obligation of conforming interpretation has a certain priority over other "traditional" methods of interpretation following the implementation deadline, because if conforming interpretation were ignored, the special legal features of EU law (primacy, direct effect, and non-compliance procedure) will otherwise "enforce" the true objectives of the norm in question. Accepting that the directive (or FD) influences the interpretation of national law before the expiration of the implementation deadline, it shall be pointed out that the obligation is only to consider the content of the directive already at the time when Member States legislature is already in motion with regard to implementation.[46]

5. Changing Interpretation and Lex Praevia?

The application of any norm requires judicial interpretation of the legal text. The application of codified penal provisions requires interpretation to reveal and formulate the immanent meaning of the legal norm (ratio legis). There is no application of a statute without prior interpretation. Since the wording of a legal norm determines the scope of its applicability, questions concerning interpretation and the principle of legality arise. There are many ways to interpret criminal law and the legality principle sets the boundaries for any such interpretation: judicial discretion in analyzing ratio legis may not be detrimental to the person subjected to the judicial process.

The case of changing interpretation (e.g. when diverging practices followed by different local courts unified by decisions of a higher court or of a constitutional court or by judicial reflection to changing societal values) is a delicate one. In such a setting, a question regarding the non-retroactivity of unfavorable criminal law and relevant judicial interpretation must be answered. When the result of the new interpretation unfavorably affects the persons in the justice system, there is a real collision between principle and interpretation. It is therefore important to see that legality does require the rejection of detrimental "content" in the norm; although not based on the rationale of the prohibition of retroactivity, but because a new law has not been issued. The real grounds for refusal shall be based on the principle of lex stricta, meaning that the judge cannot establish a broader scope of criminal responsibility than as is prescribed by law. In the particular case where the text of the norm allows for both narrow (former) and broad (new) interpretations (without these being contra legem), then legality is not affected and the application of the law with the new "content" is justified.[47]

6. Consequences for Criminal Law

Because under legal interpretation the limitations of criminal responsibility may be extended, and considering that EU legislation provides for indirect effect – which may have an effect on Member States judicial legal interpretation activities –, the question legitimately as to whether retroactively effective adverse legal interpretation in this unique legal constellation is precluded by the principle of legality arises. In the legal constellations that are the subject of the investigation, a criminal procedure is before a Member States court for a criminal act for which the EU has issued a legally approximating framework decision, but the deadline for its transposition has not yet expired.

In relation to conforming interpretation, the core issue is: what are the requirements that flow from lex praevia, and from the prohibition of unfavorable retroactive criminal law?

The context we are moving in is the following:

- (i) the national criminal court tries an offence with already – at least partially – harmonized statutory elements[48]; and

[44] ECJ, Judgment of 4.7.2006 – C-212/04 (Konstantinos Adeneler and Others vs. Ellinikos Organismos Galaktos [ELOG]), ECR I-6057, p. 121 ff.

[45] ECJ, Judgment of 4.7.2006 – C-212/04 (Konstantinos Adeneler and Others vs. Ellinikos Organismos Galaktos [ELOG]), ECR I-6057, p. 116 (*Adeneler*).

[46] Partly similarly, see *Auer*, NJW 2007, 1109.

[47] See *Lenckner/Eser/Stree/Eisele/Heine/Perron/ Sternberg-Lieben* (fn. 27), § 2 para. 7, for more details on the German doctrine.

[48] The terms "harmonized offence" and "harmonized statutory elements" are used for criminal law norms of a Member States that were influenced by EU law (through either a directive or a framework decision).

- (ii) the national legislator is bound to implement the EU law norm into the domestic legal order.

Legality (nullum crimen/nulla poena sine lege praevia) prescribes the application of the law in force and effect at the time of perpetration, and the relevant rule of lex mitior allows for the application of newer provisions, if such application would result in a favorable outcome for the offender. Applicable law does not matter in this scenario; because national law shall be applied (the direct application of any European norm is not open), but then the question arises of how to take any directive or framework decision that might be in the "background" into consideration. EU law norms shall be taken into consideration in the interpretation of national law and the duty of conforming interpretation is binding from the date of publication of the EU law norm.

In a temporal setting, there are five theoretic subscenarios dependent both on the time of perpetration and of the judgment. A common feature of these scenarios is that domestic criminal law shall apply in adjudication; EU law does not intrude the texture of national law, but might have real impact via the duty of conforming interpretation. In all of these scenarios, I will examine whether directives or FD (accepted and implemented in the meantime) could ever lead to a more lenient content of national criminal law and whether the retroactivity of the newer laws can be applied.

