

HARMONISATION OF CRIMINAL LAW ACROSS THE EUROPEAN UNION AND THE ROLE OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE¹

HARMONIZÁCIA TRESTNÉHO PRÁVA NAPRIEČ EURÓPSKOU ÚNIOU A ÚLOHA EURÓPSKEJ PROKURATÚRY

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<https://doi.org/10.33542/SIC2022-1-07>

ABSTRACT

This paper elaborates on the topic of harmonisation across the European Union in the field of criminal law, its progress to date as well as its limits and the question of the so called institutional harmonisation. It is argued that the establishment of the European Public Prosecutor's Office might contribute to further harmonisation of the criminal law across the European Union either directly or indirectly by "forcing" the Member States to adopt rules which will facilitate the cooperation and smooth functioning of national authorities in relation to the European Public Prosecutor's Office as well as in relation to authorities of other Member States.

ABSTRAKT

Tento príspevok sa venuje harmonizácii trestného práva naprieč Európskou úniou, jej doterajšiemu napredovaniu ako aj jej limitom a otázke takzvanej inštitucionálnej harmonizácii. Príspevok sa zaoberá tvrdením, že vznik Európskej prokuratúry môže prispieť k ďalšej harmonizácii trestného práva naprieč Európskou úniou buď priamo, alebo nepriamo "nútiac" členské štáty prijať opatrenia, ktoré uľahčia spoluprácu a hladké fungovanie štátnych orgánov a Európskej prokuratúry ako aj štátnych orgánov rozličných členských štátov.

1. INTRODUCTION

One of the most sensitive issues within the framework of the relationship between a state and an individual is undoubtedly that of interfering with individual's personal liberty by means of criminal law measures. The significance of this question is visible in the European Union (hereinafter referred to as "Union" or "EU") matters as well, notably in relation to the question of harmonisation of national criminal law regulation. The importance of state's ability to decide on certain questions is reflected in several decisions of constitutional courts of EU Member States as well as in the discussions regarding the harmonisation of law within such areas.

The establishment of the European Public Prosecutor's Office (hereinafter referred to as "EPPO") is undoubtedly a milestone in the EU's endeavour to protect its financial interests and combat fraud. Papers written on this topic were – taking into account the circumstances surrounding the EPPO and its current state of functioning – rather anticipating than assessing or evaluating. Since not many practical findings might be presented yet, this paper is not an

¹ This paper was written within the framework of the project "APVV-18-0421, The European Public Prosecutor's Office in Connections of the Constitutional Order of the Slovak Republic as Strengthening of the European Integration through Law."

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exception. In its first part, overview of harmonisation in general as well as in the field of criminal law is presented with regard to the limits to such harmonisation. In the second part of the paper, the issue of so called institutional harmonisation is elaborated on, and it is argued that the establishment of the EPPO might contribute to further harmonisation of the criminal law across the EU either directly or indirectly by “forcing” the Member States to adopt rules which will facilitate the cooperation and smooth functioning of national authorities in relation to the EPPO as well as in relation to authorities of other Member States.

The aim of this paper is to assess and answer the question whether the establishment of the EPPO might contribute to further harmonisation of the criminal law across the European Union either directly or indirectly by “forcing” the Member States to adopt rules which will facilitate the cooperation and smooth functioning of national authorities in relation to the EPPO as well as in relation to authorities of other Member States. While doing so, it makes use of analysis of particular fields of the EPPO's functioning, identifying those which might be most affected by harmonisation and further, by means of induction, provides for – on the grounds of the partial conclusions stemming from the above-mentioned analysis – the overall assessment of the so called institutional harmonisation as well as harmonisation as such within the field of the criminal law across the EU, thus contributing to fulfilling the aim of this article.

2. HARMONISATION, APPROXIMATION OR UNIFICATION?

When discussing harmonisation, particularly with regard to the EU law, one may come across two other notions – approximation and unification. These are often used interchangeably or, although separately, with no further clarification as to their meaning. Even the legal sources are not an exception – Treaty on the Functioning of the European Union (hereinafter referred to as “TFEU”) uses in its Article 114(1) the term “approximation” while in the para. 4 of the very same Article the term “harmonisation”.