> Scenario 1[49]: The offense is committed at a time when the directive (or framework decision) has not yet been issued. The court shall decide before the expiration of the implementation deadline (p. 37).

In this scenario, domestic law has not changed after perpetration, but there is already an EU law norm (i) which shall be implemented later than the time of the adjudication and (ii) which could have a substantive connection with the relevant norms of domestic criminal law. As suggested above, directives (FD) have a real impact on the jurisdiction of the Member States before the implementation deadline expires.

In this case, the judge has the following options:

- a) s/he must interpret national law in accordance with the aims and justifications of the EU law norm, because the Member States cannot enforce "undesirable" legal norms if such enforcement would be in a (yet) contextual contradiction with EU law. If this interpretation resulted in a more lenient content than the interpretation not taking into account the indirect effect of the specific EU law norm, then the former shall be applied. In reaching a contradicting conclusion, the decisive factor is that the offense was perpetrated before the issuance of the EU law norm, and the court cannot incorporate new "more rigorous content" in its interpretation because as of perpetration there was no such content available.
- b) if s/he is aware of the fact that there is a new law being enacted implementing the EU law norm or that a new domestic law will enter into force later on, and if the new law brings about changes in the scope of criminal responsibility (or sanctioning), then s/he could wait for the entry into force of said new law. Obviously, this option is a vagabond one, but in the case of doubt in complicated cases, might lead to better outcomes. If the new domestic law implements the EU law norm properly, the lex praevia requirement can be incorporated in the adjudication without difficulty.

It is necessary to remind ourselves that even if the EU law norm set forth minimum standards, more rigorous national criminal provisions do not lead to automatic contradiction with the EU law norm.

> Scenario 2: The time of perpetration is the same as in Scenario 1, but the court has to decide after the expiration of the implementation deadline (p. 38).

In this scenario, b) (supra) is the only option the judge has since there is already a new law (or modification) in effect concerning the offence in question.

If the implementation is not proper or the implementation deadline expired without transposition, the possibility of direct application opens. Finally, if the EU law norm cannot be applied directly, the "loyalty obligation" of the national court is activated in order to ensure the goals of the regulatory schemes concerned until the national legislator issues the proper implementing norm.

> Scenario 3: In this scenario, both the perpetration and the decision take place within the "twilight zone", i.e. when the EU law norm already exists, but the deadline for implementation has not yet expired (p. 38).

This scenario requires a resolution similar to that presented under Scenario 1, without taking into account the commission of the offence before the issuance of the EU law norm.

> Scenario 4: In this case the offence is perpetrated after the issuance of the EU law norm to be implemented, and the court shall decide after the expiration of the implementation deadline (p. 39).

The fourth scenario is a simple one: there is a new domestic law implementing the EU law norm. If the new domestic law has properly implemented the EU law norm, the general commands of the lex praevia can be observed. It is not difficult to realize that proper implementation shall mean that the result of an eventual conforming interpretation before the implementation deadline expires (with regard to the time of perpetration) and the content of the new law shall overlap with one another. It can be taken for granted that if the implementation is not proper or the deadline has expired without transposition, the same consequences arise as mentioned

[49] C/UL norm = community law norm or union law norm.

under Scenario 2 (i.e. the loyalty obligation of the national courts is triggered).

> Scenario 5: The clearest scenario is the last one: both the perpetration and the adjudication follow the expiration of the implementation deadline (p. 39).

In this case the influence of EU law norm on national criminal law can be enforced only in the case of a failure to implement or in the case of improper implementation.

7. The Berlusconi Case

As the Berlusconi case, in 2005, hit the fan of European news media, it became clear that there is another modality of temporal changing criminal law governed by the interaction of legality and the process of European legal integration.

> Scenario Berlusconi: The Berlusconi-case brought particular attention to this very special modality: How the law should react if criminal law has already been rendered compatible with the relevant directive (that is, if the statutory regulation of the offense or the punishment in question is harmonized) at one point, but then it was changed after the perpetration and the new law is not in conformity with the relevant EU law norm (p. 39).

In this case, if the former norm was more lenient, the enforcement of lex praevia is unobstructed, as well as the application of the law in force at the time of the perpetration. Nonetheless, under the Berlusconi Scenario, that was not the case: the new provisions of the Italian regulation of criminal responsibility were more lenient than the former rules which rendered applicable a manifestly more rigorous punishment, and which were in force at the time when the prosecuted criminal acts were committed.