Unification may be considered as a process which would result in the complete replacement of particular aspects of the legal orders of the Member State with a new order adopted at the European level. Unification would mean that existing legal principles would be replaced by new principles applicable throughout all the Member States. In contrast, although harmonisation may result in the creation of a common set of rules which have the same substantive scope, the implementation of these rules utilises the legal principles and concepts familiar to each particular Member State.³

As for the approximation, this term is often used in the literature without any distinction to the term “harmonisation”,⁴ providing it with the scope identical to that above.⁵ Some of the authors, however, have tried to draw a line between approximation and harmonisation,⁶ nevertheless, their meanings and scope undoubtedly suffer from a lack of conceptualisation. Harmonisation itself suffers from certain ambiguity as well, since it may be distinguished as a minimum and maximum harmonisation, the former being a state when a directive sets minimum standards, often in recognition of the fact that the legal systems in some EU countries have already set higher standards and, in this case, EU countries have the right to set higher standards than those set in the directive, while the latter is a state when EU countries may not introduce

³ STEINER, J. and WOODS, L. *EU law*. 10th edition. New York: Oxford University Press, 2009. ISBN 978-0-19-921907-0, pp. 362 – 363.

⁴ See, for example, PAKAMANTIS, M. The Need and Possibilities of Harmonisation in Criminal Law Matters in the EU. In *Public Security and Public Order*, vol. 10, 2013. ISSN 2335–2035 (online), p. 170. Available online: <https://repository.mruni.eu/bitstream/handle/007/14931/Pakamanis.pdf?sequence=1&isAllowed=y>.

⁵ In this article, the terms “approximation” and “harmonisation” might be used interchangeably, depending on which term is used in particular case in the founding Treaties or other legal sources.

⁶ See, for example, ĆEMALOVIĆ, U. Framework for the Approximation of National Legal Systems with the European Union's Acquis: From a Vague Definition to Jurisprudential Implementation. In *Croatian Yearbook of European Law and Policy*, vol. 11, 2015. ISSN 1848-9958 (online), pp. 241 – 258. Available online: <https://www.cyelp.com/index.php/cyelp/article/view/200>.

rules that are stricter than those set in the directive. On the other hand, it may be distinguished as well as a total harmonisation, where no derogation is allowed from Member States except for safeguard measures, optional harmonisation, where a directive provides an option to follow either the harmonized rules or the national rules, partial harmonisation, which employs two sets of rules and generally requires cross-border transactions to be subject to Union rules, alternative harmonisation, where Member States are allowed to choose between alternative methods.⁷

Some authors consider also the principle of mutual recognition as one of the types of harmonisation.⁸ However, we perceive it more as a means of European integration rather than of harmonisation, although it is undoubtedly intertwined with the concept of harmonisation. In our opinion, mutual recognition serves only to overcome legal differences between EU Member States via mechanism that enhances cooperation between them, and such objective is similar if not the same as that of harmonisation, the means of doing so are, however, different – while harmonisation observes the aim of *changing* legal rules of EU Member States, either directly or indirectly, mutual recognition aims at *overcoming* them in a rather passive way. Nonetheless, it is true that the mutual recognition mechanism is a useful mechanism in the areas which are harmonised, yet, these are not harmonised to a full extent and mutual recognition serves as a tool for fulfilling the empty space caused by the lack of full and exact harmonisation in particular area.

Similarly, as argued by Schroeder, “*it is remarkable that mutual recognition should take priority over the approximation of national legislation by means of EU secondary legislation. Positive harmonisation of criminal law should merely be a subsidiary means of enforcing the principle of mutual recognition.*”⁹ Nonetheless, it is true that the subsumption of mutual recognition under the types of harmonisation is often visible in relation to the EU internal market,¹⁰ in which the mutual recognition serves to extend rights in opposition to EU criminal law, where it serves to reduce them transnationally.¹¹ Therefore, in internal market, the borders between mutual recognition and harmonisation are not clearly recognisable, if recognisable at all.

3. HARMONISATION OF CRIMINAL LAW ACROSS THE EU

While creating the Area of Freedom, Security and Justice, the Union committed itself to respect fundamental rights and the different legal systems and traditions of the Member States,¹² hand in hand with ensuring a high level of security through measures to prevent and combat crime, racism and xenophobia, measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.¹³ As was already stated elsewhere,¹⁴ functional understanding of EU's legislative harmonisation leads us to conclusion that it does not serve only to reduce legal differences

⁷ See, for example, WEN, S. Less is More – A Critical View of Further EU Action towards a Harmonized Corporate Governance Framework in the Wake of the Crisis. In *Washington University Global Studies Law Review*, vol. 12, no. 1, 2013. ISSN 1546-6981, p. 52. Available online: https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1424&context=law_globalstudies. For further description, see STEINER, J. and WOODS, L. *EU law*, op cit., pp. 363 – 373.

⁸ See WEN, S. Less is More – A Critical View of Further EU Action towards a Harmonized Corporate Governance Framework in the Wake of the Crisis, op cit., p. 52.

⁹ SCHROEDER, W. Limits to European Harmonisation of Criminal Law. In *EUCRIM. The European Criminal Law Associations' Forum*. 2020, no. 2, pp. 144 – 148. Available online: <https://eucrim.eu/articles/limits-european-harmonisation-criminal-law/#docx-to-html-fnref9>; <https://doi.org/10.30709/eucrim-2020-008>

¹⁰ STEINER, J. and WOODS, L. *EU law*, op cit., p. 360.

¹¹ SCHROEDER, W. Limits to European Harmonisation of Criminal Law, op cit.

¹² See Article 67(1) TFEU.

¹³ Article 67(3) TFEU.

¹⁴ SCHROEDER, W. Limits to European Harmonisation of Criminal Law. In *EUCRIM. The European Criminal Law Associations' Forum*, op cit.

between EU Member States but also to achieve certain policy objectives as well as an overall “European common good.” In the area of criminal law harmonisation, the policy goal of ensuring a „high level of security“ is not merely designed to meet criminal law problems arising as a side effect of a European area without internal borders, since it has a meaningful function for the EU as a whole, which has developed from a community focusing on economic objectives into a community with an individual at its centre or a „supranational living space.“ Such evolution is mirrored in EU's values and objectives laid down in the Articles 2 and 3(2) of the Treaty on the European Union (hereinafter referred to as „TEU“). Therefore, the harmonisation of criminal law might be considered as an expression of the common values of EU Member States.¹⁵

1. Legal basis and current state of criminal law harmonisation across the EU

The legal basis for the harmonisation of criminal law in the EU is laid down in several Articles of the TFEU, namely Articles 67, 82 and 83.¹⁶ These provide for harmonisation of procedural as well as substantive criminal law and several other Articles even touch upon the “institutional harmonisation” providing for the bodies responsible for the tasks which shall be vested in them in all or in the majority of EU Member States.¹⁷ Harmonisation of procedural and substantive criminal law is possible only through the means of directives and as the minimum harmonisation, that is, it shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.

As for the harmonisation of procedural criminal law, according to the TFEU, 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 several areas. These include mutual admissibility of evidence between Member States, the rights of individuals in criminal procedure, the rights of victims of crime and any other specific aspects of criminal procedure which the Council has identified – unanimously and after obtaining the consent of the European Parliament – in advance by a decision.

In the area of cross-border evidence gathering, the Directive regarding the European Investigation Order in criminal matters¹⁸ (hereinafter referred to as “the EIO Directive”) was adopted. Nevertheless, the admissibility of evidence depends to a great extent on national legal orders, leaving the full potential of the Article 82(2) TFEU untapped. Furthermore, in line with the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings,¹⁹ the area of rights of individuals in criminal procedure was already harmonised via 6 directives regarding the right to information in criminal proceedings,²⁰ the right to interpretation and translation in criminal proceedings,²¹ the right to access to a lawyer,²² the

¹⁵ Ibid.

¹⁶ It should be pointed out that the discussions on legal basis for criminal law harmonisation are still open. See, for example, ÖBERG, J. The Legal Basis for EU Criminal Law Legislation—A Question of Federalism? In *European Law Review*, vol. 43, no. 3, 2018. ISSN 0307-5400, pp. 366 – 393.

¹⁷ For example Article 86 TFEU.

¹⁸ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 1.5.2014, p. 1–36.

¹⁹ Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (Text with EEA relevance), OJ C 295, 4.12.2009, p. 1–3.

²⁰ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1.6.2012, p. 1–10.

²¹ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010, p. 1–7.

²² Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294, 6.11.2013, p. 1–12.

presumption of innocence,²³ procedural safeguards for children who are suspects or accused persons in criminal proceedings²⁴ and the legal aid.²⁵ However, implementation of these directives across the EU did not reach, even until now, a desirable state and the debates on further strengthening of procedural safeguards of individuals in criminal proceedings are taking place.²⁶ The area of the rights of victims of crime was harmonised by the directive establishing minimum standards on the rights, support and protection of victims of crime.²⁷

In the field of substantive criminal law, Article 83 TFEU constitutes a legal basis for its harmonisation stating that the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. The EU legislator may harmonise areas of crimes such as terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime, all of them listed in the Article 83. Nevertheless, other areas of crime may be unanimously and with the European Parliament's consent identified by the Council on the basis of developments in crime, however, they shall meet the criteria set out in the paragraph 1, that is the cross-border dimension and particular seriousness resulting either from nature or impact of such offences or from a special need to combat them on a common basis.

Furthermore, if certain area was subject to harmonisation measures, minimum rules with regard to the definition of criminal offences and sanctions in the area concerned may be established by directives, however, only if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in such area.²⁸

With regard to the Article 83(1) TFEU, several directives were adopted concerning, *inter alia*, preventing and combating trafficking in human beings,²⁹ combating the sexual abuse and sexual exploitation of children,³⁰ attacks against information systems,³¹ protection of the euro,³²

²³ Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ L 65, 11.3.2016, p. 1–11.