In order to learn about the case, the following analysis shall be laid out: The first question is: what is the law applicable to the offense at hand here? National criminal law contains harmonized offenses (due to the EU law norm) and the temporal dimension of legality prescribes that new laws can be applied if they are more lenient than the applicable law governing adjudication of the case at hand. However, doubts surfaced as some held that the implementation of the EU law norm was improper; and therefore violates EU law and the application of the transposing norm, and thus, should be blocked. In case we affirm this assertion, the application of the harmonized statutory offense will be at risk and it would result in a knock-on effect on the relevant rule of lex mitior. It shall be recognized that it is not insignificant who submits such claims of improper implementation and what is the subject of such claims, e.g. whether is it in favor of the individual (defendant) or it is rather unfavorable regarding his/her status. According to well-established ECJ case law, reliance on (i.e. claiming) improper implementation is allowed only for the individuals; Member States authorities or the Member States itself are not entitled to rely on admitting legislative omissions against the defendant. Even in this case, only EU law norms with a possible favorable effect can claim to have been improperly implemented. In Berlusconi, the claim was submitted by the public prosecutor; therefore the ECJ was not compelled to test impropriety.

> "[I]t is, however, unnecessary to resolve that question for the purpose of the disputes in the main proceedings as the Community rule in issue is contained in a directive on which the law-enforcement authorities have relied against individuals within the context of criminal proceedings."[50]

In order to close the remaining gaps, it is necessary to make a further remark: in case a claim is admissible, the next level of analysis is the issue of direct application: if the EU law norm affected by the claim can be applied directly, the national court shall apply it in such a manner as part of its obligations under EU law.

In summation of the legal arguments, the following shall be added, as the ECJ held:

> "[…] should the national courts conclude that the new law does not satisfy the Community law requirement that penalties be appropriate, it would follow, that the national court would be required to set aside, under their own authority, those new articles without having to request or await the prior repeal of those articles by way of legislation or any other constitutional procedure.[51]"

This means that the domestic court shall test the propriety of implementation and in the case of a negative outcome, the national legislator shall be compelled to comply with its obligations under EU law. Otherwise, the Union itself is well within its rights to enforce the proper implementation via a non-compliance procedure initiated against the Member States in violation of its obligations.

In the case at hand, under the Berlusconi Scenario, more lenient criminal law was applied against the defendant who was a public figure. Regardless, the ECJ did not answer the question as to whether the principle of the retroactive application of the more lenient punishment applies to the case, in which such punishment is at variance with other rules of Community law. It can be argued that the codification of the legality principle in the CFR creates a special constitutional safeguard. However, no details are elaborated herein, since the facets of this special safeguard will be shaped in the future.

V. Summary

Legality is a conductive force on both the European and the national levels. "Codification" – in the CFR – of the principle at the European level is indeed an important new development. Through the CFR, the principle was attributed a special constitutional character besides being a general principle of EU law.

The original limitations of ius puniendi uncovered herein make for a special case in terms of enforcing legality in do-

[50] Ibid. fn. 25 – Berlusconi, p. 71.

[51] See inter alia ECJ – Case 106/77 (Simmenthal), ECR 1978, 629, No. 21.

mestic criminal law: the interference between national criminal law and EU law norms could lead to a special constellation, where the relevant norm is to be disregarded in the application of the law, despite its legal force and existence.

The prerequisites arising from the fact that EU law norms can simultaneously be considered as sources of criminal law constitute for the courts an obligation of conforming interpretation, although this obligation shall also respect legality as defined under national law.

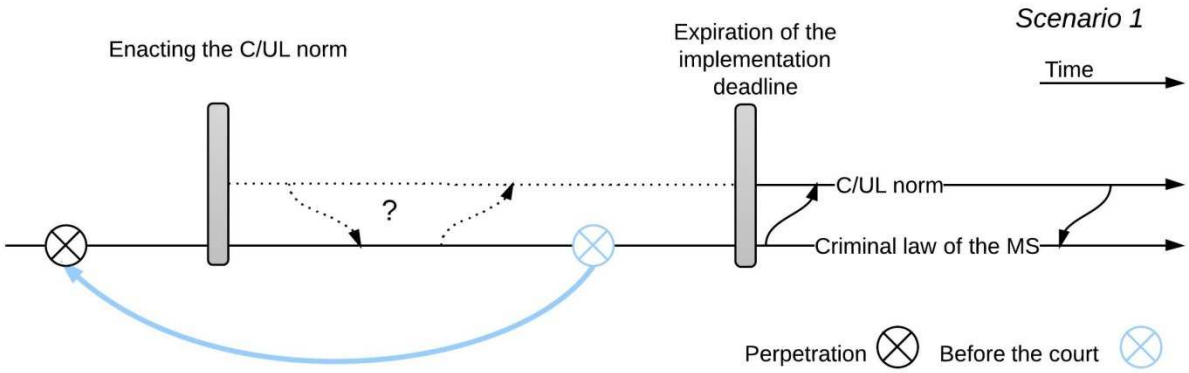
However, to this date, it remains unclear whether legality has primacy in case of its collision with other EU law norms.