²⁴ Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ L 132, 21.5.2016, p. 1–20.

²⁵ Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L 297, 4.11.2016, p. 1–8.

²⁶ RIEHLE, Cornelia. 10 Years after the Roadmap: Procedural Rights in Criminal Proceedings in the EU Today. *ERA Forum* 20, 2020, pp. 321 – 325. Available online: <https://link.springer.com/article/10.1007/s12027-019-00579-5#Fn5>, <https://doi.org/10.1007/s12027-019-00579-5>.

²⁷ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315, 14.11.2012, p. 57–73.

²⁸ Article 83(2) TFEU.

²⁹ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101, 15.4.2011, p. 1–11.

³⁰ Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, OJ L 335, 17.12.2011, p. 1–14.

³¹ Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA, OJ L 218, 14.8.2013, p. 8–14.

³² Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA, OJ L 151, 21.5.2014, p. 1–8.

combating terrorism³³ and combating money laundering.³⁴ Furthermore, on the basis of Article 83(2) TFEU, directives regarding criminal sanctions for market abuse³⁵ and on the fight against fraud to the Union's financial interests³⁶ were adopted.

2. Positive and negative harmonisation in the field of criminal law

Harmonisation may have several forms and be divided into several types, one of them being so called negative harmonisation. As opposed to positive harmonisation which describes the rules adopted in order to set out requirements for what the Member States should do, negative harmonisation is reflected in the provisions which require the Member States to refrain from some action. The difference between the limits of the harmonisation and negative harmonisation stems from the fact that rules on the limits of criminal law harmonisation as well as the harmonisation in general contain restraints in relation to the action of the EU, while rules representing the negative harmonisation contain restraints of the Member States' action. The general example of the negative harmonisation may be found in the Article 4(3) TEU which requires the Member States to refrain from any measure which could jeopardise the attainment of the Union's objectives. This way, the law across the Union might be considered harmonised not by the means of adopting legal rules to achieve EU's objectives, but to refrain from adopting the rules which may jeopardise them.

3. Limits of harmonisation of criminal law

EU legislator is, of course, not allowed to adopt harmonisation rules in the area of criminal law without any limits whatsoever. These limits may be found as an explicit rule provided for in the EU primary law, be it in relation to the harmonisation in general or to the harmonisation particularly in the area of criminal law. The latter may as well have a form of limits which forbid the criminal law harmonisation *per se* or allow for such prohibition after triggering certain mechanism.

The first and foremost, although general rule, is the principle of conferral laid down in the Article 5 TEU. Under this principle, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain its objectives, while the competences not conferred upon the Union in the Treaties remain with the Member States. Following the rules on the division of competences between the EU and its Member States³⁷ as well as their exercise,³⁸ the Union may not adopt harmonisation measures in the

³³ Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, OJ L 88, 31.3.2017, p. 6–21.

³⁴ Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law, PE/30/2018/REV/1, OJ L 284, 12.11.2018, p. 22–30.

³⁵ Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive), OJ L 173, 12.6.2014, p. 179–189.

³⁶ Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ L 198, 28.7.2017, p. 29–41.

³⁷ The competences of the EU may be divided into 3 categories: exclusive, shared and supportive. As for the exclusive competences, only the Union may legislate and adopt legally binding acts in this area, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts. These competences include the areas such as customs union, the establishing of the competition rules necessary for the functioning of the internal market, monetary policy for the Member States whose currency is the euro, the conservation of marine biological resources under the common fisheries policy and common commercial policy. It shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope. As for the shared competences, both the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence and to the extent that the Union has decided to cease exercising its competence. These competences are laid down in the Art. 4 TFEU. As for the third category of competences – supporting competences, – the Union can only intervene to support, coordinate or complement the action of Member States and its legally binding acts must not require the harmonisation of EU countries' laws or regulations. Area of supportive competences are set out in the Article 6 TFEU.

³⁸ According to the Article 5 TEU, the exercise of Union competences is governed by the principles of subsidiarity and proportionality. Under the principle of subsidiarity, in areas which do not fall within the EU's exclusive competence, it

areas it does not have the competences to act, and even if it does, it may do so only in accordance with the principles of subsidiarity and proportionality.