From a theoretic standpoint, the argument can be made that granting "true" ius puniendi to the European legislator could lead to a changing concept as regards the "limitations" of EU law norms with criminal law content, by intruding upon national criminal law systems. If the European ius puniendi is once acknowledged, the exclusion of establishing criminal responsibility in a Member States based solely on EU law norms shall be abolished.

Table 1

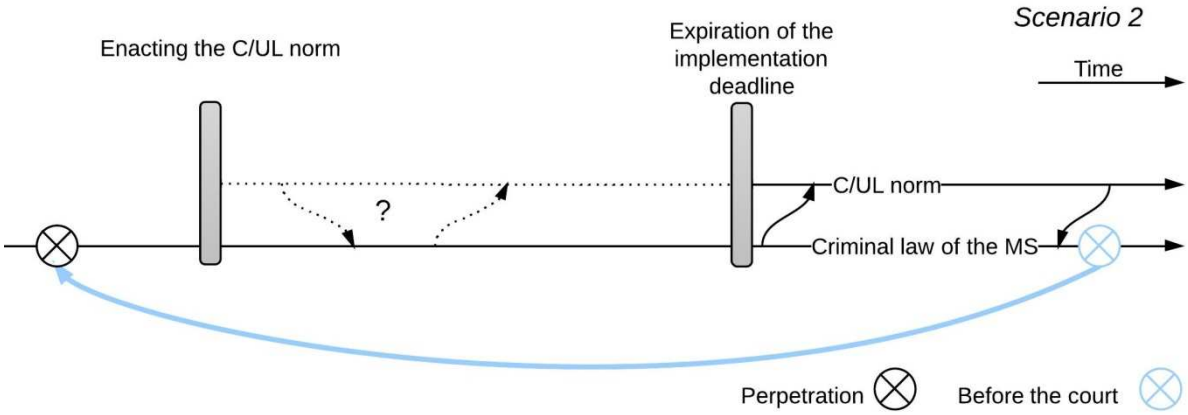
Minimum content governed in EU sources of law	MS legislation not harmonized by the agreed deadline	Consequences	Legal reasoning
the *positive* elements of criminal responsibility[1]	less stringent[2]	no indirect effect	internal limitation of indirect effect of the directive[3]
	more stringent	no indirect effect	characteristic of minimum regulation
the *negative* elements of criminal responsibility[4]	less stringent[5]	no indirect effect	internal limitation of indirect effect of the directive[6]
	more stringent	no indirect effect	characteristic of minimum regulation
explicit criminalization *prohibition*[7]	more stringent	indirect effect	the conditions of indirect effect are met
transfer to MS *discretion* (factors aggravating or mitigating responsibility)	*(not relevant)*	no indirect effect	directive