As for the more specific rules regarding the limits of criminal law harmonisation, these are laid down in the Articles 82 and 83 TFEU. Article 82 speaks in relation to the criminal law harmonisation about the extent which is *necessary* to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension. Furthermore, harmonisation by the means of minimum rules, as stated by the Art. 82 as well as 83, reflects the element of necessity as well. The necessity requirement is laid down also in the Article 67(3) TFEU which provides for general provisions on the Area of Freedom, Security and Justice. These rules thus mirror the principle of proportionality set out in the Article 5 TEU and may be considered as its more concrete expression.³⁹

Another limitation which stems from Articles 82 and 83 TFEU regards the form of harmonisation which may be achieved only by means of directives. These are binding only as to the result to be achieved, leaving the choice of form and methods to the national authorities.⁴⁰ Nevertheless, it must be pointed out that the Article 325 TFEU does not lay down such limitation. According to this Article, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union's institutional framework. This is the reflection of the requirement that the Union and its Member States counter fraud and any other illegal activities affecting the financial interests of the Union through measures which shall act as a deterrent and be such as to afford effective protection. It is therefore crucial to opt for a correct legal basis for adopting measures in the area which may touch upon the matters of the criminal law.⁴¹

With regard to the substantive criminal law harmonisation, the TFEU lays down in its Article 83(1) the requirement of particular seriousness of a crime with a cross-border dimension which might also be considered as a limitation to EU criminal law harmonisation in some way. The crimes which do not satisfy this requirement, are excluded from the subject-matter of the harmonisation measures.

Another precondition for harmonisation of criminal law which has its more general counterpart in other provision of the primary law, is taking into account the differences between the legal traditions and systems of the Member States. Such requirement is laid down in the Article 82(3) TFEU and its counterpart with more general scope may be considered the Article 4(2) TEU which states that the Union shall respect, inter alia, Member States' national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government as well as their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. Although this matter is far from clear, some authors and constitutional courts of EU Member States may consider this Article as a limit to harmonisation – not only in the area of criminal law – as well.⁴² Article 83 TFEU on the harmonisation in the area of substantive criminal law across the EU does not include such explicit requirement, it may, however, among

shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can be better achieved at Union level. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

³⁹ This argument may be supported by the conclusions of W. Schroeder. See SCHROEDER, W. Limits to European Harmonisation of Criminal Law, op cit.

⁴⁰ Article 288 TFEU.

⁴¹ See, to this extent, ÖBERG, J. The Legal Basis for EU Criminal Law Legislation—A Question of Federalism?, op cit.

⁴² For example German Constitutional Court. See its Judgment of 30 June 2009, 2 BvE 2/08, ECLI:DE:BVerfG:2009:es20090630.2bve000208, paras. 251 – 253.

others, be invoked by the Member States themselves via the so called emergency brake mechanism.

Emergency brake mechanism in the area of harmonisation of criminal law is provided for by the Articles 82(3) and 83(3) TFEU.⁴³ These state that where a Member State considers that a draft directive concerning the areas in which they may be adopted according to the Articles 82 and 83 TFEU would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council, in which case the ordinary legislative procedure will be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which, in case of a consensus, shall take into account the observations and proceed with the procedure or, if this is not the case, at least nine Member States may decide to establish enhanced cooperation in the area concerned according to the corresponding rules. The definition of the “fundamental aspects of criminal justice system” is left to the Member States alone and may be therefore subject to several different standards.

Notwithstanding the above-mentioned limitations of harmonisation in the field of criminal law, the largest and the most general is undoubtedly the will of the Member States. The lack of the Member States' will to allow for harmonisation via EU measures as a limitation of harmonisation is reflected not only in several Treaties' provisions, such as the articles laying down the emergency brake mechanisms but in the process of adopting the EU primary law as well. If there is no will to change the rules on the harmonisation possibilities in the EU legal framework, further harmonisation of national legal orders will be hardly imaginable without the discussions about the lack of legitimacy while finding the other ways around the rules currently in force.

4. INSTITUTIONAL HARMONISATION OF CRIMINAL LAW – THE ROLE OF THE EPPO

Not many articles were written on the issue of the so called “institutional harmonisation” within the EU,⁴⁴ this term thus needs further clarification. In this paper, the term “institutional harmonisation” does not represent merely the changes made within the Member States' institutions in order to comply with the obligations stemming from EU law, but rather a complex process of national law's adaptation and adjustment in situations where a new institution, body or agency of the Union is created and starts being operational, in particular with the aim of ensuring smooth cooperation and coexistence of the Union authority and corresponding national authority within EU legal space as well as when the rules on the already existing subject's functioning are amended. The same may apply when a new state accedes the Union and aligns its legislation or institutional rules with already existing institutional framework of the Union. An example, although quite narrow in comparison with possible reach of harmonisation in general, might be the need to insert a clause in the national law requiring staying of proceedings in situation when a national court needs a judgment of the Court of Justice of the EU to be delivered in order to decide a case.

Institutional harmonisation may be direct, that is, consisting of the same rules for certain areas of national institutions' functioning laid down by the EU legislator. Indirect institutional harmonisation might be defined as a state when, although the adoption of concrete rules is left for the Member States and their national law, the EU institutional framework and the rules of its functioning indirectly “force” the Member States to introduce certain changes in their legal

⁴³ As regards the emergency brake mechanism, see, for example, ROSIN, K. and KÄRNER, M. The Limitations of the Harmonisation of Criminal Law in the European Union Protected by Articles 82(3) and 83(3) TFEU. In *European Journal of Crime, Criminal Law and Criminal Justice*, vol. 26, no. 4, 2018. ISSN 0928-9569, pp. 315-334. <https://doi.org/10.1163/15718174-02604003>

⁴⁴ At least not to the author's knowledge.

systems in order to be fully compliant with the EU legislative framework. Taking into account the potential reach and influence of the institutional harmonisation, it is argued that the establishment of the EPPO will enhance further harmonisation of national legal orders in the area of criminal law, therefore contributing to the overall harmonisation of law.

In the field of substantive criminal law and in relation to the EPPO's establishment,⁴⁵ the PIF Directive⁴⁶ was adopted in 2017. One might indeed argue that it was the EPPO that was built upon the PIF Directive, taking into account particularly the fact that its establishment was first mentioned in *Corpus Juris* in 1997, while the PIF Convention – the predecessor of the PIF Directive – was adopted already in 1995.⁴⁷ However, the evolution of the legal framework of protection of EU financial interests in the area of substantive criminal law proceeded, undoubtedly, hand in hand with its evolution within the institutional framework. Furthermore, the timeline of the adoption of PIF Convention and the establishment of the EPPO is without prejudice to the fact that the EPPO's establishment and its further functioning in practice may affect the EU legislator's choices as to the changes in the PIF Directive in the future.

As for the area of cross-border investigation, according to the current wording of the EPPO Regulation, recognition and execution of cross-border investigative measures depend highly on national legal orders; recourse to the legal instruments on mutual recognition or cross-border cooperation should serve only as a supplement to specific rules provided for by the EPPO Regulation. Polák states as an example of an instrument which may not be available in purely domestic situation but may be available through application of the legal instruments on mutual recognition or cross-border cooperation an interrogation via video-conference or a phone.⁴⁸ Taking into account mostly cross-border dimension of offences affecting financial interests of the EU, these instruments might be made use of quite often, leading the EU legislator to adopt new set of rules on such mechanisms directly in the EPPO Regulation, thus avoiding the procedures under the mutual recognition regime. In the area of procedural criminal law, the same applies to the procedural rights of suspects and accused persons, which may become subject to further changes once the functioning of the EPPO and its proceedings show that they are necessary.

The debates around the EPPO's establishment further elaborated on the question of judicial review of its acts, which, too, highly depends on national legislation regarding review of the acts of prosecution. Although the EPPO Regulation does not intend the Member States to provide for review by national courts in cases where the national law of a Member State provides for the internal review of certain acts within the structure of the national prosecutor's office,⁴⁹ different treatment of EU nationals in this regard might be an impulse to adopt some

⁴⁵ EPPO was established by the Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), OJ L 283, 31.10.2017, p. 1–71 (hereinafter referred to as „EPPO Regulation”). For further overview of the EPPO's establishment see, for example, BECKOVÁ, D. The European Public Prosecutor's Office: New Actor in EU Criminal Law. In *Bratislava Law Review*, vol. 4, no. 2, 2020. ISSN 2644-6359, pp. 163 – 172. Available online: <https://blr.flaw.uniba.sk/index.php/BLR/article/view/207/164>; <https://doi.org/10.46282/blr.2020.4.2.207>

⁴⁶ Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ L 198, 28.7.2017, p. 29–41.

⁴⁷ For the general overview, see, for example, LIGETI, K. The European Public Prosecutor's Office: How Should the Rules Applicable to its Procedure be Determined? In *European Criminal Law Review*, vol. 1, no. 2, 2011. ISSN 2191-7442, pp. 123 – 148. Available online: <https://www.nomos-elibrary.de/10.5235/219174411798862569/the-european-public-prosecutor-s-office-how-should-the-rules-applicable-to-its-procedure-be-determined-volume-1-2011-issue-2>; <https://doi.org/10.5235/219174411798862569>

⁴⁸ POLÁK, P. Úřad evropského veřejného žalobce a mezinárodní justiční spolupráce ve věcech trestních. In *Acta Universitatis Carolinae Iuridica*. 2019, Vol. LXV, No. 4, p. 55. ISSN 2336-6478. DOI: 10.14712/23366478.2019.38

⁴⁹ See Recital 30 of the EPPO Regulation.

minor changes.⁵⁰ As was argued elsewhere,⁵¹ such changes would be in line with the requirement of the effective judicial protection across the EU.