Scenario 1

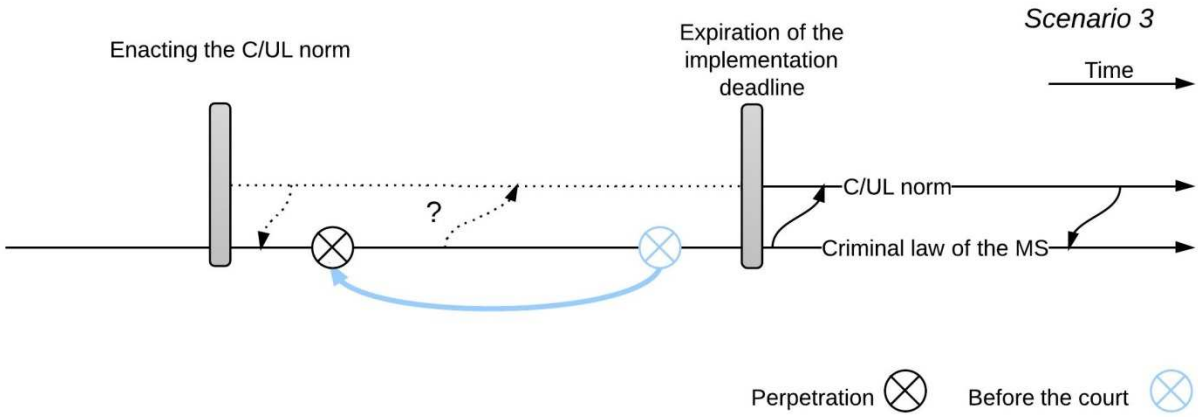


[1] E.g. more criminal conduct.
[2] E.g. the given criminal conduct is not punishable.
[3] The claim would establish or would increase criminal responsibility, thus the state would claim this at the detriment of the individual.
[4] E.g. defining reasons for exclusion of illegality, in the case of illicit goods, establishing minimum boundaries and other factual element limitations.
[5] E.g. the conditions for exclusion of illegality are of a wider scope.
[6] The claim would establish or would increase criminal responsibility, thus the state would claim this at the detriment of the individual.
[7] I currently do not know of such directive provision.

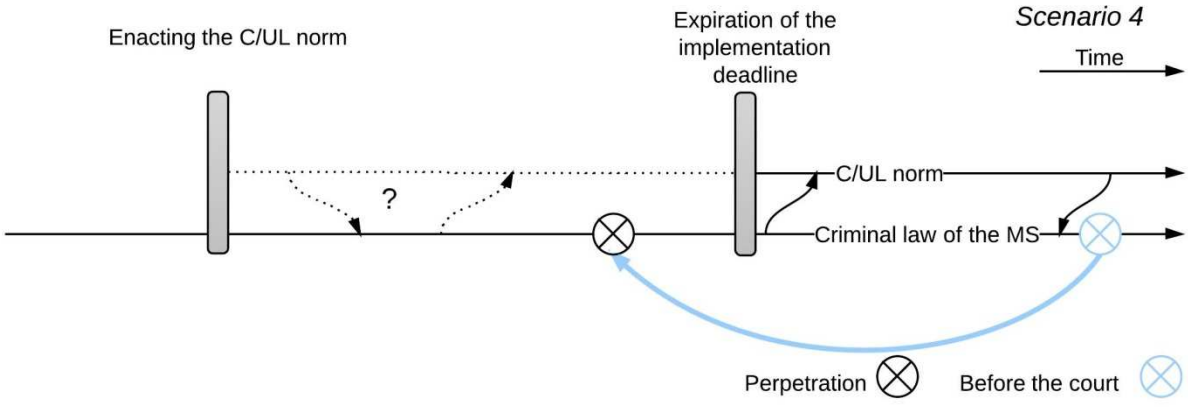
Scenario 2



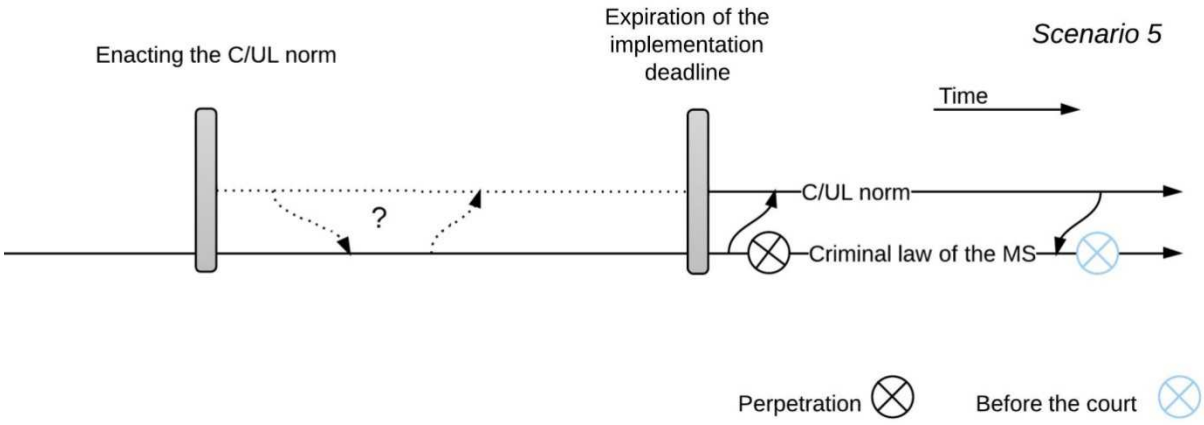
Scenario 3



Scenario 4



Scenario 5



Scenario Berlusconi