Introduction of such changes might be welcomed also in another regard – since the EPPO Regulation presupposes, *inter alia*, jurisdiction of the Court of Justice to give preliminary rulings concerning the validity of procedural acts of the EPPO, in so far as such a question of validity is raised before a court or tribunal of a Member State directly on the basis of EU law,⁵² it should be, in our opinion, considered to provide for legislation allowing judicial review of EPPO's procedural acts that are intended to produce legal effects vis-à-vis third parties in those Member States whose legislation provides only for the internal review of such acts within the national prosecutor's office's structure, despite the above-mentioned recital of the EPPO Regulation's Preamble. Otherwise, should a question regarding validity of procedural acts of the EPPO arise, in order for a Court of Justice to be enabled to decide on it within the preliminary procedure framework, the prosecutor deciding on a complaint or respective remedy against such act – which would be an act of another prosecutor – would have to be entitled to refer a question for a preliminary ruling to the Court of Justice. Taking into account a criterion of independence of bodies entitled to refer a preliminary question, prosecutors would most probably not be entitled to do so. The same applies to the question of interpretation of EU law.

Not adjusting legislation in the above-mentioned manner might cause not only different treatment of EU nationals but also arouse the debates regarding the need for effective judicial protection within the EU as well as the issue of ensuring the right to a lawful judge to be respected in cases where there is a question as regards interpretation of EU law and validity of certain EPPO's acts and there is no body that can refer such question to the Court of Justice. It is true that even in Member States where there is provided only for internal review within the structure of the national prosecutor's office, an individual may be entitled to lodge a complaint before a constitutional court, nevertheless, taking into account specific nature and role of constitutional court as well as – in some cases – their reluctance to refer preliminary questions to the Court of Justice, this may not be sufficient in order to ensure full effectiveness and uniform application of EU law regarding the EPPO.

Furthermore, if we consider mutual recognition only as a tool serving the harmonisation process as described above, limitation of its use may open door for adoption of more harmonisation rules instead of accepting existing rules in particular Member State. The use of mutual recognition in the EPPO Regulation is quite limited, leaving enough room for creation of a set of new rules. Nevertheless, it must be pointed out that current regime under the EPPO Regulation relies to a great extent on the national legal orders, what may undermine harmonisation efforts. However, this does not exclude the so called indirect institutional harmonisation. The fields in which it might be possible and desirable are, as was at least partially shown above, quite wide.

5. CONCLUSIVE REMARKS

Harmonisation of criminal law across the EU has undoubtedly already made several significant steps forward. Nevertheless, although the Member States are quite cautious as regards this matter, various voices are starting to echo in the discussions promoting further harmonisation. The biggest issue in this regard is that once the harmonisation process starts, it

⁵⁰ Since the situation may arise when EPPO's act regarding a national of one EU Member State may be subject of a judicial review while corresponding EPPO's act in another EU Member State regarding another national of that state may not.

⁵¹ RUŽIČKOVÁ, V. Judicial Review of the Acts of the European Public Prosecutor's Office: Possible Shortcomings and Several Considerations in Relation to the Slovak Republic and its Legislation. In *The Lawyer Quarterly*, 2021, Vol. 11, No. 4. Available online: <https://tlq.ilaw.cas.cz/index.php/tlq/article/view/490>.

⁵² See Article 42 of the EPPO Regulation.

is difficult to separate other legal areas which were not meant to be harmonised and, what is more, sometimes those are the areas in which the complications related to the fact that there is a lack of harmonisation occur. As an example may serve the European Arrest Warrant which – among many other constitutional concerns especially in its beginnings – came across a significant obstacle in the form of different detention conditions in EU Member States. It was also for this reason that the discussion about harmonisation in the detention area emerged. As for the impact of the EPPO's establishment, an assumption may be made that it will put this issue in far bigger spotlight than it was put in before.

Critical comments emerge in the area of evidence gathering,⁵³ proposing further adoption of rules on the admissibility of evidence.⁵⁴ As for the procedural law, the need for further action at EU level to strengthen the rights of suspected or accused persons in criminal proceedings is pointed out, especially with regard to the future EPPO proceedings.⁵⁵ Therefore, the EPPO's establishment may influence these discussions to a significant extent.

We consider the scope of the area within which further harmonisation of criminal law across the EU is possible quite wide and – especially as regards the field of judicial review as well as judicial protection – we consider some changes even desirable to ensure smooth functioning of the EPPO and national authorities. Therefore, in theoretical terms, establishment of the EPPO should enhance debates and efforts on national level in order to adjust national legislation in respective manner and could, consequently, result in initiation of discussions and adoption of a general framework on the EU level.

Nonetheless, one must not forget that the EPPO was established via enhanced cooperation mechanism. That alone shows that the union of European states lacks unanimity in such sensitive matters as is the criminal law. Some of the Member States consider certain issues with regard to the field of criminal law to be very sensitive and important and therefore do not accept the idea of conferring the competence in particular areas to the Union.⁵⁶ Furthermore, it is hardly imaginable that the Member States would agree on significant changes in the area of judicial review of prosecution acts taking into account their different perception and application of principles of legality and opportunity – some issues may arise should the Member States be forced to adapt their legislation regarding the prosecution's acts which may be reviewed and thus interfere with the principle of opportunity since in some of the participating Member States, the investigation and prosecution activities of the prosecutor's office are guided by the opportunity principle and therefore there is no review provided for a decision to start an investigation, that being fully on the prosecutor's consideration.⁵⁷

On the other hand, although the Member States link the criminal law to their sovereignty and resist the EU's intervention in this area namely because of the concerns related to the level of fundamental rights protection, current situation shows that it is not necessarily the Union which may be the threat to such protection and that it may even enhance it. We should keep in mind that many of the concerns echoing across Europe relate to the detention conditions and

⁵³ See in this regard, KUSAK, M. Mutual Admissibility of Evidence and the European Investigation Order: Aspirations Lost in Reality. *ERA Forum*, 2019, pp. 391 – 400. Available online: <https://link.springer.com/content/pdf/10.1007/s12027-018-0537-0.pdf>; <https://doi.org/10.1007/s12027-018-0537-0>.

⁵⁴ GARAMVÖLGYI, B., LIGETI, K., ONDREJOVÁ, A., VON GALEN, M. Admissibility of Evidence in Criminal Proceedings in the EU. In *EUCRIM. The European Criminal Law Associations' Forum*. 2020, no. 3, pp. 201 – 208. Available online: <https://eucrim.eu/articles/admissibility-evidence-criminal-proceedings-eu/>; <https://doi.org/10.30709/eucrim-2020-016>.

⁵⁵ RIEHLE, C. and CLOZEL, A. 10 Years after the Roadmap: Procedural Rights in Criminal Proceedings in the EU Today. *ERA Forum*, 2020, pp. 321 – 325. Available online: <https://link.springer.com/content/pdf/10.1007/s12027-019-00579-5.pdf>; <https://doi.org/10.1007/s12027-019-00579-5>. BECKOVÁ, D. Európska prokuratúra a práva obvinených a podozrivých osôb v trestnom konaní. In *Studia Iuridica Cassoviensia*, vol. 9, no. 2, 2021. ISSN 1339-3995, pp. 20 – 33. Available online: http://sic.pravo.upjs.sk/ecasopis/92021-2/02_Beckova_Europaska_prokurat%C3%BAra.pdf; <https://doi.org/10.33542/SIC2021-2-02>.

⁵⁶ Already mentioned German Constitutional Court.

⁵⁷ Such significant changes might, after all, result in unification should the change of principles be required.

the EU might provide for the regulation of these matters in a more sufficient way than some of the Member States do.

It should also be pointed out that the Romanian Presidency of the Council brought up several ideas on how to shape the future of the substantive criminal law in the EU and opened up the discussion about areas in which it could be necessary to broaden the regulatory framework. The outcome of the discussions was, among others, that it could be appropriate to carry out a full and thorough examination of the necessity establishing further minimum rules concerning the definition of criminal offences and sanctions in specific areas, such as, for example, environmental crimes, including maritime, soil and air pollution, trafficking in cultural goods, the counterfeiting, falsification and illegal export of medical products, non-conviction based confiscation, trafficking in human organs, manipulation of elections, identity theft, preventing the facilitation of unauthorised entry, transit and residence, in order to combat illegal immigration or to crimes relating to artificial intelligence.⁵⁸ However, another outcome was that the emphasis should be on ensuring the effectiveness and quality of the implementation of *existing* EU legislation, and more efforts should be deployed to that effect. This suggests that the Member States do not rush into adopting further harmonisation measures at this time.

It remains to be seen whether all the space provided for the possible harmonisation measures will be used. We consider it desirable and expect several changes in the Member States' legislation, otherwise the EPPO's functioning may not be as effective as intended. However, in such sensitive area, these changes will definitely not happen overnight. Nevertheless, the EPPO's establishment seems to be an excellent opportunity to discuss more about the need, effectiveness and appropriateness of further criminal law harmonisation. It may, after all, not be an idea which should be thrown away easily. However, as is very well known, "haste makes waste" and the EU Member States definitely seem to prefer the cautious approach towards this matter. Let's just hope that in this case it would be for the benefit of the Union and its citizens as well.

KEY WORDS

Criminal law, harmonisation, European Public Prosecutor's Office

KLÚČOVÉ SLOVÁ

Trestné právo, harmonizácia, Európska prokuratúra

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